

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Consolidated Application of )  
 )  
The News Corporation )  
The DIRECTV Group, and ) MB Docket No. 07-18  
Liberty Media Corporation )  
 )  
For Consent to Transfer Control )

To: The Commission

**REPLY COMMENTS**



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## I. Introduction and Summary.

In its initial Comments, ACA asks the Commission to affirm the small cable company conditions imposed on News Corp.-affiliated broadcast stations and satellite channels and further refine the conditions by “filling the gaps and plugging the loopholes”.<sup>1</sup> Refinements of the conditions should include:

- Ensuring that the program access and nondiscrimination conditions cover Discovery Holdings Company- (“DHC”) affiliated channels.
- Clarifying the rights of a collective bargaining agent.
- Extending the arbitration notice periods to prevent inadvertent loss of arbitration rights.
- Prohibiting Liberty- and DHC-affiliated programmers from engaging in noncost-based price discrimination.
- Expanding the scope of the small and medium-sized cable company conditions to include all ACA members.
- Placing a term of 10 years on the small and medium-sized cable company conditions.<sup>2</sup>

These adjustments will better protect consumers – and the small and medium-sized cable companies that serve them – from the serious public interest harms that would otherwise result from the proposed transaction.<sup>3</sup> Without these added protections, Liberty/DirecTV will have strong incentives and ample opportunity to raise costs for consumers and harm competition in many of the smaller and rural markets served by ACA’s members.

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<sup>1</sup> *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, Comments of the American Cable Association at 2 (filed Mar. 23, 2007) (“ACA Comments”).

<sup>2</sup> *Id.* at 7-17.

<sup>3</sup> *Id.* at 20.

Nearly all commenters recognize the powerful incentives and ability of Liberty/DirecTV to disadvantage competitors and raise costs to consumers.<sup>4</sup>

ACA files this Reply to highlight the overwhelming support to apply – and adjust – the News Corp./DirecTV conditions. Further, ACA supports comments filed by RCN and NCTC:

- ACA supports RCN’s proposed condition to limit the Applicants’ ability to enter into exclusive arrangements for local, regional and national sports programming whether or not it is vertically integrated; and
- ACA supports NCTC’s proposal that the News Corp./DirecTV conditions should continue to apply to any News Corp. programming service involved in an arbitration proceeding commenced or noticed prior to the completion of the proposed transaction.

**II. The record supports the continued need for News Corp. and its affiliates to remain subject to the News Corp./DirecTV conditions on retransmission consent, RSN access and program access for their full term.**

**What ACA says:**

To maintain the public interest benefits of the *News Corp./DirecTV Order* conditions for consumers served by small/medium-sized cable companies, the Commission should make clear that those conditions shall continue to constrain News Corp. affiliated

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<sup>4</sup> *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, Comments of Consumers Union et al at 3-4 (filed Mar. 23, 2007) (“*Consumers Union Comments*”); *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, Comments of EchoStar at 2 (filed Mar. 23, 2007) (“*EchoStar Comments*”); *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, Comments of Hispanic Information and Telecommunications, Inc. at 7 (filed Mar. 23, 2007) (“*HITN Comments*”); *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, Comments of NCTC at 4 (filed Mar. 23, 2007) (“*NCTC Comments*”); *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, Comments of RCN at 2 (filed Mar. 23, 2007) (“*RCN Comments*”).

broadcast stations, RSNs, and satellite channels, at a minimum for the full term of the order.<sup>5</sup>

**What other participants say:**

Consumers Union:

[T]he Commission should permit the transfer only if the merger conditions imposed by the *News Corp./Hughes Order*, including non-exclusivity rules, program access rules and binding arbitration for RSNs and broadcast stations, continue to apply to News Corp. post-transaction...<sup>6</sup>

NCTC:

The FCC should continue to enforce the *News Corp./DirecTV Order* conditions with respect to News corp.-affiliated programming services.<sup>7</sup>

EchoStar:

The Commission should continue to apply the *News/Hughes* conditions to News Corp until the Applicants can demonstrate conclusively that this transaction severs News Corp's ties with DIRECTV and Liberty, and all current News Corp/DirecTV programming contracts expire.<sup>8</sup>

The record supports that the small cable conditions imposed on News Corp.-affiliated broadcast stations and satellite channels must remain in place for the full term. The News Corp./DirecTV conditions help to serve at least two of the intended public interest benefits – avoiding disruption of customer viewing

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<sup>5</sup> *ACA Comments* at 19.

<sup>6</sup> *Consumers Union Comments* at 6-7.

<sup>7</sup> *NCTC Comments* at 4.

<sup>8</sup> *EchoStar Comments* at iii.

patterns<sup>9</sup> and protecting competition by maintaining access to “must have” programming.<sup>10</sup> As explained in ACA’s Comments, these conditions will continue to serve the public interest by bringing a measure of stability to program access, retransmission consent, and RSN renewals.<sup>11</sup> To further protect these public interest benefits, the conditions must remain in place for their full term.

**III. The record supports the need for enhanced News Corp./DirecTV conditions to constrain Liberty/DirecTV’s abuse of market power against small and medium-sized cable companies.**

The record provides solid support for ACA’s analysis that the Commission must also expand and improve the News Corp./DirecTV conditions.

**What ACA says:**

In this proceeding, any approval of the transaction should adjust, clarify, and expand the small and medium-sized cable company conditions to fill the gaps and plug the loopholes through which transaction-specific abuses of market power continue to flow.<sup>12</sup>

**What other participants say:**

Consumers Union:

Application of the conditions from the *News Corp./Hughes Order* on

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<sup>9</sup> *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶ 161 (2004) (“*News Corp. Order*”) (“The transaction would result in secondary public harms by depriving subscribers of access to RSN programming during the period of temporary foreclosure or by causing subscribers to change MVPDs to access the foreclosed programming, even where they would otherwise not desire to change providers with greater frequency than today.”).

<sup>10</sup> *Id.*, ¶ 175.

<sup>11</sup> *ACA Comments* at 18.

<sup>12</sup> *Id.* at 2.

Liberty as to its existing and new properties is insufficient to protect competition and the interests of consumers.<sup>13</sup>

NCTC:

NCTC shares many of the concerns voiced by others, such as the American Cable Association, regarding the need for the Commission to impose additional conditions...<sup>14</sup>

RCN:

Clearly, [the *News Corp./DirecTV*] conditions are the minimum necessary to protect competition from the ability of a vertically integrated DirecTV-Liberty to use the extensive programming interests of Liberty to harm the competitive efforts of other MVPDs who compete with DirecTV.<sup>15</sup>

EchoStar:

The Commission should correct the offered conditions so that they are actually comparable to the *News/Hughes* conditions and address fully the recognized public interest harm.<sup>16</sup>

As described, additional conditions beyond those imposed in the *News Corp./DirecTV Order* are necessary to protect the public interest. The conditions as applied today will not protect against the substantial public interest harms threatened by the Liberty/DirecTV combination. As the Consumers Union and others show, the *News Corp./Direct TV* conditions do not adequately protect consumers' interests.<sup>17</sup>

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<sup>13</sup> *Consumers Union Comments* at 3.

<sup>14</sup> *NCTC Comments* at 2.

<sup>15</sup> *RCN Comments* at 2.

<sup>16</sup> *EchoStar Comments* at ii.

<sup>17</sup> *Consumers Union Comments* at 3 (“[G]iven undisclosed agreements, long-standing connections between Liberty and News Corp., and the commingling of management, the *Application* strongly suggests that the transaction will not result in a distinct separation of DirecTV

The Commission has repeatedly recognized that small and medium-sized cable companies are especially vulnerable and warrant additional protection.<sup>18</sup> But ACA members' experience and that of others demonstrate that the News Corp./DirecTV conditions have failed to prevent the exercise of overwhelming market power by Fox.<sup>19</sup> In short, the Commission must improve the conditions as ACA describes in its Comments so that smaller and medium-sized cable companies – and the consumers those companies serve – are not harmed.

The record also supports a need to include additional programming affiliated with Liberty and DirecTV under the program access and nondiscrimination rules:

**What ACA says:**

Given the extraordinary combination of distribution and content, and the clear overlap of ownership and interest between Liberty and DHC, any order approving the transaction must make clear that program access conditions apply to DHC-affiliated programming.<sup>20</sup>

**What other participants say:**

Consumers Union:

We strongly urge imposition of the *News Corp./Hughes Order*

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from News Corp., but instead appears to merely be a transfer of property from one partner to another. Therefore, application of the conditions from the *News Corp./Hughes Order* on Liberty as to its existing and new properties is insufficient to protect competition and the interests of consumers.”).

<sup>18</sup> *News Corp. Order*, ¶ 176 (“We agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for “must have” programming such as RSNs following News Corp.’s acquisition of control of DirecTV.”).

<sup>19</sup> *Consumers Union Comments* at 2-4; *EchoStar Comments* at 30-31; *NCTC Comments* at 4-8; *RCN Comments* at 2.

<sup>20</sup> *ACA Comments* at 9 (emphasis added).

conditions, particularly the non-exclusivity, program access and binding arbitration conditions, on Liberty as applied to any current, transferred or future programming, not limited to “national” programming, that is owned by or affiliated with Liberty or its principle shareholder.<sup>21</sup>

NCTC:

The Commission should determine whether all of the News Corp.-affiliated RSNs should continue to be subject to the News Corp./DirecTV Order conditions due to their commonality of operations.<sup>22</sup>

HITN:

The Application makes note that Dr. John C. Malone, who serves as Chairman of Liberty Media, is also Chairman and CEO of Discovery Holding Company. As part of its public interest review, the Commission must examine the effect the transfer will have on vertical integration and how Liberty Media will interact with independent programmers.<sup>23</sup>

The record reflects high anxiety about the potential for Liberty/DirecTV’s abuse of market power in future transactions. As described in ACA’s Comments, to protect the public interest, any program access conditions imposed by the Commission must extend to DHC-owned programming.<sup>24</sup> Given the extraordinary combination of distribution and content, and the clear overlap of ownership and interest between Liberty and DHC, any order approving the transaction must apply program access conditions to DHC-affiliated programming.

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<sup>21</sup> *Consumers Union Comments* at 2-3 (emphasis added).

<sup>22</sup> *NCTC Comments* at 6 (emphasis added).

<sup>23</sup> *HITN Comments* at 6 (emphasis added).

<sup>24</sup> *ACA Comments* at 9.

But the Commission's analysis must not stop with DHC-affiliated programming. It is well-established that Liberty/DirectTV will have the incentive and ability to withhold access to any Liberty/DirectTV-affiliated programming.<sup>25</sup> The Commission must carefully examine the concerns on the record about all programming affiliated with Liberty.

**IV. ACA supports additional proposals raised on the record that are necessary to protect the public interest.**

ACA supports the following additional proposals raised on the record:

- RCN's proposed condition to limit Applicants' ability to enter into exclusive arrangements for local, regional and national sports programming whether or not it is vertically integrated; and
- NCTC's proposal that the Commission should clarify that the News Corp/DirectTV conditions should continue to apply to any News Corp. programming service involved in an arbitration proceeding commenced or noticed prior to the completion of the transaction.

We discuss each of these in turn below.

**A. The Commission should follow the recommendations of RCN and prohibit exclusive and unreasonably discriminatory arrangements between DirectTV or Liberty and providers of "must have" sports programming.**

To protect against DirectTV's ability to withhold key sports programming, ACA supports RCN's proposal for additional conditions to safeguard competitive access to critical "must have" local, regional and national sports programming.

Nearly all commenters fear DirectTV's significant market power aligned with "must have" programming.<sup>26</sup>

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<sup>25</sup> *RCN Comments* at 3-4.

<sup>26</sup> *Consumers Union Comments* at 3-4; *EchoStar Comments* at i-ii; *NCTC Comments* at 7; *RCN Comments* at 2.

It is well-established that DirecTV and EchoStar are now the dominant MVPDs in many of the smaller and rural markets served by ACA members.<sup>27</sup> Given Liberty/DirecTV's ability, incentive, and propensity to obtain exclusive programming, particularly "must have" sports programming, the Commission must limit Liberty and DirecTV's ability to maintain and acquire exclusive access to "must have" programming. As the Commission has recognized, small and medium-sized cable operators are especially vulnerable to competitors' exclusive control over sports programming.<sup>28</sup> Small and medium-sized operators must have access to key sports programming upon reasonable prices, terms and conditions.<sup>29</sup>

Specifically, ACA concurs that any approval of the transaction should prohibit exclusive or unreasonably discriminatory arrangements between DirecTV or Liberty and third-party providers of "must have" sports programming.

**B. The Commission should follow the recommendations by NCTC and clarify that the News Corp./DirecTV conditions should continue to apply to any News Corp. programming service involved in an arbitration proceeding commenced or noticed prior to the completion of the proposed transaction.**

ACA supports NCTC's proposal that the News Corp./DirecTV conditions should continue to apply to any News Corp. programming service involved in an

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<sup>27</sup> *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, 20 FCC Rcd. 14117, Comments of the American Cable Association at 3-4 (filed Sept. 19, 2005) (*citing* Leichtman Research Group, Inc., *DBS Now the Leading Video Provider in Rural America*, Research Notes, at 3-4 (2Q 2005), available at [http://www.leichtmanresearch.com/research/notes06\\_2005.pdf](http://www.leichtmanresearch.com/research/notes06_2005.pdf)).

<sup>28</sup> *News Corp Order*, ¶ 176.

<sup>29</sup> *EchoStar Comments* at 22 ("The Commission should, therefore, prevent DirecTV from acquiring any additional exclusive (or *de facto* exclusive) programming rights.").

arbitration proceeding commenced or noticed prior to the completion of the transaction. This clarification will provide many smaller and medium-sized cable operators with a degree of certainty for the pending negotiations.

If the conditions were to lapse, News Corp. would effectively avoid complying with arbitration conditions the Commission imposed in the *News Corp./DirecTV Order*.<sup>30</sup> As ACA points out in its comments, Fox Cable stalled meaningful RSN renewal negotiations with NCTC by refusing to acknowledge that NCTC as bargaining agent could review its principal's expiring RSN contract.<sup>31</sup> Fox Cable's strategy ate through nearly half of the six year term of the RSN conditions before Fox Cable and NCTC fully engaged in negotiations. The Commission should not reward this dilatory conduct by removing the conditions.

## **V. Conclusion.**

The record supports ACA's concerns that in the smaller and rural markets served by ACA members, the insertion of Liberty into the DirecTV ownership will present a clear and present danger to the public interest. The Commission must address the public interest harms emphasized by ACA and others on the record. To best manage the potential harms, the Commission should impose the additional conditions outlined in ACA's Comments and on the record. Without additional conditions imposed, the public interest harms threatened by this merger – harms acknowledged on the record – will occur.

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<sup>30</sup> *News Corp. Order*, ¶ 176.

<sup>31</sup> *ACA Comments* at 9-11.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

By: \_\_\_\_\_ /s/ \_\_\_\_\_

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