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

In the Matter of	)	
	)	
General Motors Corporation Hughes Electronics Corp., Transferors	)	
	)	MB Docket No. 03-124
And	)	
	)	
The News Corporation Limited, Transferee	)	
	)	
For Authority to Transfer Control	)	

To: The Commission

OPPOSITION

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I. INTRODUCTION AND SUMMARY

The Commission should deny News Corp.'s Petition for Modification ("*Petition*") based on the following:

- The *Petition* shows how News Corp. has blatantly manipulated Commission processes to suppress scrutiny from an issue of decisional significance to the Liberty/DirecTV transaction. For twelve months, while trying to get its deal approved, News Corp. maintained that the conditions were scheduled to remain effective through 2010, and that any consideration of removing the conditions was "irrelevant" and a "waste of Commission resources." Then, less than two weeks after the Commission consented to the transaction, News Corp. changed its story and sought removal of conditions. This lack of candor interfered with consideration of an issue of substantial significance to the Commission's review of the transaction. The Commission should not reward this misbehavior.

- The conditions continue to have substantial public interest benefits, including maintaining access to "must have" programming and avoiding disruption of customer viewing patterns. Moreover, there is no countervailing harm to retaining the conditions; all evidence indicates that News Corp.'s businesses have flourished in the past four years.

For these reasons, the Commission should deny the Petition and maintain the *News Corp./DirecTV* conditions for their full term.

If the Commission does not summarily deny the *Petition* for the above reasons, it should defer any decision until it completes its current program access rulemaking ("*Program Access FNPRM*").[1] In that proceeding, the Commission and others have raised questions whether similar constraints should be imposed on the exercise of market power in a broader range of programming and retransmission consent transactions. To avoid substantial disruption to the marketplace from

[1] *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17,791 (2007) ("*Program Access FNPRM*").

repeatedly altering the terms of transacting with Fox, the Commission should wait until concluding the *Program Access FNPRM*, then consider the *Petition* if necessary.

The American Cable Association. ACA represents nearly 1,100 independent cable businesses serving nearly 8 million cable subscribers primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. ACA members range from family-run cable businesses serving a single town to multiple system operators that focus on smaller systems and smaller markets. About half of ACA's members serve less than 1,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets.

ACA members share a vital interest in this proceeding. ACA members report that the News Corp. conditions have brought a measure of stability to Fox-affiliated retransmission consent and RSN renewals. This has benefited consumers by maintaining access to "must have" programming and avoiding disruption of customer viewing patterns. Withdrawal of these conditions place small and medium-sized cable companies and the consumers they serve at serious risk.

II. THE COMMISSION SHOULD DENY THE *PETITION* BECAUSE NEWS CORP. HAS MANIPULATED COMMISSION PROCESSES TO SUPPRESS SCRUTINY OF A KEY ISSUE IN THE LIBERTY/DIRECTV TRANSACTION.

The *Petition* pulls aside the veil screening News Corp.'s blatant attempt to manipulate Commission processes. For more that twelve months, News Corp. maintained on the record before the Commission that the conditions were "scheduled to remain effective, by their terms, until January 14, 2010," and that any consideration of removing the conditions was "irrelevant" and "a waste of Commission resources."[2] Then, just two weeks after getting its deal approved, News Corp. changed its story. From this, the Commission can readily infer that News Corp. knew all along that it would seek removal of the conditions promptly upon deal approval. But in an obvious campaign to suppress scrutiny of an issue of decisional significance, News Corp. withheld this information from the Commission and from interested parties. The Commission should <u>not</u> reward this misbehavior by granting the *Petition*. To the contrary, News Corp.'s lack of candor and manipulation of Commission processes should lead to investigation and sanctions where warranted.

News Corp. has no legitimate argument for not disclosing earlier its plan to seek modification of the conditions. There is no question that potential modification of the conditions was an issue of decisional significance to the Liberty/DirecTV transaction.[3] Many commenters raised the issue of the News Corp. conditions during the Liberty/DirecTV public comment period.[4] And News Corp. felt this issue significant enough to respond and claim as follows:

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[2] *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket 07-18, Reply Comments of the News Corporation at 15 (filed Apr. 9, 2007) ("*News Corp. Liberty Reply*").

[3] Commission regulations require applicants to update the Commission on matters <u>of decisional significance in a Commission proceeding involving a pending application</u>. 47 C.F.R. § 1.65(a) ("Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application….Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate.").

[4] *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket 07-18, Comments of the American Cable Association at 19 (filed Mar. 23, 2007); Comments of the Consumers Union at 6-7 (filed Mar. 23, 2007); Comments of the National Cable Television Cooperative at 4-5 (filed Mar. 23, 2007).

> [B]ecause News Corp. has not filed a petition for modification of the conditions, they are scheduled to remain effective, by their terms, until January 14, 2010. Accordingly, requests that the Commission continue to apply to News Corp. the RSN and broadcast arbitration conditions, as set forth in the CU, ACA and NCTC comments, <u>are inapposite and untimely</u>….At this point, further discussion of the issue is <u>unnecessary, irrelevant and a waste of Commission resources</u>….Since News Corp. has not requested any change to the conditions, the Commission need not speculate about any impact that elimination of the conditions could have on pending disputes.[5]

News Corp.'s statements and conduct show a blatant strategy to manipulate Commission processes. Had News Corp. informed the Commission of its intent to petition for modification of the conditions, the issues would have been fully engaged in the Commission's review. Instead, in the Order approving the transaction, the Commission stated:

> News Corp. has not petitioned the Commission for removal of the *News Corp. Order's* arbitration conditions. Thus, assessing the continued need for the conditions after the transaction is premature."[6]

The Commission would have reached a much different conclusion had News Corp. disclosed the truth – it intended to immediately file the *Petition* after approval of the transaction. This maneuver epitomizes lack of candor before the Commission.

The Commission should not reward News Corp.'s ploy. <u>The Commission must deny the Petition and retain the *News Corp./DirecTV* conditions for their full term</u>.

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[5] *News Corp. Liberty Reply* at 15 (emphasis added).

[6] *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, MB Docket 07-18, ¶ 128 (rel. Feb. 26, 2008).

III. THE COMMISSION SHOULD DENY THE PETITION TO PRESERVE THE SUBSTANTIAL PUBLIC INTEREST BENEFITS GAINED THROUGH THE *NEWS CORP./DIRECTV CONDITIONS*.

The Commission should deny the Petition because to do otherwise would erode the substantial public interest benefits that have accrued, and will continue to do so throughout the full term of those conditions. The *News Corp./DirecTV* conditions continue to advance the public interest by: (i) protecting competition by maintaining access to "must have" programming; and (ii) avoiding temporary foreclosures and the disruption of customer viewing patterns. Moreover, the existence of the conditions has not resulted in any appreciable harm to News Corp.

A. The conditions have helped protect competition by maintaining access to "must have" programming.

The *News Corp./DirecTV* conditions have advanced the key public interest goal of avoiding temporary foreclosure and maintaining access to "must have" programming. The standstill and arbitration provisions imposed in the *News Corp. Order* have brought a measure of stability to retransmission consent and RSN negotiations with News Corp.

Small and medium-sized cable operators are particularly vulnerable to the withdrawal of "must have" programming.[7] These cable operators rarely serve a large enough market share to give the operator any market power in negotiations with broadcasters and programmers. This is where the standstill and arbitration provisions help bring a measure of balance to the negotiations. These conditions restrict News Corp. from using the threat of temporary foreclosure, enabling MVPDs to continue to

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[7] *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶ 176 (2004) ("*News Corp. Order*"); *Program Access FNPRM*, ¶ 120.

have access to "must have" programming during negotiations. This, in turn, keeps customers from potentially moving to another provider who has the "must have" programming, ensuring that video competition does not suffer.

B. The *News Corp./DirecTV* conditions have helped to avoid the disruption of customer viewing patterns.

The *News Corp./DirecTV* conditions have advanced the public interest goal of avoiding disruption of customer viewing patterns. In imposing the News Corp. conditions, the Commission was concerned that subscribers would be forced to change MVPDs during periods of temporary foreclosure, even if the subscriber would not desire to change providers.[8] When the standstill and arbitration provisions prevent News Corp. from using the threat of temporary foreclosure, the provisions also achieve this public interest goal. If a cable operator avoids temporary foreclosure, the channel does not disappear, and customers are not forced to switch to a provider that has the "must have" programming. Therefore, customer viewing patterns are not adversely affected.

C. The *News Corp./DirecTV* conditions have not harmed News Corp; it has flourished since the conditions were imposed.

News Corp. claims that retention of the RSN and retransmission consent conditions would harm the public interest by placing News Corp. at a competitive disadvantage in negotiating with MVPDs.[9] This claim is without merit. By all accounts, News Corp. has flourished since 2004.

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[8] *News Corp. Order*, ¶ 161 ("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").

[9] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transferee Control*, MB Docket 03-124, News Corp. Petition for Modification of Conditions at 7 (filed Mar. 11, 2008) ("Retention of the RSN and RTC

News Corp. has posted record revenues and income since the conditions were imposed in 2003.[10] In this time, News Corp. has seen its operating revenue increase from $17.3 billion in 2003 to $28.66 billion in 2007.[11] This exceeds the operating revenues of even the largest U.S cable operator, Comcast.[12] News Corp. will continue to retain the overwhelming amount of market power it has today. News Corp.'s argument that it will be somehow "competitively disadvantaged" by operating through 2010 under the conditions it accepted in 2004 lacks any factual basis and should be disregarded.

In summary, the News Corp. conditions continue to have significant public interests benefits and have not resulted in any appreciable harm to News Corp. <u>The Commission must deny the petition and retain the *News Corp./DirecTV* conditions for their full term</u>.

Conditions would harm the public interest because it would place News Corp. and its popular programming services at a competitive disadvantage in negotiating with MVPDs and in competing with other programming networks for the acquisition of video content").

[10] *See* Press Release, News Corp., News Corp. Reports Record Full Year Operating Income of $4.45 Billion; Growth of 15% over Fiscal 2006, *available at* http://www.newscorp.com/news/index.html.

[11] News Corporation, Annual Report, at 37 (2007).

[12] Press Release, Comcast Corporation, Comcast Reports 2006 Results and Outlook for 2007, *available at* http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-news (Comcast reports 2006 operating revenues of $24.966 billion).

IV. IF THE COMMISSION DOES NOT SUMMARILY DENY THE PETITION, IT SHOULD DEFER ANY DECISION UNTIL COMPLETING THE *PROGRAM ACCESS FNPRM* RULEMAKING.

The Commission is currently examining in the *Program Access FNPRM* proceeding whether constraints similar to the *News Corp./DirecTV* conditions should apply more broadly to wholesale programming and retransmission consent transactions, including whether a standstill provision should apply to all program access and retransmission consent complaints.[13] Additionally, that proceeding focuses in particular on potential relief for small and medium-sized cable operators.[14] While the Commission considers this action, it should defer any decision on the *Petition* until completion of the *Program Access FNPRM* proceeding.

The record in *Program Access FNPRM* docket contains many recommendations that the Commission impose constraints on the exercise of market power in wholesale programming and retransmission consent transactions.[15] Discontinuing the *News Corp./DirecTV* conditions while the Commission examines whether similar conditions should be applied more broadly would not serve the well-established public interest goals of maintaining access to “must have” programming and avoiding the disruption of customer viewing patterns.

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[13] *Program Access FNPRM*, ¶ 134-137.

[14] *Id.*, ¶ 119-132

[15] *In the Matter of Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket 07-198, American Cable Association Comments at 20-26 (filed Jan. 3, 2008); Comments of the Small Cable Systems Operators for Change at 6 (filed Jan. 4, 2008); Comments of the Rural Iowa Independent Telephone Association at 3 (filed Jan. 4, 2008); Comments of the National Telecommunications Cooperative Association at 2-4 (filed Jan. 4, 2008); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Alliance at 19 (filed Jan. 4, 2008).

Moreover, the Commission has ample authority to defer a decision on the *Petition*. It is well-settled that the Commission may freeze the acceptance of petitions when considering rule changes in a related proceeding.[16] Therefore, to maintain stability for ongoing negotiations for News Corp.-affiliated broadcast stations and RSNs, the Commission should defer any decision on the *Petition* at a minimum until the Commission completes the *Program Access FNPRM* proceeding.

[16] *See, e.g., In the Matter of Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Notice of Proposed Rulemaking, 20 FCC Rcd. 11,169, ¶ 4 (2005).

V. CONCLUSION

The *Petition* exposes News Corp.'s ploy to suppress consideration of an issue of decisional significance to the Commission's review of the Liberty/DirecTV transaction. In addition, the News Corp. conditions continue to have substantial public interest benefits. To protect the public interest and to not reward News Corp.'s misbehavior, the Commission should deny the *Petition* and maintain the conditions on News Corp.-affiliated broadcast stations and RSNs at least through 2010.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

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