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

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

OPPOSITION OF THE NATIONAL CABLE TELEVISION COOPERATIVE, INC. TO NEWS CORPORATION PETITION FOR MODIFICATION OF CONDITIONS

The National Cable Television Cooperative, Inc. ("NCTC"), by its attorneys, respectfully submits these comments in opposition to the Petition for Modification of Conditions ("Petition") filed in this proceeding by News Corporation Limited ("News Corp.").[1] The Petition specifically requests that the Commission terminate, some twenty months before they are otherwise due to expire, the regional sports network ("RSN") and broadcast signal retransmission consent ("RTC") conditions (including conditions providing for arbitration of carriage disputes and requiring News Corp. to negotiate with bargaining agents appointed by small cable operators) that the Commission imposed on News Corp. in the *News Corp./DIRECTV Order*.[2] For the reasons set forth below, the

[1] *See* Public Notice, DA 08-774 (rel. April 1, 2008).

[2] *General Motors Corporation and Hughes Electronics Corporation, Transferors, And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) ("*News Corp./DIRECTV Order*").

Commission should find that the early termination of the RSN and RTC conditions would not be in the public interest and, thus, the Commission should deny the Petition.

INTRODUCTION AND BACKGROUND

NCTC is a not-for-profit, member-operated purchasing cooperative representing smaller and medium-sized cable television companies. NCTC, which was created more than 20 years ago and currently has more than 1,100 member companies ranging in size from fewer than 100 subscribers to more than 1 million, fills a vital role in the cable industry. Specifically, NCTC's mission is to reduce the operating costs of its member companies by negotiating and administering master affiliation agreements with cable television programming networks, cable hardware and equipment manufacturers and other service providers on behalf of its member companies.

NCTC participated in the proceeding that led to the *News Corp./DIRECTV Order* and advocated for the adoption of the conditions imposed on News Corp. therein. Those conditions included both a "program access" condition (subjecting all News Corp.-affiliated programming to restrictions on exclusivity, discriminatory terms and conditions, and refusals to deal comparable to the restrictions imposed on vertically-integrated cable programmers) and a series of conditions that allow multichannel video programming distributors ("MVPDs") to submit carriage disputes involving News Corp.-affiliated RSNs and broadcast stations to commercial arbitration.[3] Most significantly, from NCTC's perspective, were those elements of the RSN and RTC conditions that expressly barred News Corp., for a period of at least six years, from refusing to negotiate carriage with a "bargaining agent" appointed to negotiate on behalf of "small cable

[3] *Id.* at ¶¶ 179, 226. The *News Corp./DIRECTV Order* was released on January 14, 2004 and, thus, the term of the RSN and RTC conditions runs until January 14, 2010.

companies" and granted such collective bargaining entity the right to arbitrate on behalf of the companies it represents.[4]

On February 26, 2008, the Commission released an order (the "*News Corp./Liberty Order*") approving transactions that have resulted in the divestiture by News Corp. of its ownership interest in DIRECTV (and in three RSNs).[5] In the *News Corp./Liberty Order*, the Commission concluded that, as a general matter, there was no reason to apply the *News Corp./DIRECTV Order*'s program access condition following the divestiture of DIRECTV by News Corp.[6] However, the Commission acknowledged that the program access condition would continue to apply, even after News Corp. divested itself of its interest in DIRECTV, to complaints based on programming carriage agreements that were entered into between News Corp. and DIRECTV prior to the divestiture.[7]

The *News Corp./Liberty Order* also discussed the post-divestiture status of the RSN and RTC arbitration conditions in the *News Corp./DIRECTV Order*, stating that it would be premature to assess the continued need for those conditions.[8] Rather, according to the Commission, those conditions will stay in effect for their full term absent a

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[4] *Id.* The *News Corp./DIRECTV Order* provided that the conditions imposed therein with respect to News Corp.-affiliated RSNs and local broadcast television stations would remain in effect for a six-year term following the release of the *Order* (*i.e.*, until January 14, 2010). *News Corp./DIRECTV Order*, *supra*, at ¶¶ 179, 226.

[5] *News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, FCC 08-66, (2008) ("*News Corp./Liberty Order*").

[6] *Id.* at ¶¶ 126-27.

[7] *Id.* at ¶ 126 and note 417.

[8] *Id.* at ¶ 128.

showing by News Corp. that it "would serve the public interest" to terminate the conditions.[9]

Two weeks later, News Corp. filed its Petition requesting that the RSN and RTC conditions should be eliminated.

ARGUMENT

THE COMMISSION SHOULD DENY NEWS CORP.'S PETITION AND CONTINUE TO APPLY THE RSN AND RTC CONDITIONS FOR THEIR FULL TERM.

The News Corp./Liberty Order clearly places the burden on News Corp. to demonstrate conclusively that the public interest would be served by the early termination of the RSN and RTC conditions (which are scheduled to terminate in approximately 20 months). The Petition fails to satisfy this burden. Indeed, the Petition offers only the most perfunctory and conclusory of analyses in support of its request for early termination.

In particular, the Petition first points to the Commission's discussion of the separate program access condition. According to the Petition, the Commission expressly determined that, once News Corp. divested itself of any interest in DIRECTV, "it would not be appropriate…to continue subjecting News Corp. to the program carriage conditions."[10] However, News Corp.'s description of the status of the program access condition mischaracterizes what the Commission actually determined. As discussed above, the Commission expressly found that the program access condition would continue to serve as the basis for timely complaints brought with respect to agreements

[9] *Id.*

[10] Petition at 3.

entered into between News Corp. and DIRECTV prior to the divestiture.[11] The Commission's recognition that programming agreements entered into while News Corp. and DIRECTV were vertically-integrated may contain discriminatory terms or favor DIRECTV in some way leads inescapably to the conclusion that the Commission cannot and should not grant News Corp.'s request to terminate the RSN and RTC conditions.

At minimum, the *News Corp./DIRECTV Order's* RSN and RTC Conditions Should Continue to Apply to Any News Corp.-Affiliated Programming Service Involved in an Arbitration Proceeding Commenced or Noticed Prior to the Completion of the News Corp./Liberty Transactions.

The RSN and RTC conditions adopted by the Commission in the *News Corp./DIRECTV Order* allow small cable companies to appoint a bargaining agent to negotiate, or if such negotiations reach an impasse, arbitrate, agreements for carriage of News Corp.-affiliated RSNs and local broadcast stations. It would violate the letter and spirit of these conditions – and be patently unfair and contrary to the public interest – for the Commission to find that the divestiture of News Corp.'s interest in DIRECTV allows News Corp. to walk away from or otherwise fail to comply with the terms of the conditions with respect to any arbitration proceeding or negotiation commenced prior to such divestiture.

This is not merely an abstract or theoretical issue. NCTC, acting as bargaining agent on behalf of a number of small cable companies, currently is involved in two separate arbitration proceedings covering a number of News Corp.-affiliated RSNs.[12] These arbitrations were commenced pursuant to notices and demands timely filed in

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[11] *See* note 7 *supra.*

[12] Only one of the RSNs that is the subject of a pending arbitration proceeding initiated by NCTC pursuant to the *NewsCorp./DIRECTV Order's* conditions was transferred by News Corp. to Liberty (Fox Sports Net Northwest). All of the other RSNs involved in the arbitrations remain directly affiliated with News Corp.

accordance with the RSN condition with respect to carriage agreements that expired at the end of 2006 and 2007 respectively.

Among other things, it would be enormously disruptive and a waste of resources if the ongoing arbitration proceedings being conducted pursuant to the *News Corp/DIRECTV Order* conditions simply terminated because, after the fact, News Corp. divested itself of its interest in DIRECTV. NCTC and the small cable companies that it represents have expended considerable time and resources to prosecute these arbitrations with the expectation that the proceedings would not suddenly be terminated if and when the bargaining agent and arbitration conditions expire.

The premature expiration of the conditions would be especially problematic for smaller cable companies that chose to negotiate and/or arbitrate through a bargaining agent such as NCTC since, as the Commission acknowledged in establishing the RSN and RTC conditions, such companies are least able to afford to act individually and are most susceptible to pressure from a company with the size and resources of News Corp. Moreover, since it is only by virtue of the RSN condition that these cable operators are currently entitled to carry these RSNs (pursuant to the "standstill" element of the conditions that requires News Corp. to allow continued carriage after an agreement expires if the arbitration condition is timely invoked), terminating the condition as to these pending proceedings would harm the public by causing an immediate loss of access to RSN programming.

Under the circumstances, the Commission should make clear that the RSN and RTC conditions imposed on News Corp. will continue to apply, at minimum, for their entire scheduled term to those News Corp.-affiliated networks or stations that were the subject of an ongoing or scheduled arbitration proceeding at the time News Corp.

divested itself of its interest in DIRECTV. In addition, the continued application of the conditions should extend to situations where the parties have not yet formally commenced an arbitration proceeding, but had entered into negotiations for carriage of a News Corp.-affiliated RSN prior to the Commission's approval of the News Corp./Liberty transaction. Continued application of the conditions in such situations is appropriate and will serve the public interest because the MVPDs were acting with a reasonable expectation that, should their negotiations reach an impasse, they could rely on the bargaining agent and/or arbitration provisions as contemplated by the *News Corp./DIRECTV Order.*

The *News Corp./DIRECTV Order*'s RSN and RTC Conditions Should Continue to Apply to Any News Corp.-Affiliated RSN or Local Broadcast Station that Entered Into a New or Modified Carriage Agreement with DIRECTV During the Period When News Corp. and DIRECTV Were Vertically-Integrated.

In addition to rejecting News Corp.'s Petition insofar as it would terminate currently pending arbitrations or prevent MVPDs that commenced negotiations prior to the divestiture of News Corp.'s interest in DIRECTV from relying on the bargaining agent and/or arbitration provisions if those negotiations reach an impasse, the Commission also should find that it would not be in the public interest to terminate the RSN and RTC conditions with respect to carriage disputes involving News Corp.-affiliated RSNs or local broadcast stations that currently are covered by programming agreements entered into with DIRECTV during the period when News Corp. and DIRECTV were vertically-integrated. In other words, for example, if an RSN affiliated with News Corp. entered into a five-year carriage agreement with DIRECTV in 2005, the bargaining agent and arbitration conditions should continue to apply to the renewal of an expiring carriage agreement between an MVPD and that RSN (or a new agreement between an MVPD and that RSN) until at least January 14, 2010, as contemplated by the *News Corp./DIRECTV Order*.

Continued application of the RSN and RTC conditions in the circumstances described is necessary both to protect the reasonable expectations of MVPDs that may have acted in reliance on the availability of the bargaining agent and arbitration remedies provided by the *News Corp./DIRECTV Order* as well as to ensure that any favoritism shown by News Corp. to DIRECTV in transactions conducted while they were vertically-integrated is not perpetuated in new agreements with other MVPDs. Even though it is no longer affiliated with DIRECTV, News Corp. has an incentive to "make up" for any price breaks it may have given DIRECTV by demanding discriminatory or unfair terms and conditions from other MVPDs.

While the Commission could approach this on a case-by-case basis and allow the RSN and RTC conditions to terminate one service at a time as the pre-divestiture agreements between News Corp. and DIRECTV expire, NCTC submits that the public interest would be best be served by simply allowing the conditions to remain in effect with respect to all of News Corp.'s affiliated RSNs (and covered local broadcast stations) through January 14, 2010.[13] Such an approach would best ensure that the expectations of the various parties for whose benefit the bargaining agent and arbitration conditions were adopted are met and will minimize the risk that News Corp. could delay or otherwise impede negotiations for carriage of an RSN or local broadcast station until the expiration of a pre-divestiture agreement with DIRECTV.

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[13] In the alternative, NCTC suggests that, should the Commission find that the public interest is better served by allowing the conditions to expire on a service-by-service basis as pre-divestiture agreements between services and DIRECTV expire, the Commission should place the burden on News Corp. to disclose to MVPDs with whom they are negotiating carriage agreements whether particular RSNs or local stations are covered by a pre-divestiture carriage agreement between News Corp. and DIRECTV.

CONCLUSION

On the basis of the foregoing, NCTC urges the Commission to deny the News Corporation Petition for Modification of Conditions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jennifer Walker, a secretary at the law firm of Fleischman and Harding LLP, hereby certify that, on this 1st day of May 2008, copies of the foregoing "Opposition of the National Cable Television Cooperative, Inc. to News Corporation Petition for Modification of Conditions" were sent via first class mail, postage prepaid, to the following:

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