

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: General Motors Corporation and Hughes Electronics, Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control

Here we go again. Today the Commission demonstrates how serious -- and seriously misguided -- it was when it voted on June 2 to eviscerate media concentration protections. Presented with the opportunity to signal whether it intends to protect the important goals of diversity, competition, and localism, or to allow instead ever greater and more threatening levels of media consolidation, the majority flashes the green light for the next great wave of media consolidation.

News Corp was already a media giant:

- In the U.S., News Corp. owns television stations reaching over 44 percent of the country. (WNYW-5, New York; WWOR-TV-9, New York; KTTV-11, Los Angeles; KCOP-13, Los Angeles; WFLD-32, Chicago; WPWR-TV-50, Chicago; WTXF-TV-29, Philadelphia; WFXT-25, Boston; KDFW-4, Dallas; KDFI-27, Dallas; WTTG-5, Washington, DC; WDCA-20, Washington, DC; KMSP-TV-9, Minneapolis; WFTC-29, Minneapolis; WJBK-2, Detroit; WAGA-5, Atlanta; WUTB-24, Baltimore; KRIV-26, Houston; KTXH-20, Houston; WTVT-13, Tampa Bay; WRBW-65, Orlando; WOFL-35, Orlando; WJW-8, Cleveland; KSAZ-TV-10, Phoenix; KUTP-45, Phoenix; KDVR-31, Denver; KTVI-2, St. Louis; WITI-6, Milwaukee; WDAF-TV-4, Kansas City; KSTU-13, Salt Lake City; WBRC-6, Birmingham; WHBQ-TV-13, Memphis; WGHP-8, Greensboro; KTBC-7, Austin; WOGX-51, Ocala).
- In nine markets, it owns more than one television station (New York, Los Angeles, Chicago, Dallas, Washington, DC, Minneapolis, Houston, Orlando and Phoenix).
- It owns a major national broadcast network (Fox).
- It owns numerous cable and DBS channels, including regional sports networks across the country (among them FX, Fox News Channel, Fox Movie Channel, Fox Sports, Fox Sports en Espagnol, National Geographic Channel, Speed Channel).
- It owns the most widely used electronic program guide for navigating television content (Gemstar-TV Guide).
- It owns newspapers, magazines, and publishing (including *New York Post*, *The Weekly Standard* and HarperCollins Publishers).
- It owns studios (including Twentieth Century Fox, Searchlight, Fox Television Studios, Twentieth Century Fox Television).
- It will now own a nationwide multi-channel direct broadcast satellite system (DirecTV).
- And it will now also own a major fixed satellite service provider that carries video broadcast and cable programming for delivery to distribution systems (PanAmSat).

- This list constitutes News Corp's major holdings in the United States. This conglomerate also has massive media holdings in other nations spanning the globe.

When is "Big Media" big enough? With spectrum always scarce and diversity hanging by a thread, where is the logic -- where is the public interest benefit -- of giving more and more media power to fewer and fewer players? In the end, it all comes back to this: to putting too much power in one conglomerate's hands and creating opportunities for abuse that accompany such concentrated power. Any public interest benefits that may potentially come about from this huge consolidation of commercial power are vastly outweighed by the potential for significant harm to consumers, the industry and the country. I therefore dissent from allowing this merger to go forward.

The majority seems to recognize that the agreement that the parties presented to the Commission for approval was seriously flawed. But the majority's strategy to apply band-aids in several places to stem what is in fact a public interest hemorrhage did not -- because it could not - - work. This agreement was probably beyond repair. Certainly the band-aids applied by the majority don't fix it.

The Applicants point to several claimed public interest benefits of the proposed merger. Yet, even the majority discounts all but two of these benefits as not supported by the record. The majority relies on the potential public interest benefits of innovative services that will be offered under News Corp.'s management and on additional markets in which DirecTV will provide carriage for local television stations. As to the former, the majority admits it is difficult to quantify, but points to the innovative service offerings available on News Corp.'s satellite systems in other parts of the world which include interactive sports betting and casinos. As to the claimed second benefit, the major DBS providers have already been increasing their local station carriage for competitive reasons and, as several commenters point out, DirecTV is altogether able to expand those offerings without this merger.

The *Order* is even more telling in its handling of potential harms emanating from this transaction. The majority finds that News Corp. has market power in its programming services, that this transaction increases its ability and incentive to use its market power to raise programming costs, and that these increases would ultimately be passed on to consumers. Indeed, all of the Commissioners appear to agree that in the transaction, as proposed by the Applicants, the harms outweigh the benefits. In addition to my belief that the conditions imposed in this *Order* are not adequate to address the harms acknowledged by the majority, I am further concerned that the majority fails to acknowledge other real and potential harms associated with the merger. These include:

- **Media Concentration:** Although the majority at least attempts to address the harms of vertical integration, it dismisses outright horizontal integration harms that can arise from allowing one company to own broadcast outlets across the country *and* a nationwide multi-channel distribution system -- an unprecedented level of consolidation. Instead, the majority concludes that broadcast outlets do not serve the same market as cable and DBS. The majority further discounts any harms to localism or diversity, finding instead that market forces will ensure adequate sources of information. To trust that in the unforgiving environment of the market, the public interest will somehow magically trump the urge to build power and profit is a leap of faith that this Commissioner, for one, is unprepared to take. The majority ought to know better. This is the same flawed logic we saw in the Commission's June 2

decision. In addition, the majority fails to analyze the impact of this merger on ensuring independent and diverse programming. Alleged economies of scale do precious little to nurture program or viewpoint diversity.

Given the majority's analysis, I am concerned that this merger is merely the beginning of another wave of consolidation. News Corp. has indicated it may continue growing by acquiring additional television duopolies and other properties. Indeed, the majority apparently presumes that additional News Corp. acquisitions of television stations, radio stations, and newspapers is in the public interest under the Commission's new bright-line media ownership rules. And other Big Media conglomerates, encouraged by today's decision, will now feel emboldened or compelled to consolidate further. My service as a Commissioner has taught me that the response to one company's acquisition is almost invariably another company's request to grow bigger so that it can "compete" and "survive."

The majority's conclusion that broadcast stations do not compete in the same market as cable and DBS, along with its unwillingness closely to examine harms to diversity and localism, make clear that this Commission has no intention to slow, or even critically to examine, cross-platform mergers between broadcast stations and cable or DBS systems.

- ***Community Standards and Indecency:*** Some have suggested that there may be a link between increasing consolidation and increasing indecency on our airwaves. As I traveled across this country holding hearings and attending forums earlier this year, I heard time and again that ownership matters when it comes to what is offered up to viewers and listeners, particularly to our children. I am troubled that today's decision comes on the heels of complaints that News Corp. aired indecent material on the *2003 Billboard Music Awards* just last week. This is not the first instance of such viewer complaints against News Corp. Many of the indecency complaints I have seen come into the Commission involve stations owned by large media companies. I raise the issue here not because of any specific broadcast program, but because the Commission has refused to study the possible relationship between indecency and media concentration. I believe such a study is relevant to decisions such as the one we make today and that, indeed, we should not be making these decisions until we have credibly considered the matter. As we allow media conglomerates to grow ever larger, many Americans are concerned that the race to the bottom will accelerate and that broadcaster consideration for local community standards will continue to erode.

Yet, today, before we even consider these complaints or address the impact of increasing consolidation on increasing indecency, we reward News Corp. with a nationwide programming distribution system. And what will be the effect? Will we see even more attempts to air progressively coarser content? As we move towards more interactive programming, will we see gambling intrude itself into our homes on DirecTV as News Corp. provides on its overseas satellite system? Will we see wider distribution of shows that continue to push the envelope of outrageousness even further?

- ***Increasing Consumer Rates:*** Applicants cite economic efficiencies that will result from their agreement and claim that the merger will give them the scale and scope to compete more effectively. There may well be some such efficiencies, although the baleful tale of many recent high visibility corporate mega-mergers does not provide

much proof of commercial success. Be that as it may, Applicants did not demonstrate that any of these alleged savings would be passed on to consumers nor did they evince great enthusiasm for so doing. It is telling that Applicants produced so little data as to how this transaction could possibly discipline rising cable rates. The likelihood of its doing so is so remote as to be invisible. Lower prices seldom ensue from industry combinations. When we approve a transaction that further increases concentration in programming production and distribution, it is reasonable to assume that we are setting the stage for upward pressure on consumer rates. An entirely plausible outcome of this decision is escalating rates for multi-channel services from both cable systems and DirecTV. When faced with a similar scenario, the Federal Trade Commission in the Time Warner/Turner merger adopted a benchmark price index mechanism. Here, the majority dismisses such an approach, adopting instead so-called baseball arbitration. I am not convinced that arbitration has succeeded in bringing down costs in baseball. More to the point, this is not baseball and it is surely not a game. Although the majority allows the Commission to review the arbitration decisions, it then ties the Commission's hands by requiring us to choose between each party's final offer. This reduces the Commission's obligation to protect the public interest to a multiple choice test. Let's be clear here: what the arbitrators will most often be arbitrating are two companies' proposals about how much more programming is going to cost. The only question to be decided is: how much more. Payment for higher programming license fees will be borne, of course, by consumers.

Moreover, although the majority seems to recognize the possibility of increased consumer rates from this level of consolidation, it inexplicably provides a sunset for these conditions of six years. This sunset is adopted without any explanation of why the majority expects these harms to be resolved within that timeframe.

I am troubled by other aspects of this decision.

I am troubled by the lack of analysis on the foreign ownership implications of the transaction. In section 310(b) of the Act, Congress adopted a broad provision that limits the ability of foreign entities to own or operate parts of our communications system. This foreign ownership restriction applies across a broad range of communications services. For decades, the Commission applied these restrictions to DBS. Last year, with inadequate justification, the Commission determined that the foreign ownership restrictions in 310(b) should not apply to DBS. As a result, the majority, in approving this deal under which News Corp., an Australian company, purchases control of a U.S. DBS licensee, concludes that it need not consider the foreign ownership implications.

I am troubled by the majority's failure to consider the impact of this merger on minority communities. The Congressional Hispanic Caucus in a recent letter raised numerous serious issues related to the negative impact of this merger on the Latino community, on minority-owned independent programmers and on local and Latino-focused programming. The majority fails to do justice to these concerns.

I am troubled that the Commission is approving this merger without resolving issues specific to the Applicants that have been raised regarding service in Alaska and Hawaii. Parties have filed complaints that DirecTV fails to provide reasonably comparable packages of services to Alaska and Hawaii, as required by our rules. If these companies are violating Commission rules, we should address these issues as part of our public interest analysis.

Finally, I am troubled by the failure to clarify that DirecTV, or any other DBS provider, may not discriminate against some local broadcasters by requiring consumers to obtain a second dish to receive those broadcasters. In 1999, Congress passed the Satellite Home Viewer Improvement Act (SHVIA). That Act required that, if a provider carries any local broadcast signals, it must carry all local broadcast signals, and must do so at a nondiscriminatory price and in a nondiscriminatory manner. In 2002, Commissioner Martin and I issued a joint statement making clear our view that a plan to require consumers to obtain a second dish to receive only some of the local broadcast stations in a market did not comply with the statute or Commission rules.

In sum, I simply cannot support the level of concentration by a single owner that will result from this merger absent compelling public interest circumstances. Unfortunately, I do not find that the potential public interest benefits of this transaction outweigh the real and potential harms. This decision is the wrong decision – wrong for the media industry, wrong for consumers, wrong for democracy in America.