



July 26, 2007

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Linda Kinney  
Vice President, Law and Regulation  
202.293.0981  
[linda.kinney@echostar.com](mailto:linda.kinney@echostar.com)

***Re: Scope of Programming Commitments, MB Docket No. 07-18***

EchoStar Satellite L.L.C. filed a petition last week seeking a declaratory ruling that the News Corporation (“News Corp.”)-backed Big Ten Network is a Regional Sports Network (“RSN”) under the *News/Hughes* merger condition.<sup>1</sup> The genesis of that petition is relevant to the Commission’s review of the proposed transfer of The DirecTV Group, Inc. (“DIRECTV”) from News Corp. to Liberty Media Corporation (“Liberty”), and is attached for Commission consideration.

Programming conditions are empty commitments absent clear definitions. The *News/Hughes* conditions were designed to protect unaffiliated distributors from having to accept unreasonable and discriminatory carriage demands from vertically integrated media conglomerates. As such, EchoStar’s ability to maximize consumer choice, constrain programming costs, and design customer-friendly programming packages is hampered absent concrete and enforceable programming conditions. Indeed, forcing expensive sports programming into entry-level packages designed for cost-conscious consumers is the antithesis of Chairman Kevin Martin’s call for more a la carte options. Excessive and unreasonable demands like this from content owners are driving up prices for all consumers.

Big Ten Network Dispute The News Corp.-backed Big Ten Network plans to launch this August and provide regional coverage of sporting events of a single NCAA conference, the Big Ten Conference, which includes 11 schools in 8 midwestern states. EchoStar submits that such an offering fits neatly within any reasonable definition of a RSN, and has offered carriage terms comparable to those offered to other RSNs carried today on DISH Network. EchoStar’s proposed carriage terms are supported by the intended core programming (regional college sports) and proposed pricing (substantially higher in-region rates) of the new channel. Notwithstanding the fact it offers only regional programming, Big Ten Network suggests it is a national network – even demanding carriage on DISH Network’s basic tier. The only evidence Big Ten Network could offer in support of its carriage demands is a national affiliation deal with its sister company, DIRECTV, hardly an arms-length negotiation.

In light of this stalemate, EchoStar has begun to evaluate its regulatory recourse under *News/Hughes*. As the Commission is aware, News Corp. agreed in that proceeding that all of its

---

<sup>1</sup> See *General Motors Corp. & Hughes Electronic Corp., Transferors, & the News Corporation Ltd., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) (“*News/Hughes*”).

affiliated programming would be subject to the Commission's program access rules because of the anti-competitive effects of "combining News Corp.'s programming assets with DirecTV's national distribution platform." *News/Hughes*, ¶ 4. Further, it agreed that its broadcasting and RSN properties would be subject to additional obligations, most importantly mandatory arbitration rights for programmers seeking access to such must-have programming. This heightened protection was found necessary because of the "importance of regional sports programming to MVPD offerings," and the lack of "readily acceptable close substitutes." *News/Hughes*, ¶ 133.

Understandably that Order did not define RSN explicitly, as there was little doubt as to which News Corp. programming channels fit within that classification. Such expanded protection is of little solace, however, if a News Corp.-owned RSN can now classify itself as a "national" network indiscriminately and avoid this critical protection. Our petition seeks to ensure that providers cannot eviscerate clear programming commitments through unreasonable carriage demands and/or self-classification.

News Corp.'s Future Commitment The proper classification of the Big Ten Network has direct consequences in this merger review. News Corp. has pledged to maintain the *News/Hughes* RSN and broadcast conditions for their full six-year term (until January 2010) if the Liberty acquisition is approved, but maintains that the any restrictions on national programming should be lifted. *News Corp Opposition* at 14-5. Given the apparent manipulation of its latest RSN, the value of that guarantee is in doubt.

At a minimum, the Commission should ensure that a fully vetted definition of RSN that protects against any gamesmanship or uncertainty going forward is included in this merger's conditions. In lieu of searching for that perfectly calibrated RSN definition, the more logical course of action, however, is to broaden the arbitration remedy to all Liberty and News Corp.-owned programming: any line drawing would be subject to potential abuse or manipulation. Further, such a bright line rule would better serve all stakeholders, as no party has provided a reasonable objection to arbitration or the *News/Hughes* arbitration procedures. See *EchoStar Petition to Deny* at 19-21.

Scope and Breadth of Liberty's Future Commitments The ongoing Big Ten Network dispute also underscores the need for the Commission to be vigilant that any definitions adopted in programming conditions encompass their intended scope and breadth. In particular, there remains significant uncertainty as to the full reach of the Applicants' proposed programming commitments, *e.g.*, applicability of a program access condition to all of Dr. John Malone's affiliated enterprises. The Commission has taken a key step to understanding the scope of Malone's holdings in its Information and Document Requests to Liberty Media, Liberty Global, and Discovery Holding.<sup>2</sup> It is critical that "Liberty" be defined in this proceeding in a comprehensive manner to ensure that any current or future Liberty or Dr. Malone-backed enterprise is captured by relevant programming protection. Promising that Dr. Malone's right hand (Liberty Media) will satisfy requirements is of little consequence, if Dr. Malone's left hand (Discovery Holdings, Liberty Capital, Liberty Global, or a new Malone programming entity) is not under the same restrictions. Such a loophole must be avoided.

---

<sup>2</sup> See Letter from Monica Shah Desai to Craig Troyer, Assistant General Counsel, Discovery Holding Company, MB Docket No. 07-18 (June 22, 2007) ("Discovery Holdings Letter"); Letter from Monica Shah Desai to Robert L. Hoegle, MB Docket No. 07-18 (June 15, 2007) ("Liberty Media Letter"); Letter from Monica Shah Desai to Christopher Ottele, MB Docket No. 07-18 (June 15, 2007) ("Liberty Global Letter").

In this regard, Liberty and Discovery Communications Inc.'s ("Discovery") strained attempt to carve out Discovery's wide programming holdings from Liberty's programming commitment is instructive.<sup>3</sup> Discovery's majority owner is Discovery Holding Company (a recent spin-off of Liberty Media itself). According to the Transfer Application, Discovery Holding is led by "Dr. John C. Malone, Liberty Media's Chairman, [who] serves as Chairman of the Board, Director and Chief Executive Officer of DHC and owns shares of DHC's common stock representing approximately 27.6 percent of DHC's aggregate voting power and 4.9 percent of DHC's equity." See Transfer Application at 11. Further, "[f]our members of Liberty Media's board of directors, including Dr. Malone, also serve as directors on DHC's five member board. *Id.* In fact, the Media Bureau sent its Informational Request to Discovery Holding at the address of Liberty Media's corporate headquarters: 12300 Liberty Boulevard. *Discovery Holding Letter.* Dr. Malone-owned and controlled Discovery and Discovery Holding are central players in Dr. Malone's acquisition of DIRECTV, and any programming restrictions should apply in full to such entities.

In sum, the Commission should ensure that any conclusions reached as a result of its public interest analysis are reflected in the sufficiency, scope, and enforceability of any programming conditions agreed to by the Applicants.

Respectfully submitted,

/s/ Linda Kinney

Vice President, Law and Regulation

EchoStar Satellite L.L.C.

cc: Monica Desai  
Rosemary Harold  
Royce Sherlock  
Patrick Webre  
Sarah Whitesell  
Tracy Waldon  
Jim Bird  
JoAnn Lucanik  
Mania Baghdadi  
William Beckwith

---

<sup>3</sup> Opposition of Discovery Communications, Inc. to Petition to Deny at 4; Liberty Media Corporation's Consolidated Opposition to Petitions to Deny and Response to Comments at 23-4. Discovery and Liberty attempt to deflect this central issue by noting that Discovery is subject today to the program access regime because of cable providers' ownership stake in Discovery. Given that Cox has recently divested its ownership stake in Discovery, and some analysts predict cable provider Advance/Newhouse (the only other owner of Discovery) may do the same, the Commission should make a clear finding that Discovery is subject to program access-like restrictions based only on Discovery Holding/Dr. Malone's ownership stake.