

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

In the Matter of)	
)	
News Corporation and)	
The DirecTV Group, Inc.,)	MB Docket No. 07-18
<i>Transferors,</i>)	
)	
and)	
)	
Liberty Media Corporation,)	
<i>Transferee,</i>)	
)	
For Authority to Transfer Control.)	
_____)	

OPPOSITION OF DISCOVERY COMMUNICATIONS, INC. TO PETITIONS TO DENY

Discovery Communications, Inc. (“Discovery”) hereby submits this Opposition in response to the Petition to Deny filed by EchoStar Satellite L.L.C. (“EchoStar”) and the Comments of the American Cable Association (“ACA”) in the above-captioned proceeding.^{1/}

INTRODUCTION AND SUMMARY

Liberty Media’s voluntary assumption of the conditions imposed on DirecTV as part of DirecTV’s merger with News Corp. resolves any public interest concerns that could be associated with allowing the transaction to go forward. Indeed, even EchoStar and ACA acknowledge that this is “encouraging[.]”^{2/} and a “notable concession.”^{3/} EchoStar and ACA nonetheless argue, without any support or economic analysis of the likely effects of the transaction, that imposition of those conditions directly on Discovery -- as well as the imposition

^{1/} *News Corporation, The DirecTV Group, Inc. and Liberty Media Corporation Seek Approval to Transfer Control of FCC Authorizations and Licenses*, MB Docket No. 07-18, Public Notice, DA 07-637 (rel. Feb. 21, 2007).

^{2/} EchoStar at 10.

of heightened program access conditions on Discovery's programming networks -- is warranted, due to the alleged "historical" practices of Liberty Media and the "broken" nature of the existing program access rules.

Specifically, EchoStar and ACA collectively argue that the Commission should impose program access requirements specifically on Discovery as a part of this proceeding.^{4/} EchoStar contends that the Commission should also (1) apply the mandatory arbitration mechanism adopted in the *News Corp./DirecTV Merger Order* to Discovery's programming networks;^{5/} (2) extend the existing program access rules to the Discovery networks' online and interactive features and platforms;^{6/} and (3) expand the program access rules to cover Liberty Media-affiliated programmers' international programming and markets.^{7/} ACA claims that the Commission should intervene in private industry negotiations, including prohibiting standard industry practices such as volume discounts.^{8/}

There is no legal or factual basis for imposing any program access conditions on Discovery as part of this proceeding. First and foremost, Discovery is not a party to the transaction, no such party is an owner of Discovery, and Liberty Media's decision to assume the *News Corp./DirecTV Merger Order* conditions voluntarily for its own networks has no effect on Discovery. Moreover, Discovery is already governed by the existing program access rules

^{3/} ACA at 6.

^{4/} EchoStar at ii, 14-15; ACA at 7-8.

^{5/} EchoStar at 19; *see also General Motors Corporation and Hughes Electronics Corporation, Transfers and The News Corporation Limited, Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473, ¶ 175 (2004) ("*News Corp./DirecTV Merger Order*").

^{6/} EchoStar at 23.

^{7/} EchoStar at 15-16.

^{8/} ACA at 12-13.

generally applicable to cable-affiliated networks.

Further, the Commission has repeatedly concluded in recent transaction-specific proceedings, including the *News Corp./DirecTV Merger Order* and the *TW/Adelphia Merger Order*, that no special heightened program access rules are needed to ensure access to general entertainment networks such as Discovery's programming channels. Neither EchoStar nor ACA has made any showing -- let alone the requisite specific showing -- that the transaction heightens Discovery's market power such that any specific conditions on Discovery are warranted. Even if any problem had been shown, the proposed conditions are not "narrowly tailored" as EchoStar claims,^{9/} but are vastly overbroad restrictions that go well beyond those that the First Amendment would allow.

Second, there is no authority for drastically expanding Discovery's program access obligations in the manner ACA and EchoStar envision. The practices EchoStar and ACA complain of require no redress: They are standard industry negotiation practices explicitly sanctioned under the rules. To the extent ACA and EchoStar believe adjustments to existing program access rules are needed, this proceeding is not the appropriate vehicle for addressing those concerns. Finally, requests to "expand" the program access rules to include interactive features and platforms and international programming are outside the scope of the Commission's authority under the statute and inappropriate to consider here. Accordingly, the "relief" requested by EchoStar and ACA as part of this proceeding should be denied.

^{9/} EchoStar at ii.

I. ECHOSTAR AND ACA HAVE NOT SUPPORTED THEIR REQUEST FOR THE IMPOSITION OF ANY CONDITIONS ON DISCOVERY

Liberty Media and DirecTV's agreement to assume the conditions previously imposed on DirecTV for Liberty-owned programming networks as part of its merger with News Corp. addresses any concerns about potential anticompetitive behavior. Despite the procompetitive commitments already assumed by Liberty Media and DirecTV, EchoStar and ACA seek to use this proceeding as a vehicle for their own gain, to impose program access-related obligations directly on Discovery. This attempt must be rejected.

There is no basis for expanding any of the News Corp./DirecTV merger conditions or imposing any company-specific program access conditions on the Discovery networks in this proceeding. Discovery played no role in the News Corp./DirecTV merger proceeding, and the voluntary decision by Liberty Media and DirecTV -- neither of which is an owner of Discovery - - to assume the conditions imposed in that proceeding for Liberty-owned networks does not reach Discovery. In any event, Discovery is already subject to the program access rules as a result of Advance/NewHouse and Cox's ownership interest in Discovery,^{10/} so EchoStar's argument that the Commission must take action in this proceeding to impose such requirements is nonsensical.

EchoStar and ACA have failed to demonstrate the need for any conditions to be imposed on Discovery. The imposition of party-specific conditions on a transaction is a drastic remedy, imposed only when demonstrably necessary to alleviate specific issues raised by the proposal

^{10/} Cox Communications Holdings currently owns a twenty-five percent (25%) share of Discovery. Discovery recently announced that it plans to buy back that stake of the company from Cox Communications Holdings in a transaction expected to close in May. *See Discovery to buy out Cox Communications stake*, WASHINGTON POST, Mar. 29, 2007; Siklos, Richard; *Discovery Is Buying Out 25% Stake Held by Cox*, NEW YORK TIMES, Mar. 30, 2007.

and narrowly tailored to reach only the conduct raising concern.^{11/} In this case, Discovery is not a party to the transaction, and the Applicants are not owners of Discovery. Petitioners advocating conditions must demonstrate “specific” and “substantial” evidence of the harm the condition is intended to remedy.^{12/} This is so because in determining whether to impose conditions on a transaction, the Commission’s decision must be based on “specific evidence” that “convincingly shows a problem to exist.”^{13/} This duty is heightened even further when, as

^{11/} *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶ 19 (2005) (“*SBC/AT&T Merger Order*”) (“Our public interest authority also enables us to impose and enforce narrowly tailored transaction-specific conditions to ensure that the public interest is served by the transaction.”); *see also Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations, et al.*, 19 FCC Rcd 21522, ¶ 43 (2004) (same).

^{12/} The Commission on numerous occasions has refused to impose conditions on transactions when the petitioner did not provide “substantial” or “sufficient” or “specific” evidence of the harms the condition was intended to remedy. *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelpia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; et al.*, 21 FCC Rcd 8203, ¶¶ 30, 90, 104, 231 (2006) (“*TW/Adelpia Merger Order*”); *see also AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189, n.140 (rel. Mar. 26, 2007) (rejecting general arguments). Indeed, the Communications Act of 1934, as amended (“Act”), and the Commission’s rules *require* that a petition to deny contain specific allegations of fact sufficient to show that the petitioner is a party-in-interest and that grant of the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d); 47 C.F.R. §§ 1.45, 1.939(d). Allegations of fact set forth in the petition to deny must be supported by the affidavit of a person with personal knowledge of the facts recited. *See id.*; *see also Joe McKissock*, 21 FCC Rcd 2187 (2006) (finding that when a petitioner “has not submitted the requisite affidavit,” its “pleading is procedurally defective and cannot be considered a petition to deny”). Neither EchoStar nor ACA has met these procedural requirements, and EchoStar’s attempt to comply with the Commission’s affidavit requirements is insufficient. *See, e.g. Columbia Broadcasting System, Inc.*, 46 FCC 2d 903, 904-05 (1974) (finding “affidavits are insufficient under Section 309(d)(1)” when the affidavit expresses only “the general and conclusory opinions” of the affiant). Their request should be denied on this basis alone.

^{13/} *Time Warner Ent’m’t Co. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2002) (“*Time Warner II*”) (stating that “to pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made”); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977) (per curiam).

here,^{14/} First Amendment protections are implicated.^{15/} The harm sought to be remedied must be “real, not merely conjectural.”^{16/} Where predictions of harm resulting from a proposed transaction are “susceptible of empirical proof,” they must be so proven.^{17/} Further, any remedy imposed must be narrowly tailored to “alleviate these harms in a direct and material way.”^{18/}

A particularized transaction-specific showing of harm is especially required here, because EchoStar and ACA’s requests directly contradict prior Commission rulings that heightened program access restrictions are unnecessary for general entertainment programming. In the *News Corp./DirecTV Merger Order*, the Commission expressly considered and declined to apply the commercial arbitration mechanism it created for regional sports network programming negotiations to general entertainment programming.^{19/} Based on the extensive expert opinion and factual analysis in the record, the Commission determined that general entertainment programming networks “participate in a highly competitive segment of [the] programming market with available reasonably close programming substitutes” and that there is “no evidence in the record” to suggest that the transaction would give News Corp. any additional market

^{14/} Cable programmers “engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)). Restricting a cable programmer’s right to freely distribute its content impinges on its First Amendment rights. See *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996).

^{15/} *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir. 2002) (“first amendment ‘intermediate scrutiny’ . . . is more demanding than the arbitrary and capricious standard of the APA”).

^{16/} *Turner I*, 512 U.S. at 664; see also *Time Warner II*, 240 F.3d at 1137.

^{17/} *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457-58 (D.C. Cir. 1985).

^{18/} *Turner I*, 512 U.S. at 664; see also *Time Warner II*, 240 F.3d at 1137.

^{19/} *News Corp./DirecTV Merger Order* ¶¶ 174-75.

power with respect to its national and non-sports regional cable programming.^{20/} Similarly, in the *TW/Adelphia Merger Order*, the Commission determined that it was unnecessary to apply conditions to national or non-sports regional programming.^{21/} Overturning those conclusions would require a particularized showing of changed circumstances justifying a different result here for Discovery's general entertainment networks.

EchoStar and ACA's allegations fall far short of the required showing. While ACA claims that its proposed conditions are necessary because "the proposed transaction will create additional incentive and ability for [Discovery], through its affiliations with Liberty and DirecTV, to increase the cost of [Discovery] programming,"^{22/} neither EchoStar or ACA has presented any economic analysis of Discovery's current role in the programming market, how Discovery's market power would change following the proposed transaction, or how the proposed conditions would specifically and narrowly curb any excessive market power identified. The requested conditions must be rejected.

II. EXPANSION OF ANY PROGRAM ACCESS RULES AS APPLIED TO DISCOVERY IS UNWARRANTED

Even apart from the lack of evidence for the requested conditions, EchoStar and ACA's requests to impose certain program access obligations on the Discovery networks -- in some cases, beyond any obligations imposed anywhere else in the industry -- are wholly without merit.

First, broad attacks on the program access rules should not be entertained here. The pending transaction "is not an opportunity to correct any and all perceived imbalances in the

^{20/} *News Corp./DirecTV Merger Order* ¶¶ 129-30.

^{21/} *TW/Adelphia Merger Order* ¶¶ 167-69.

^{22/} ACA at 8, 9.

industry” because such “issues are best left to broader industry-wide proceedings.”^{23/} The Commission will impose conditions on its approval of a transaction “only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms).”^{24/} Allegations of current anticompetitive behavior without the required showing that the proposed transaction will enhance or increase this alleged behavior are not “transaction-specific.” The examples of “harm” cited by ACA and EchoStar -- for example, ACA’s citation to the use of “volume discounts”^{25/} -- are merely frustration with the existing rules,^{26/} not transaction-specific concerns.

Second, EchoStar’s attempt to expand the program access rules to online and interactive features and programming, as well as to “non-traditional platforms” such as mobile

^{23/} *News Corp./DirecTV Merger Order* ¶ 131.

^{24/} *SBC/AT&T Merger Order* ¶ 19; *see also Constellation, LLC, et al., Transferors and Intelsat Holdings, Ltd., Transferee, Consolidated Application for Authority to Transfer Control of PanAmSat Licensee Corp. and PanAmSat H-2 Licensee Corp.*, 21 FCC Rcd 7368, ¶ 21 (2006). EchoStar’s concession that it is seeking heightened program access conditions on Discovery because it believes the program access rules are “broken,” EchoStar at 19, demonstrates that its concerns are not transaction-specific. Indeed, EchoStar has raised these same issues in several industry-wide proceedings. *See generally, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, Comments of EchoStar Satellite L.L.C. (filed Apr. 2, 2007); *see also Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 06-189, Comments of EchoStar Satellite L.L.C., at 13-14 (filed Nov. 29, 2006). The Commission has consistently “declined to consider in merger proceedings matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability.” *See, e.g., Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor to SBC Communications, Inc., Transferee*, 13 FCC Rcd 21292, ¶ 29 (1998).

^{25/} ACA at 13.

^{26/} Volume discounts are explicitly permitted under the Commission’s rules, and are a common industry practice. *See* 47 C.F.R. §§ 76.1002(b)(2), (3).

applications,^{27/} is well beyond the scope of this proceeding and likely beyond the scope of the Commission's authority. The program access rules ensure access to "satellite cable programming" as defined by the Act.^{28/} Online and interactive features fall well outside this definition. Imposing any restrictions on programmers' ability to control such content cannot be characterized as an "extension" of the program access rules, but rather would constitute a previously unseen exercise of authority by the Commission that would likely exceed its authority and in any event cannot be undertaken in a proceeding such as this.^{29/}

Third, there is no support for extending the program access rules to international programming and markets.^{30/} The Commission previously has found that general entertainment networks like Discovery's do not have market power on a national level.^{31/} From an international perspective, there is even less likelihood that Discovery could exercise market power in the international programming market given the numerous choices available to video consumers today,^{32/} and the Commission has no authority to impose program access obligations on international programming and markets in any event.^{33/} Accordingly, the request to expand the program access rules in this manner should be denied.

^{27/} EchoStar at 15-16, 23-24.

^{28/} 47 U.S.C. § 548(b); 47 U.S.C. § 605(d) (defining "satellite cable programming" as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers").

^{29/} *See supra* n.24.

^{30/} EchoStar at 15-16.

^{31/} *News Corp./DirecTV Merger Order* ¶ 130.

^{32/} *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, ¶ 189 (2006) (discussing the myriad of options for non-English programming).

^{33/} *See, e.g.*, 47 U.S.C. § 152.

CONCLUSION

For the reasons stated above and in the Application, the Petitions to Deny and EchoStar and ACA's requests for "relief" should be rejected.

Respectfully submitted,

DISCOVERY COMMUNICATIONS, INC.

By:

/s/ Tara M. Corvo

Tara M. Corvo

Angela F. Collins

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY

and POPEO, P.C.

701 Pennsylvania Avenue, N.W.

Suite 900

Washington, D.C. 20004

(202) 434-7300

tncorvo@mintz.com

Dated: April 9, 2007

CERTIFICATE OF SERVICE

I, Angela F. Collins, hereby certify that on this 9th day of April 2007, I caused copies of the foregoing "Opposition of Discovery Communications, Inc. to Petitions to Deny" to be sent to the following by electronic mail:

Sarah Whitesell
Media Bureau
Sarah.Whitesell@fcc.gov

Tracy Waldon
Media Bureau
Tracy.Waldon@fcc.gov

Royce Sherlock
Media Bureau
Royce.Sherlock@fcc.gov

Patrick Webre
Media Bureau
Patrick.Webre@fcc.gov

Jim Bird
Office of General Counsel
Jim.Bird@fcc.gov

JoAnn Lucanik
International Bureau
JoAnn.Lucanik@fcc.gov

Best Copy and Printing, Inc.
fcc@bcpiweb.com

/s/ Angela F. Collins