

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

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In re Application of)	
)	
NEWS CORPORATION and)	
THE DIRECTV GROUP, INC.,)	MB Docket No. 07-18
Transferors,)	
)	
and)	
)	
LIBERTY MEDIA CORPORATION,)	
Transferee,)	
)	
For Authority to Transfer Control.)	
_____)	

To: The Commission

REPLY OF THE NORTH DAKOTA BROADCASTERS

The North Dakota Broadcasters (“NDB”), by its attorneys, hereby replies to the Consolidated Opposition to Petitions to Deny and Response to Comments filed by DirecTV Group, Inc. (“DirecTV”) and Liberty Media Corporation (“Liberty”), each on April 9, 2007, and to the Opposition to Petition to Deny and Reply Comments of News Corporation (“NewsCorp”), filed April 9, 2007.

NDB argues in its Petition to Deny (“Petition”) that there were two principal reasons for the Commission to condition any approval of the proposed transfer of control of DirecTV to Liberty on the provision by DirecTV, by a time certain, local-into-local direct broadcast satellite service in all 210 U.S. television markets—consistent with NewsCorp’s previous commitments and with public interest requirements in light of changed circumstances since 2004.

NewsCorp's Previous Commitment

Liberty, DirecTV, and NewsCorp each filed separate oppositions to the issues raised by the various parties, including NDB. Of the oppositions, Liberty's and NewsCorp's are unresponsive to the NDB Petition to Deny; in fact, DirecTV, not NewsCorp, tried to explain what NewsCorp meant in 2003 with its commitment to the Commission. Similarly it was DirecTV, not Liberty, which objected to the imposition of the condition requested by NDB. DirecTV did make further promises to the Commission; but DirecTV cannot commit its controlling entity, Liberty, to any course of action. The solution to this confusion is the imposition by the Commission of a clear, concise, and specific condition on the transfer, as requested by NDB.

According to DirecTV, the NewsCorp commitment "did not specify delivery of all local channels *via satellite*."¹ This wordplay needs to be examined.

NDB, in its Petition, quoted at length the actual commitment of NewsCorp to the Commission, when NewsCorp acquired DirecTV. NewsCorp said as follows:

This effort—which involves a commitment of approximately \$1 billion that has not been authorized by Hughes' current owner, General Motors Corporation ("GM")—will enable DIRECTV to provide local channels in all 210 DMAs and to transmit more HDTV programming to subscribers, including local channels in HDTV format in select markets.

* * *

The parties' commitment to increase MVPD competition is not mere speculation. It is instead based on...(3) the Parties' commitment to local-into-local and high-definition television....

NewsCorp went on to state:

Accordingly, as early as 2006 and no later than 2008, (1) DIRECTV will offer a seamless, integrated local channel package in all 210 DMAs, and (2) DIRECTV will offer at least 200 to 300 channels of local and

¹ Consolidated Opposition to Petitions to Deny and Response to Comments ("DirecTV Opposition"), p. 11.

national HDTV programming. NewsCorp and Hughes continue to believe that DIRECTV will be the strongest possible competitor to incumbent cable operators only if it can provide consumers with their local broadcast channels and with HDTV programming—and as evidenced above, they intend to extend that capability as quickly and efficiently as possible. [September 22, 2003, Letter Amendment to Application, MB Docket No. 03-124 (“NewsCorp Letter”), p. 4.]

The Commission explicitly relied on that commitment in its decision.. In granting the application, the Commission stated:

Applicants claim that, in the longer term, they will design and launch a new generation of satellites as early as 2006 and no later than 2008 that will provide much greater capacity for DirecTV services. This effort, which involves a financial commitment above that which Hughes’s current owner has authorized, will enable DirecTV to provide local broadcast channels in all 210 DMAs, including local channels in HDTV format in select markets. [*Citation omitted.*]

* * *

Applicants claim that DirecTV will be the strongest possible competitor to cable *only if* it can provide customers with their local broadcast channels and with HDTV programming and that they intend to extend that capability as quickly and as efficiently as possible. [General Motors Corporation and Hughes Electronics Corporation, Transferors, and the News Corporation Limited, Transferee, Memorandum Opinion and Order, 19 FCC Rcd. 473 (“NewsCorp MO&O”), at 616.]

According to DirecTV (but not NewsCorp), the commitment didn’t really mean real local-into-local direct broadcast satellite service, despite the one billion dollars that NewsCorp was to commit to the project. According to DirecTV (but not NewsCorp), it was only a commitment for an undefined “seamless” local-into-local service.

As it turns out, the concept of seamless local-into-local service amounts to little more than an A-B switch, allowing people in rural areas to disengage from the DirecTV feed and to pick up local stations over the air. Of course, that doesn’t help people who, by virtue of

distance, intervening obstructions, hills, and other circumstances, are precluded from receiving the local stations. These viewers would be able to pay DirecTV for importation of distant network signals. DirecTV's right to import distant signals was not a result of market forces dictating distribution of resources; rather, it was Congress granting a subsidy to DirecTV allowing for the development of the then-nascent Direct Broadcast Satellite business. This subsidy may have cost local stations billions in lost advertising revenues. Viewers who watch imported signals instead of local signals delivered by cable or translators are excluded from the local stations' ratings and therefore local stations' revenues are reduced. A 38.5% interest in DirecTV is currently being sold for \$11 billion, evidence that DirecTV is no longer in need of a subsidy; yet it proposes to continue using its subsidy instead of performing its promises.

Rural broadcasters should be entitled to repayment for the losses they incurred as DirecTV developed its profits. The cost of providing universal local-into-local satellite service is likely to be a mere portion of the losses sustained by rural local broadcasters as a result of non-market forces that are subsidizing DirecTV. Without universal local-into-local DBS service, rural viewers would not have the local stations in their program guide, nor could they easily select a local station from DirecTV's tuning system. These are among the reasons that DirecTV penetration in local-into-local markets is much higher than in non-local-into-local markets. Lower penetration provides less competition for other video providers and therefore less benefit to the public.

The unanswered question remains: Just exactly what does "seamless" local-into-local mean? It certainly did not require a one-billion-dollar investment to have an A-B switch installed in a converter box. The DBS industry built its business serving areas in rural markets too remote to be served by cable. Yet DBS is now turning its back on its charter

customers in the pursuit of higher premium fees to be paid by urban subscribers who will be offered more HD signals than cable can offer, until cable upgrades its systems.

The effect of the commitment by NewsCorp was to foreclose any meaningful public discussion of DirecTV's proposed local-into-local service. As Commissioner Adelstein noted, he only learned, much later, that the words did not mean what they said and that the commitment was lacking.²

It appears likely that NewsCorp did actually plan to expand local-into-local satellite service and should be commended for its efforts. It appears that Liberty is changing DirecTV's agenda. This is a perfect example of why specific conditions need to be imposed on these transactions by the Commission.

Public Interest Considerations

In its Petition, NDB also pointed out that, in the three years since the NewsCorp decision, there have been substantial changes in satellite availability. Although the Commission may have been justified in 2004 in accepting NewsCorp's commitment and in not imposing a condition on NewsCorp to provide local-into-local direct satellite service by a date certain, because of unknown satellite capacity, it is clear from DirecTV's filing that the capacity now exists.

DirecTV (but not Liberty), in its Opposition, has confirmed that it will be guided by "market forces" in its proposed service offerings.³ This confirmation and Liberty's lack of commitment to local-into-local satellite service fairly joins the issue. In this context, "market forces" is a euphemism for "we can make more money by concentrating on the big cities and avoiding service to the rural areas."

² NewsCorp MO&O, *supra*, at 697.

³ Opposition of DirecTV, p. 12.

This Commission has historically recognized that regulation is often necessary to balance out market force inequities. The basic concept was established in the Clayton Act⁴ and the Sherman Act,⁵ and a whole series of subsequent government modifications of market forces were implemented to protect the public good.

In the instant case, Liberty is completely silent about its plans for local-into-local satellite service going forward, and DirecTV, which has no control over its own destiny, asks to be left unfettered to make as much money as it can. Maximizing profit is a legitimate business objective, but it must be done in a manner consistent with the public interest.

As noted above, the Direct Broadcast Satellite industry benefited from the right to import distant signals pursuant to a Compulsory License granted by Congress and administered at substantial cost by the Commission. This subsidy was provided due to public interest concerns and without regard for market forces.

DirecTV Arguments

DirecTV raises three arguments as to why it should not have to provide local-into-local satellite service in all 210 markets. First, it argues that NDB is trying 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 technology for achieving this goal.⁶ It is true that the public interest in this circumstance dictates modifications to market forces. It is important that the Commission impose the requested condition so that a total reliance on market forces does not render rural America second class. DirecTV’s minor commitment to provide seamless local-into-local service is never spelled out by the parties. What technology? What is seamless local-into-local? Is it really seamless? Will the resulting

⁴ Clayton Antitrust Act, 15 U.S.C. Section 12 et seq. (1914).

⁵ Sherman Antitrust Act, 15 U.S.C. Section 1 et seq. (1890).

⁶ Opposition of DirecTV, p. 12.

service be competitive with cable television service, providing universal competition? Will the proposed service be available to all households or only those that can receive over-the-air broadcasts? What benefits of high-quality digital television signals, available to most of the country, does rural America have to give up in the name of market forces? There are certainly more questions than answers, and the only party in a position to commit is Liberty, which has refused to comment.

DirecTV goes on to argue that, because it does not offer to undertake what it characterizes as an “expanded commitment,” and because the applicants (NewsCorp, DirecTV, and Liberty) have not themselves claimed that such an undertaking is a public interest benefit, “there is no basis for unilaterally imposing it upon DirecTV.”⁷ Of course, this ignores both the fact that it was a commitment of NewsCorp and, for reasons pointed out in NDB’s Petition, that the public interest requires the imposition of the condition.

Second, DirecTV argues that its has lived up to all of its local service commitments, again intoning the mantra, “DirecTV will offer a seamless integrated service in all markets.” It goes on to say, “DirecTV always anticipated that meeting this commitment would involve a mix of delivery mechanisms in different markets.”⁸ Nobody else understood that. That is like the retiring CEO who trumpets having met all the company’s goals, without ever having announced what the goals were in the first place. This commitment has a certain hollow ring to it, especially since Liberty stands mute.

Finally, it is claimed that NDB fails to recognize competing public interest claims on DirecTV’s limited resources. DirecTV asserts that it is driven to support the Commission’s stated national objective in facilitating the transition to digital television. Therefore, it wants to provide high-definition television service in major markets. What does high definition

⁷ This non-answer can be found at Opposition of DirecTV, p. 12.

⁸ Opposition of DirecTV, p. 12.

television in major markets do to facilitate the transition to digital, as opposed to providing a digital television signal via satellite to the entire country?

The bottom line to this discussion is that DirecTV and Liberty think that they can make more money by using their additional satellite capacity to provide high definition service in the larger markets than they can by expanding local-into-local satellite service in rural areas. They are probably right. The question for this Commission, as NDB has posed it before, is whether the alternative that is more profitable for the applicants trumps the public interest in nationwide (not just urban) local-into-local satellite service. NDB submits that it does not, and the remedy is the imposition of a condition requiring DirecTV to provide a local-into-local satellite service in all 210 DMAs by a date certain.

Procedural Issues

Although Liberty chooses not to say anything about local-into-local satellite service, and NewsCorp has nothing to say on the question of its previous commitment, NewsCorp, DirecTV, and Liberty all challenge NDB on procedural grounds. They contend that the North Dakota Broadcasters lack standing to file the Petition to Deny, as no sworn statement from a person with personal knowledge of the facts accompanies NDB's pleading, and that therefore NDB cannot raise these public interest questions. As will be shown, these assertions are incorrect.

It is argued that the only way that NDB could have standing to file the petition to deny would be the submission of a detailed sworn statement showing how the North Dakota Broadcasters are harmed by Liberty's acquisition of DirecTV. NDB cited not only the obvious economic harm to television stations whose signal would not be carried by DirecTV in their service area, but also, by the harm done to the citizens of North Dakota who would not be able to receive their local television stations via satellite and, in many cases, not be able to receive their local television stations at all.

Forty-one years ago, almost to the day that the Petition to Deny was filed, the United States Court of Appeals for the District of Columbia Circuit held that organizations have standing to raise certain public interest questions to “vindicate the broad public interest relating to a licensee’s performance of the public trust inherent in every licensee.”⁹ The North Dakota Broadcasters individually are harmed, but more importantly, the public is harmed. If organizations, such as the North Dakota Broadcasters Association, and the individuals licensees of the stations in the affected markets, do not have standing to raise public interest questions concerning licensee future conduct, who does have standing?

The applicants also contend that, because NDB did not submit a sworn statement of someone with personal knowledge of the facts, the Petition to Deny should be dismissed. What they fail to mention is that the facts set forth in the Petition to Deny are derived solely from the public record before this agency, newspaper accounts of interviews with principals of the parties, and the parties’ own website and filings.

This is mixed proceeding, mixed in the sense that it involves satellite acquisitions, as well as Media Bureau issues, and hence is being handled by a staff transaction team headed by the General Counsel’s Office. Section 1.933 of the Commission’s Rules applies to the Petition to Deny in this proceeding, and although Section 1.933 requires a sworn statement of an individual with personal knowledge of facts, the exception as set forth in that Rule is that an affidavit is not required for matters of which official notice may be taken. All relevant facts cited in NDB’s Petition are from public records, and there is no fact alleged that is solely within the personal knowledge of an individual. In this connection, it should be noted that the pleading of DirecTV confirms the public statements of Liberty’s principals that

⁹ Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1007 (March 25, 1966), *see also* Newhouse Broadcasting Corp., 61 FCC 2d (1976).

Liberty intends to devote its satellite capacity to high definition television in the major markets, at the expense of satellite local-into-local service in the smaller rural areas.

NDB has met the procedural requirements of the Rules: it has standing and no sworn statement is required under these circumstances. NDB has fairly raised the issue of whether the public interest requires a condition on this transfer. NDB submits that it does.

NDB appreciates the support in this proceeding that it has received from the National Association of Broadcasters; the Michigan, Ohio, Virginia, Mississippi, and Maine Associations; and specified members of the Iowa Broadcasters Association (*see attached*).

Respectfully submitted,

NORTH DAKOTA BROADCASTERS

By:

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April 16, 2007

Before the
Federal Communications Commission
Washington, DC 20554

MB Docket No. 07-18

The Iowa Television Broadcasters is an ad hoc group consisting of the commercial television stations in the Kirksville, MO/Ottumwa, IA and Sioux City, IA, Neilson Designated Market Areas (DMA). Serving the 200th and 140th television markets respectively. It includes Barrington Broadcasting Group, LLC, licensee of television station KTVO (TV), Kirksville, MO/Ottumwa, IA; Ottumwa Media Holdings, LLC, licensee of television station KYOU (TV) Ottumwa, IA; Citadel Communications Co., Ltd., licensee of television station KCAU (TV), Sioux City, IA; Waitt Broadcasting, Inc., licensee of television station KMEG (TV), Sioux City, IA; Pappas Telecasting of Sioux City L.P., licensee of television station KPTH (TV), Sioux City, IA. The Iowa Television Broadcasters supports the Petition to Deny filed by the North Dakota Broadcasters in the matter of MB Docket No. 07-18 concerning the transfer of control of DirecTV. The Iowa Television Broadcasters includes as a party the Iowa Broadcasters Association in its representative capacity as the organization of individual licensees in the state of Iowa that have chosen it to represent their interests in the development of television broadcast policy.

The Iowa stations listed above operate in markets where DirectTV has not commenced local-into-local service, despite its commitment to do so when the company was acquired by its current owner.

We believe, as do the North Dakota Broadcasters, that it is in the public interest to for local residents to be able to receive their local television stations and the news and information - including emergency news and information - that these stations provide. Subscribers to DirectTV in smaller markets should not be deprived of this service, contrary to the promises that have been made by the current owner of the company.

Thus, we support the North Dakota Broadcasters petition, and ask that the transfer be denied, or conditioned on the prompt initiation of local-into-local service in a definitive time period in the near future.

Respectively submitted,

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Sue Toma
Executive Director

CERTIFICATE OF SERVICE

I, Julia M. Gill, an employee of the law firm Borsari & Paxson, do hereby certify that on this 16th day of April 2007, a true copy of the foregoing “Reply of the North Dakota Broadcasters” was sent to the following, in the manner noted below:

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