

November 20, 2007

***VIA ELECTRONIC FILING***

Ms. Marlene Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

**Re: *Application of News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control, MB Docket No. 07-18 Ex Parte***

Dear Ms. Dortch:

In recent ex parte communications, HDNet LLC (“HDNet”) has suggested a connection between Discovery HD Theater’s decision to discontinue advertising for HDNet and Liberty Media’s proposed acquisition of control of DirecTV.<sup>1/</sup> HDNet alleges that Discovery’s decision is part of a scheme to “kill off” HDNet so that DirecTV can “obtain HDNet’s programming for its own new network, ‘The 101.’”<sup>2/</sup> According to HDNet’s unsupported assertions, Discovery’s discontinuation of certain HDNet advertisements is part of a concerted effort to destroy HDNet through “discriminatory and illegal action.”<sup>3/</sup> Nothing could be further from the truth. The decision to accept, and later terminate, advertisements from HDNet was made by Discovery for appropriate business reasons without input from, or the knowledge of, Liberty Media, DirecTV, Discovery Holding Company (“DHC”) or Dr. John C. Malone.

In assessing whether to accept HDNet advertising, Discovery’s internal review process was inadvertently short-circuited. Had the standard review occurred, the advertisements would not have been accepted. As Discovery has previously explained to the Commission, Discovery is currently engaged in significant efforts to obtain carriage of the HD simulcasts of four of its networks, Discovery Channel HD, TLC HD, Animal Planet HD and The Science Channel HD, but any programming, even popular programming like that offered by Discovery, faces

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<sup>1/</sup> Letter from David S. Turetsky, Counsel to HDNet LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-18 (Nov. 15, 2007); Letter from David S. Turetsky, Counsel to HDNet LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-18 (Nov. 13, 2007) (“November 13, 2007 Turetsky Letter”).

<sup>2/</sup> November 13, 2007 Turetsky Letter at 4.

<sup>3/</sup> *Id.* at 1, 4.

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substantial challenges in gaining carriage in today's regulatory environment.<sup>4/</sup> This is true even though Discovery is offering its simulcasts to distributors for free -- in contrast to programmers such as HDNet, who are seeking substantial carriage fees. Discovery is also expending substantial efforts to ensure that Discovery HD Theater retains carriage where it is currently distributed. As such, any advertising encouraging viewers to contact their local cable operator and request carriage of a competing HD service places Discovery at a significant business disadvantage.

Indeed, at least one of Discovery's cable distributor affiliates that is wholly unrelated to Discovery pointed out the irony of Discovery running such advertisements while engaged in carriage negotiations for its own HD programming, noting that Discovery was making it more difficult for itself by running ads encouraging viewers to request other HD-oriented networks. As a result, the fact that such advertising was running on Discovery's own HD network was brought to the attention of those decision-makers who inadvertently had not been included in the review process. Once those individuals learned of the advertisements, the decision was made to terminate the advertising several weeks after it had begun.<sup>5/</sup> No one from Liberty Media, DirecTV, DHC or Dr. John C. Malone participated in that decision.

While HDNet may not agree with Discovery's decision, its attempt to link this occurrence to the pending Liberty-DirecTV transaction is wholly unfounded. The Commission has recognized previously that proposed transactions may not be used by third parties as opportunities to raise all private grievances they may have with the parties to the transaction.<sup>6/</sup> In

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<sup>4/</sup> See Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120, Comments of Discovery Communications, LLC, at 6-8 (July 16, 2007).

<sup>5/</sup> Discovery does not agree with HDNet's recounting of the facts regarding this decision, nor should any statement herein be taken as a concession of any factual or legal argument Discovery may raise in its dispute with HDNet, but in any event, Discovery maintains that its contractual dispute with HDNet is not an appropriate matter for Commission examination. See, e.g., *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950) (holding that the Commission is not the proper forum to litigate private contractual disputes); *Constellation, LLC, Memorandum Opinion and Order*, 21 FCC Rcd. 7368, 7401 ¶ 63 (2006) ("It has been the Commission's long-standing practice to defer to judicial decisions regarding the interpretation of contracts"); *Applications of Arcibo Radio Corporation, Memorandum Opinion and Order*, 101 F.C.C. 2d 545, 548 ¶ 8 (1985) (the Commission does not possess the resources, expertise or jurisdiction to adjudicate breach of contract questions fully and so normally defers to judicial decisions regarding the interpretation of contracts); *Loral Satellite, Inc., Order and Authorization*, 19 FCC Rcd. 2402, 2420 ¶ 37 (2004) (the Commission is not the proper forum to raise private contractual disputes).

<sup>6/</sup> See, e.g., *Alaska DigiTel, L.L.C. Memorandum Opinion and Order*, 21 FCC Rcd. 14863, 14874-75 ¶ 15 (2006); *Guam Cellular and Paging, Inc., Memorandum Opinion and Order*, 21 FCC Rcd. 13580, 13593 ¶ 17 (2006); *Nextel Partners, Inc., Memorandum Opinion and Order*, 21 FCC Rcd. 7358, 7361 ¶ 9 (2006); *SBC Communications Inc. and AT&T Corp., Memorandum Opinion and Order*, 20 FCC Rcd. 18290, 18303 ¶ 19 (2005); *Verizon Communications Inc. and MCI, Inc., Memorandum Opinion and*

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this case, a dispute with Discovery, a non-party to the pending transaction, is even more inappropriately examined as part of the transaction.

HDNet also may not use the contract dispute with Discovery as an attempt to affect the Commission's consideration of the pending transaction between Liberty and DirecTV. Despite HDNet's theory, there is no link between Discovery's internal business decisions and any alleged desire by DirecTV to "accelerate the shift of concert acts away from HDNet."<sup>71</sup> HDNet's characterization of the "motive" behind Discovery's decision to terminate HDNet's advertising on Discovery HD Theater is absurd and should be rejected.

Pursuant to section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed electronically with the Office of the Secretary. Any questions should be addressed to the undersigned.

Sincerely,

/s/

Tara M. Corvo

*Counsel to Discovery Communications, LLC*

cc: Mania Baghdadi (via e-mail)  
William Beckwith (via e-mail)  
Jim Bird (via e-mail)  
Rudy Brioche (via e-mail)  
Ann Bushmiller (via e-mail)  
Michelle Carey (via e-mail)  
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Marilyn Simon (via e-mail)  
Elvis Stumbergs (via e-mail)  
Tracy Waldon (via e-mail)  
Sarah Whitesell (via e-mail)

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*Order*, 20 FCC Rcd. 18433, 18445 ¶ 19 (2005); *Nextel Communications, Inc. and Sprint Corporation, Memorandum Opinion and Order*, 20 FCC Rcd. 13967, 13979 ¶ 23 (2005); *AT&T Wireless Services, Inc. and Cingular Wireless Corporation, Memorandum Opinion and Order*, 19 FCC Rcd. 21522, 21546 ¶ 43 (2004).

<sup>71</sup> November 13, 2007 Turetsky Letter at 4.