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

In re Consolidated Application of	)	
	)	
The News Corporation	)	
The DIRECTV Group, Inc. and	)	MB Docket No. 07-18
Liberty Media Corporation	)	
	)	
For Consent to Transfer Control	)	

To: The Commission

American Cable Association

COMMENTS

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I. INTRODUCTION AND SUMMARY

Here, we face yet another proposed combination aligning the market power of "must have" channels with the market power of the one of the nation's top MVPDs. In this proceeding, the Commission can build upon its analyses in the *News Corp./DirecTV Order,*[1] zero in on the public interest harms of the proposed transaction, and impose the necessary constraints. But in doing so, the Commission must refine and expand those conditions in light of the experiences of ACA members. As discussed in these Comments, gaps and loopholes in the News Corp./DirecTV conditions have diminished their protection, especially concerning small and medium-sized cable companies.

[1] *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004) ("*News Corp. Order*").

As ACA and its members have learned, the News Corp./DirecTV conditions fall short in protecting against the public interest harms identified by the Commission. In this proceeding, any approval of the transaction should adjust, clarify, and expand the small and medium-sized cable company conditions to fill the gaps and plug the loopholes through which transaction-specific abuses of market power continue to flow. These refinements should include:

- Ensuring that the program access and nondiscrimination conditions cover Discovery Holdings Company- ("DHC") affiliated channels.
- Clarifying the rights of a collective bargaining agent.
- Extending the arbitration notice periods to prevent inadvertent loss of arbitration rights.
- Prohibiting Liberty- and DHC- affiliated programmers from engaging in noncost-based price discrimination.
- Expanding the scope of the small and medium-sized cable company conditions to include all ACA members.
- Placing a term of 10 years on the small and medium-sized cable company conditions.

With these adjustments, backed by firm Commission oversight enforcement, the conditions may better protect against the substantial public interest harms threatened by the Liberty/DirecTV combination.

In addition, the Commission should affirm that the small cable company conditions imposed on News Corp.-affiliated broadcast stations and satellite channels shall remain in place for their full term. These conditions have, and will continue to, serve the public interest by bringing a measure of predictability to program access, retransmission consent, and RSN renewals. Moreover, given Fox Cable's three-year delay and resistance to collective bargaining with NCTC, removing those conditions now would allow Fox to benefit further from its strategic behavior. The Commission should not give the appearance of rewarding that conduct by lifting the conditions.

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. All ACA members currently transact with Liberty- and DHC-controlled companies for satellite programming. All ACA members face DirecTV as their principal competitor. The anticompetitive potential of the proposed combination and the immense disparity in economic power between Liberty/DirecTV and ACA members place small and medium-sized cable companies and the consumers they serve at serious risk.

II. ANALYSIS

A. To protect against substantial public interest harms, the Commission must impose conditions to constrain Liberty/DirecTV's abuse of market power against small and medium-size cable companies.

It is well-settled that the combination of multichannel distribution and "must have" programming results in the incentive and ability to harm competition and consumers. The Commission has found this is especially true for RSNs, repeatedly recognizing the "must have" nature of RSNs and the market power over unaffiliated distributors those in control of RSNs wield.

> Since the Commission first began tracking regional cable programming networks in 1998, it has repeatedly recognized the importance of regional sports programming to MVPD offerings. This acknowledgement is based, in part, on the finding that for such programming, there are no readily acceptable close substitutes. The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: regional sports networks ("RSNs") typically purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game.[2]

> [T]he incentive for the vertically integrated regional programmer to foreclose programming, is further increased in situations in which there is no readily acceptable substitute for the programming, such as regional sports programming.[3]

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[2] *News Corp. Order*, ¶133 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 13 FCC Rcd 24284 (1998); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, ¶ 171 (2002); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act Sunset of Exclusive Contract Prohibition*, CS Docket No. 01-290, 17 FCC Rcd. 12124, ¶ 54 (2002) ("*Program Access Order*"); FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 124.

[3] *Program Access Order*, ¶ 54.

In the case of News Corp.'s acquisition of control of DirecTV, the Commission carefully analyzed the transaction and concluded that serious public interest harms would result, especially from the combination of control over RSNs and DirecTV.

> We conclude that News Corp. currently possesses significant market power with respect to its RSNs within each of their specific geographic regions, and that the proposed transaction will enhance News Corp.'s incentive and ability to temporarily withhold or threaten to withhold access to its RSN programming to increase the fees it receives for the programming, over and above what it could negotiate absent the transaction, to the ultimate detriment of the public.[4]
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> [W]e find that the primary public interest harm that is likely to flow from the combination of RSN programming and nationwide MVPD distribution assets is the competitive harm of across-the-board price increases to MVPDs for carriage of News Corp. RSNs and/or other carriage concessions, over and above the level of price increases or other concessions that News Corp. could otherwise expect to obtain, through the more frequent use of credible threats of withholding or actual withholding of programming. We also find that the transaction would result in secondary public interest 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.[5]

The Commission affirmed these findings in the *Comcast/Time Warner/Adelphia Order*.[6]

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[4] *News Corp. Order*, ¶ 147.

[5] *Id.*, ¶ 161.

[6] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors and Transferors, Comcast Corporation and Time Warner Inc., Assignees and Transferees*, 21 FCC Rcd 8203, ¶ 123 (2006) ("*Comcast/Time Warner/Adelphia Order*") ("We find that the transactions would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all MVPDs, including their own systems, by engaging in so-called "stealth discrimination," or by permanently or temporarily withholding programming").

Critical for ACA's constituency is the Commission's recognition that small and medium-sized cable companies are especially vulnerable and warrant additional protection.

> [W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for "must have" programming such as RSNs following News Corp.'s acquisition of control of DirecTV. Given the size of their subscriber base and financial resources, small and medium-sized MVPDs may also be far less able to bear the costs of commercial arbitration, even on an expedited basis, than large MVPDs, thus rendering the remedy of less value to them. To counter-balance the increase in News Corp. market power with respect to RSN programming following the transaction, and to provide all MVPDs a useful procedure, we specify that an MVPD meeting the definition of "small cable company" may choose to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage of regional sports networks with News Corp., and News Corp. may not refuse to negotiate carriage of RSN programming with such an entity. The designated collective bargaining entity will have all the rights and responsibilities granted by our arbitration conditions.[7]

As with News Corp./DirecTV, if the proposed transaction closes, ACA members would face overwhelming market power in attempting to compete against vastly larger DirecTV while dealing with Liberty for affiliated RSNs and other core programming. Both substantive and procedural conditions are necessary to protect small and medium-sized cable companies and consumers against the substantial public interest harms that would result from the unconstrained exercise of that market power.

The Applicants here indicate they will accept the conditions imposed on News Corp.[8] While a notable concession, for small and medium-sized cable companies, it is

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[7] *News Corp. Order*, ¶ 176.

[8] *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, at 22-24 ("*Liberty Application*").

not enough. As discussed below, experience has shown that additional conditions are necessary to protect the public interest.

B. To fill gaps and plug loopholes in the News Corp./DirecTV conditions, any approval of the proposed transaction must include adjustments and additions to the small and medium-sized cable company conditions.

To this proceeding, ACA members bring more than three years experience in dealing with Fox Cable Networks and Fox Television under the *News Corp./DirecTV Order*, while facing increasingly intense competition from DirecTV. That experience has exposed gaps and loopholes in the News Corp./DirecTV conditions, shortfalls that the Commission must address in any approval of this transaction. Below, we explain six adjustments that are necessary to protect against the public interest harms of combining control over RSNs and DirecTV.

1. The Commission must include Discovery and related channels under the program access and nondiscrimination conditions.

The Application describes the well-known stable of satellite programming owned by DHC.[9] These include the following five core basic/expanded basic channels:

- Discovery
- TLC
- Animal Planet
- Travel Channel
- Discovery Health Channel

When dealing with small and medium-sized cable companies, Liberty and DHC have exercised market power over these core channels to require wide distribution of affiliated channels. For example, ACA members report that to obtain access to highly popular Animal Planet, they must agree to distribute, and pay for, multiple affiliated

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[9] *Liberty Application* at 10-11.

channels on basic or expanded basic. ACA has previously described this situation to the Commission.[10]

In addition, DHC owns several important digital channels, including:

- Science Channel
- Discovery Kids
- Military Channel
- Discovery Home
- Discovery Times
- FitTV
- Discovery HD Theatre

As with the analog channels, Liberty and DHC impose costly distribution obligations on ACA members as a condition of access to digital channels. For example, ACA members offering digital services report that as a condition of access to Discovery digital channels, DHC requires distribution of those channels to all digital subscribers.[11] ACA members that offer, or would like to offer, digital theme tiers, report that DHC refuses to allow carriage of its digital channels in theme tiers. Given the Commission's strong support for digital theme tiers, this wholesale programming practice should garner close scrutiny here.[12]

As with RSNs, the proposed transaction will create additional incentive and ability for DHC, through its affiliations with Liberty and DirecTV, to increase the cost of DHC

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[10] *Inquiry Concerning A La Carte, Themed Tier Programming and Pricing, Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Comments of the American Cable Association at 11 (filed July 12, 2004) ("ACA Programming Report Comments") ("Programming contracts for several of the most popular Top 50 Channels obligate small cable companies to distribute affiliated services. In several cases, this involves multiple additional channels").

[11] *ACA Programming Report Comments* at 13.

[12] *Further Report on the Packaging and Sale of Video Programming Service to the Public*, MB Docket No. 04-207, 2006 WL 305873, ¶ 96 (February 9, 2006) ("[T]hemed tiers appears to be an inexpensive option that would benefit some consumers. . .").

programming, both in license fees and carriage obligations, all to the detriment of DirecTV's competitors.

The Application describes Liberty's spin-off of DHC.[13] At the same time, the Application admits that common control remains through Dr. Malone – chairman of Liberty, and chairman, director, and CEO of DHC.[14] The Application further describes Dr. Malone's ownership and voting percentage of each entity.[15]

Under the Commission's program access attribution rules, ample affiliation exists between Liberty and DHC through Dr. Malone.[16] Even if it did not, to protect the public interest, any program access conditions imposed by the Commission must extend to DHC-owned programming as well. Given the extraordinary combination of distribution and content, and the clear overlap of ownership and interest between Liberty and DHC, any order approving the transaction must make clear that program access conditions apply to DHC-affiliated programming.

2. To prevent delay and evasion of the collective bargaining conditions, the Commission should clarify the rights of a collective bargaining agent.

The Commission has twice concluded that the costs and burdens of an arbitration process would likely foreclose many small and medium-sized cable companies from the protection afforded by arbitration.[17] Yet, as demonstrated by Fox

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[13] *Liberty Application* at 10.

[14] *Id.* at 10-11.

[15] *Id.* at 10-11.

[16] 47 CFR §§ 76.1000(b), 76.501 n.2(g).

[17] *News Corp. Order*, ¶ 176 ("Given the size of their subscriber base and financial resources, small and medium-sized MVPDs may also be far less able to bear the costs of commercial arbitration, even on an expedited basis, than large MVPDs, thus rendering the remedy of less value to them"); *Comcast/Time*

Cable's delay and intransigence in dealing with the National Cable Television Cooperative ("NCTC"), a media conglomerate has ample incentive and ability to frustrate collective bargaining efforts. By clarifying the rights of a collective bargaining agent in any approval of this transaction, the Commission can help constrain that conduct.

The Chairman's Office has before it letters from NCTC seeking help with what should be a straightforward issue: Is NCTC, as bargaining agent for a small cable company, entitled to see its principal's expiring contract?[18] As a matter of agency law and as a practical matter of efficiently negotiating an RSN renewal, it should be uncontroversial that a principal can share its expiring contract with its bargaining agent.[19] Yet, as Fox's responses to NCTC show, Fox Cable is unwilling to acknowledge this.[20] Instead, Fox Cable reserves the threat of News Corp.-powered litigation against any small cable company for breach of nondisclosure provisions, even when that

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Warner/Adelphia Order, app. B ("An MVPD meeting the definition of a 'small cable company' may appoint a bargaining agent to bargain collectively on its behalf").

[18] Letter from Jeffrey Abbas, President & CEO, NCTC, to FCC Chairman Kevin Martin, MB Docket No. 03-124, at 4 (July 25, 2006) ("*July NCTC Letter*"); Letter from Jeffrey L. Abbas, President & CEO, NCTC, to FCC Chairman Kevin J. Martin, MB Docket No. 03-124, at 4 (August 7, 2006) ("*August NCTC Letter*").

[19] The relationship between a principal and an agent is a fiduciary relationship. RESTATEMENT (THIRD) OF Agency § 1.01 (2006). Courts have long recognized that this relationship is confidential and legal, similar to that of a guardian and ward, trustee and beneficiary, or attorney and client. *See*, *e.g.*, *Bonnell v. B & T. Metals Co.*, 81 N.E.2d 730 (Ohio. Ct. App., 1948); *Menzel v. Morse*, 362 N.W.2d 465 (Iowa, 1985); *Bopp v. Brames*, 713 N.E.2d 866 (Ind. Ct. App., 1999); *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865 (Tex. App., 2001); *Richelle L. v. Roman Catholic Archbishop*, 130 Cal.Rptr.2d 601 (Cal. Ct. App., 2003)

[20] Letter from Lindsay Gardner, President, Affiliate Sales & Marketing, Fox Cable Networks, to FCC Chairman Kevin Martin, MB Docket No. 03-124, at 3 (July 27, 2006); Letter from Lindsay Gardner, President, Affiliate Sales & Marketing, Fox Cable Networks, to FCC Chairman Kevin Martin, MB Docket No. 03-124, at 3 (August 24, 2006).

disclosure is limited to an FCC-sanctioned collective bargaining agent.[21] Despite NCTC's express willingness to maintain the confidentiality of all contract information it obtains from a principal,[22] Fox Cable refuses to budge.

As a result, small cable companies face the following choices:

- Forego collective bargaining and go it alone against Fox Cable and DirecTV;
- Appoint NCTC as bargaining agent, withhold essential information from NCTC, and have NCTC negotiate blindly; or
- Appoint NCTC as bargaining agent, provide essential information for renewal negotiations and hunker down for the assault by battalions of News Corp. lawyers.

None of these is a real choice. As a result, Fox Cable's conduct threatens to eviscerate the collective bargain alternative for small and medium-sized cable companies.

To rectify this, the Commission should make clear in this proceeding that a collective bargaining agent is fully entitled to access the expiring contract of its principal.

3. To prevent inadvertent loss of arbitration rights, the Commission should extend the notice periods for small and medium-sized cable companies.

The current arbitration conditions require all cable operators to provide a notice of intent to arbitrate within five business days of expiration of an existing contract with the complete arbitration demand 15 – 20 days after contract expiration.[23] ACA

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[21] *July NCTC Letter* at 2; Letter from Mathew Polka, President & CEO, ACA, to FCC Chairman Kevin Martin, MB Docket No. 03-124, at 1 (August 18, 2006).

[22] *July NCTC Letter* at 3 ("NCTC expressly committed to abide by the confidentiality provisions of its members' agreements and stated that it would 'not be permitted to further disclose any such information to its individual members or to third parties other than NCTC's attorneys'"); *August NCTC Letter* at 2 ("There are protections put in place to ensure that the information is used only for limited purposes and is not disclosed to any of NCTC's members or to 3rd parties other than NCTC's attorneys").

[23] *News Corp. Order*, ¶ 177; *Comcast/Time Warner/Adelphia Order*, app. B.

members report that the initial narrow notice window is difficult to track and overly burdensome for small companies with limited administrative resources. Similarly, the brief period to prepare a comprehensive arbitration demand, including a proposed contract, overwhelms many ACA members. Unlike Fox, which no doubt has contingency plans for arbitration positions and filings, arbitration for a small cable company, with or without a collective bargaining agent, is a singular and difficult undertaking. Given the current narrow notice and demand windows, smaller companies face substantial risks of inadvertent procedural default and loss of arbitration rights.

In other contexts, the Commission has provided extended response periods in recognition of the limited resources available to smaller cable companies.[24] It should make the same adjustment here and extend the initial intent to arbitrate notice period to 20 business days. Similarly, it should extend the arbitration demand window to 45 days. These adjustments will facilitate participation in arbitration by thinly staffed small companies and will not prejudice the Applicants in any way.

4. To constrain supracompetitive license fee increases, the program access conditions should include a prohibition on noncost-based price discrimination.

The Applicants' program access, nondiscrimination, and arbitration undertakings, even supplemented by the conditions discussed here, still contain a loophole – "volume discounts." The Commission should plug that loophole here.

For small and medium-sized cable operators, "volume discounts" is a euphemism for abuse of market power. ACA members report paying up to 30% or more per

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[24] *See, e.g.*, 47 CFR § 76.970(i)(2) (Commission allows operators of small systems 30 days – instead of the 15 afforded to larger cable system operators – to provide certain information to prospective leased access programmers).

subscriber for programming than larger cable operators, even working through NCTC.[25] This disparity between large and small distributors, we believe, extends to DirecTV's programming costs as well. With the combination of Liberty and DirecTV, Liberty and DHC have increased ability and incentive to use "volume discounts" as a means to raise rivals' programming costs.

To be clear, we are not concerned with legitimate, cost-based, pricing differentials. Yet, under scrutiny, it becomes apparent that little, if any, of "volume discount" pricing is cost-based. Once programming is uplinked to a satellite, the distributor bears all incremental costs. It is the cable company, not the programmer that must maintain the earth stations, signal processing equipment, and distribution network. In short, it will cost Liberty no more to deliver FSN Pittsburgh to DirecTV or Comcast than to a small cable company serving rural portions of that market. Yet, the small cable company pays substantially more for the channel, solely due to the disparity in market power.[26] The same holds true for Discovery and other Liberty and DHC-affiliated channels.

The same analysis concerning withdrawal of RSNs applies to the incentive and ability for Liberty/DHC to use noncost-based "volume discounts" to benefit DirecTV by harming its smaller competitors. Price differentials cloaked by "volume discounts" give Liberty/DHC the ability to raise costs for smaller cable companies and maintain a

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[25] *ACA Programming Report Comments* at 39 ("[Cable companies that have acquired systems from major MSOs] estimate that programming costs increased up to 30%, solely because a smaller company acquired ownership….The only discernable change was the lack of market power of the smaller cable company compared to its major MSO predecessor. And for this reason, wholesale rates increased up to an estimated 30%.")

[26] News Corp. has ready access to information concerning price differentials, and the Commission should obtain that information as part of its investigation of this transaction.

defense under the program access regulations or conditions. This is but another version of the central anticompetitive strategy that concerns the Commission in these combinations.[27]

To fix this, the Commission should make clear that nondiscrimination obligations extend to price discrimination. The Commission should condition any approval of the transaction with a prohibition on Liberty/DHC engaging in any noncost-based price discrimination when dealing with small and medium-sized cable operators or their buying group.

5. To extend the protection of the small and medium-sized cable company conditions to more smaller market consumers, the Commission must expand the scope of the conditions to include all ACA members.

In the *News Corp./DirecTV Order* and the *Comcast/Time Warner/Adelphia Order*, the Commission incorporated a decade-old definition of "small cable company."[28] For purposes of this transaction, the Commission should expand the 400,000 subscriber threshold to include all ACA members. No ACA member serves more than 1.5 % of U.S. television households, and that threshold provides a better measure of companies that warrant protection under the small and medium-sized company conditions.[29]

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[27] *News Corp. Order*, ¶ 161 ("We find that the primary public interest harm that is likely to flow from the combination of RSN programming and nationwide MVPD distribution assets is the competitive harm of across-the-board price increases to MVPDs for carriage of News Corp. RSNs and/or other carriage concession").

[28] *Id.*, ¶ 176 n.491; *Comcast/Time Warner/Adelphia Order*, app. B.

[29] ACA estimates that extending the relief to all ACA member companies will expand the scope of protection by approximately 2 million additional households, predominantly small market and rural subscribers. This represents an expansion of the small and medium-size cable company conditions to less than 1.8% of US television households. The Applicants can hardly argue that this would have any material adverse impact on there businesses.

The Commission adopted the 400,000 subscriber threshold principally due to the limited financial and administrative resources available to small cable companies when dealing with full-blown rate regulation.[30] While that analysis has some application here, adopting the threshold without further consideration unnecessarily restricts the scope of protection and exposes many rural consumers to the abuse of market power the conditions seek to constrain.

For at least two reasons, the Commission should adjust the threshold. First, even as the Applicants exist separately, it is self-evident that a vast disparity in market power and resources exists between any ACA member and Liberty or DirecTV. Liberty's diverse international media interests plus its affiliation with DHC dwarf the operations, assets, and resources of any ACA member.[31] Similarly, DirecTV, with almost 16 million subscribers,[32] serves a customer base of at least 15.99 million more than most ACA members, and 14.6 million more subscribers than the largest ACA member. When combined, that vast disparity in market power between any ACA member and Liberty/DirecTV would be overwhelming, just as the Commission concluded in the *News Corp./DirecTV Order*.

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[30] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 7393, ¶¶ 55-56 (1995) ("*Small System Order*").

[31] *Liberty Application* at 8-12.

[32] Press Release, The DirecTV Group, Inc., The DirecTV Group Announces Fourth Quarter and Full Year 2006 Results (February 7, 2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-news (DirecTV reports 15,953,000 total subscribers as of December 31, 2006).

Second, it is the overwhelming disparity in market power underlying the News Corp./DirecTV conditions[33] and that would underlie small and medium-sized cable company conditions imposed in this transaction. It is here that the link between the scope of rate regulation relief in the *Small System Order* and the scope of relief necessary begins to attenuate. Recall that the *Small System Order* relief arose almost entirely out of concern for lack of administrative and financial resources to deal with rate regulation.[34] From that perspective, the Commission concluded that 400,000 subscribers was an appropriate threshold. But in News Corp./DirecTV and in this transaction, the concern goes well beyond lack of administrative and financial resources. The central concern is offsetting the immense disparity in market power between smaller distributors and the owner of RSNs and DirecTV.[35] Viewed in this way, the 400,000 subscriber threshold threatens underinclusion.

Together, these differences support adjusting the threshold of protection of the small and medium-sized cable company conditions. A threshold of 1.5% of US television households would expand the protection to about 2 million additional households and would not burden the Applicants in any material way.

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[33] *News Corp. Order*, ¶ 176 ("We agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for "must have" programming such as RSNs following News Corp.'s acquisition of control of DirecTV").

[34] *Small System Order*, ¶¶ 55-56.

[35] *News Corp. Order*, ¶¶ 147 ("We conclude that News Corp. currently possesses significant market power with respect to its RSNs within each of their specific geographic regions"), 159 ("News Corp., after the transaction, will have an increased incentive and ability to engage in temporary foreclosure in order to raise the price of RSN programming"), and 161 ("We find that the primary public interest harm that is likely to flow from the combination of RSN programming and nationwide MVPD distribution assets is the competitive harm of across-the-board price increases to MVPDs for carriage of News Corp. RSNs and/or other carriage concessions").

6. Any approval of the transaction should require the Applicants to accept small cable conditions for at least 10 years.

The *News Corp./DirecTV Order* adopted a six-year term for the program access, RSN and retransmission consent conditions. For small and medium-sized cable companies, that term provides insufficient protection for at least two reasons. First, as demonstrated by Fox Cable, resistance to the collective bargaining process with NCTC has squandered nearly half of the six-year term. Liberty will have the same incentive and ability as Fox Cable to footdrag. A longer term for the conditions will constrain this strategic delay.

Second, ACA members report that many Liberty/DHC-affiliated programming and RSN contracts are for terms in excess of five years. Unless the term of the conditions is meaningfully extended, ACA members face the prospect of renewals unconstrained by program access commitments, arbitration, or collective bargaining rights. Consequently, the Commission should require the Applicants to accept a minimum of a 10-year term on conditions as applied to small and medium-sized cable companies.

With the six adjustments described above added to previously adopted conditions, the Commission will better protect consumers served by small and medium-sized cable companies from the serious public interest harms that would otherwise result from the proposed combination.

Before concluding, we must turn to the conditions that currently constrain Fox Television and Fox Cable.

C. Any approval of the transaction should require News Corp. and affiliates to remain subject to the News Corp./DirecTV conditions on retransmission consent, RSN access and program access for their full term.

ACA members report that the News Corp./DirecTV conditions have brought a measure of stability to Fox-affiliated retransmission consent and RSN renewals. Principally, the constraints on temporary withdrawal have allowed negotiations to proceed without a Fox-manufactured crisis of pulling, or threatening to pull, "must have" channels. As a result, the conditions have served at least two of the intended public interest benefits - avoiding disruption of customer viewing patterns,[36] and protecting competition by maintaining access to "must have" programming.[37]

At the same time, the *News Corp./DirecTV Order* has not prevented the exercise of overwhelming market power by Fox. ACA members report that retransmission consent costs and RSN rates for Fox-affiliated channels continue to escalate well in excess of inflation. Further, for RSNs, Fox Cable's delay in engaging in collective bargaining with NCTC has allowed three years to elapse without small and medium-sized cable companies benefiting from that specific condition. This has frustrated key intended public interest benefits of the conditions, especially the additional protection designed for the most vulnerable distributors - small/medium-sized cable companies.[38]

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[36] *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").

[37] *Id.,* ¶ 175.

[38] *Id.*, ¶ 176 ("We agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for "must have" programming such as RSNs following News Corp.'s acquisition of control of DirecTV").

To maintain the public interest benefits of the *News Corp./DirecTV Order* conditions for consumers served by small/medium-sized cable companies, and to avoid rewarding Fox Cable for its strategic delay in engaging in collective bargaining, the Commission should make clear that those conditions shall continue to constrain News Corp. affiliated broadcast stations, RSNs, and satellite channels, at a minimum for the full term of the *Order*.[39]

[39] Since the Commission imposed a term of 6 years from the release of the Order, the conditions do not expire until January 14, 2010. *News Corp. Order*, app. F

III. CONCLUSION

The Applicants propose yet another combination of "must have" content, distribution, and control of licensed spectrum. In the smaller markets served by ACA members, the Commission has already found that such a combination presents a clear and present danger of substantial public interest harms. The Applicants' apparent willingness to accept the conditions imposed by the *News Corp./DirecTV Order* is a notable concession, but as discussed above, it does not go far enough.

The Commission now has the benefit of ACA members' three years of experience in dealing with the News Corp./DirecTV conditions. That experience has exposed gaps and loopholes that must be fixed. To do so, before approving the proposed transaction, the Commission must adjust and expand those conditions as set forth in these comments. To further protect the public interest in markets served by ACA members, the Commission must also maintain the constraints on News Corp. affiliated broadcast stations and satellite channels at least through 2010.

Respectfully submitted,

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