

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

In the Matter of)
)
General Motors Corporation,) MB Docket No. 03-124
Hughes Electronics Corp., Transferors)
)
and)
)
The News Corporation, Limited, Transferee)
)

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 2009

Released: June 15, 2009

By the Commission:

I. INTRODUCTION

1. In 2003, News Corporation (“News Corp.”), a media firm with extensive broadcast and cable programming assets, acquired a *de facto* controlling interest in the direct broadcast satellite (“DBS”) firm The DIRECTV Group, Inc. (“DIRECTV”). In the *News Corp.-Hughes Order*, the Commission approved News Corp.’s acquisition, subject to several conditions applicable to News Corp. and DIRECTV.¹ In 2008, News Corp. transferred its interest in DIRECTV to Liberty Media Corporation (“Liberty”).² As a result, News Corp. was relieved of some, but not all, of the conditions that the Commission adopted in the *News Corp.-Hughes Order*.³ The remaining conditions continue to apply to News Corp. until January 14, 2010, or until such time as the Commission determines that a material change in circumstance has occurred that renders the conditions no longer necessary in the public interest.⁴

2. In a Petition for Modification (“News Corp. Petition”) filed on March 11, 2008, News Corp. requests that the remaining conditions be removed, claiming that News Corp. no longer has any control over or ability to influence DIRECTV or any other multichannel video programming distributor (“MVPD”).⁵ News Corp. asserts that the transfer of its interest in DIRECTV to Liberty constitutes a

¹ *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473, 676, App. F (2003) (“*News Corp.-Hughes Order*”).

² *News Corporation and the DIRECTV Group, Inc., Transferors and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, 23 FCC Rcd 3265 (2008) (“*Liberty-DIRECTV Order*”); see also Letter from Robert L. Hoegle, Timothy J. Fitzgibbon, Nelson Mullins Riley & Scarborough LLP, Counsel for Liberty Media Corporation, FCC at 1 (Mar. 13, 2008) (submitted in MB Docket 07-18) (“*Liberty Mar. 13, 2008 Ex Parte*”).

³ See *infra*, paras. 5-7.

⁴ *News Corp.-Hughes Order*, 19 FCC Rcd at 677-83, App. F(III), (IV).

⁵ News Corporation Petition for Modification of Conditions (“News Corp. Petition”) at 1-2; see also *Comment Dates Set for Petition of Modification of Conditions Filed by News Corporation*, Public Notice, 23 FCC Rcd 5537 (2008).

material change in circumstance that renders the conditions no longer necessary in the public interest.⁶ Specifically, News Corp. seeks to be relieved from the following conditions: (1) a condition requiring News Corp. to participate in the arbitration of disputes concerning the carriage of its regional sports networks (“RSNs”) by MVPDs, (2) a condition requiring News Corp. to participate in the arbitration of disputes concerning retransmission consent for carriage of its local broadcast stations by MVPDs, and (3) two conditions applicable to News Corp. retransmission consent negotiations.⁷ As discussed below, we find that the News Corp. Petition demonstrates that a material change in circumstance has occurred that renders the conditions no longer necessary in the public interest. Thus, we grant the News Corp. Petition and remove the remaining conditions adopted in the *News Corp.-Hughes Order*.

II. BACKGROUND

3. The Commission approved News Corp.’s acquisition of an interest in DIRECTV in 2003 in the *News Corp.-Hughes Order*, subject to certain conditions.⁸ On February 27, 2008, News Corp. exchanged its approximately 41 percent ownership interest in DIRECTV, its 100 percent interest in three RSNs, and a cash payment, in return for Liberty’s 16.3 percent ownership interest in News Corp.⁹ As a result of this transaction, News Corp. divested all of its interest in DIRECTV, and Liberty divested its interest in News Corp.¹⁰ Currently, News Corp. owns and operates 27 full power television stations, 17 of which are affiliates of the Fox Broadcasting Company (“FOX”).¹¹ In addition, News Corp., through Fox Television Stations, Inc., owns and operates an additional ten stations affiliated with My Network TV, Inc.¹² News Corp. also owns cable programming networks that provide news, general entertainment

⁶ News Corp. Petition at 1-2.

⁷ See id. News Corp. refers to Appendix F(IV) as the retransmission consent condition. *Id.* at 1 n.1; see also *News Corp.-Hughes Order*, 19 FCC Rcd at 680, App. F(IV).

⁸ *News Corp.-Hughes Order*, 19 FCC Rcd at 676, App. F.

⁹ Liberty Mar. 13, 2008 *Ex Parte* at 1 (Mar. 13, 2008) (submitted in MB Docket No. 07-18); see also News Corporation, *SEC Form 10-K for the Period Ending June 30, 2008* (“News Corp. 10-K”), at 1; *Liberty-DIRECTV Order*, 23 FCC Rcd at 3274, ¶ 16. News Corp. sold the following RSNs to Liberty: (1) Fox Sports Net Rocky Mountain, LLC, (2) Fox Sports Net Northwest, LLC, and (3) Fox Sports Net Pittsburgh, LLC. *News Corp. 10-K* at 1. Under the terms of the *Liberty-DIRECTV Order*, the transferred RSNs are subject to program access and arbitration conditions. *Liberty-DIRECTV Order*, 23 FCC Rcd at 3340-1, 46-49, App. B(III), App. B(IV) (Additional Conditions Concerning Access to Regional Sports Networks).

¹⁰ *Liberty-DIRECTV Order*, 23 FCC Rcd at 3274, ¶ 18.

¹¹ *News Corp. 10-K* at 8. As of June 30, 2008, Fox Television Stations, Inc. owned and operated 35 full power stations, 25 of which were FOX affiliates. However, in July 2008, Fox Television Stations sold 8 of the 25 owned and operated affiliate stations to an indirect, wholly owned subsidiary of Oak Hill Capital Partners. *Id.* at 6. FOX provides 15 hours of prime time broadcast programming and 90 minutes of late-night programming on Saturday to over 200 FOX affiliates. FOX features broadcast programs such as *The Simpsons*, *American Idol*, *Prison Break*, *24*, and *Bones*, as well as extensive live sports broadcasts of games from the National Football League (“NFL”), Major League Baseball (“MLB”), the Sprint Cup series of the National Association of Stock Car Auto Racing (“NASCAR”), and the Bowl Championship Series. *Id.* at 8. FOX obtains its non-sports television broadcast programming from major television studios and independent television production companies and obtains rights to sports programming from professional sports leagues or organizations. It also licenses film programming from major independent film companies. Twentieth Century Fox Television (“TCFTV”), a subsidiary of News Corp., also produces television programming for numerous broadcast and cable networks, including FOX. TCFTV has produced programs such as *24*, *The Simpsons*, and *Bones*. *Id.* at 6, 8-13. In addition to its broadcast and cable properties, News Corp. owns a wide variety of other media properties such as Dow Jones and the Wall Street Journal. *Id.* at 16-17.

¹² *Id.* at 6.

programming, and sports programming for regional and national audiences.¹³ News Corp.’s sports networks include Fox Sports Net, Inc. (“FSN”), the largest RSN programmer in the U.S., SPEED (which carries NASCAR and motorcycle racing programming), Fox College Sports, Fox Soccer Channel, Fox Pan American Sports, and the Big Ten Network.¹⁴

4. With respect to the three transferred RSNs, News Corp. agreed to provide transition and production services to permit the continued operation of those RSNs in a manner consistent with their operation under News Corp.’s ownership.¹⁵ For example, FSN provides the RSNs with national sports programming until 2011 to supplement the RSNs’ regional sports programming.¹⁶ News Corp. also provides the transferred RSNs with other services, such as web-based services from Fox Interactive Media, Inc., and national advertising sales services, pursuant to a four-year contract.¹⁷

5. The Commission approved the license transfers attendant to News Corp.’s divestiture of DIRECTV, subject to certain conditions applicable to Liberty and DIRECTV.¹⁸ As a result of the Commission’s approval, News Corp. was relieved of its obligation to comply with some, but not all, of the *News Corp.-Hughes* conditions.¹⁹ Specifically, the program access condition applicable to News Corp. expired by its own terms upon News Corp.’s divestiture of its attributable interest in DIRECTV.²⁰ Under the terms of that condition, News Corp. had been required to comply with the program access rules even if, in the future, it no longer remained subject to those rules.²¹ The Commission rejected arguments

¹³ Fox non-sports programming networks include Fox News, FX, and National Geographic. *Id.* at 10-12.

¹⁴ *Id.* at 10-13.

¹⁵ See *Liberty-DIRECTV Order*, 23 FCC Rcd at 3323, ¶ 124 & n.403.

¹⁶ See *id.* at 3323, ¶ 124. FSN, Inc. operates FSN, a national sports programming service. According to News Corp.’s 10-K, “FSN, Inc. also is affiliated, through FSN, with an additional nine RSNs that are not owned by FSN, Inc. (the ‘FSN Affiliated RSNs’).... FSN provides the FSN Affiliated RSNs with national sports programming, featuring original and licensed sports-related programming and live and replay sporting events.” *News Corp. 10-K* at 10-11. FSN provides programming such as *The Best Damn Sports Show Period* and *Chris Myers Interviews* to the FSN Affiliated RSNs, including the transferred RSNs. Each transferred RSN produces its own local professional and college sports team programming and supplements that programming with national programming from Fox Sports. *Liberty Media Corp., SEC Form 10-K for the Year Ended December 31, 2007*, I 20. The transferred RSNs employ or hire the necessary on-air talent and technical personnel to produce and uplink game telecasts. *Id.*

¹⁷ *Liberty-DIRECTV Order*, 23 FCC Rcd at 3323-24, ¶ 124 n.403 (citing to Liberty Media Corporation Apr. 9, 2007 Opposition at 14-15, submitted in MB Docket No. 07-18). With respect to the web-based services, Fox Interactive Media, Inc. agreed to provide those services to the transferred RSNs for as long as the RSNs continue to receive the FSN backdrop feed. *Id.*

¹⁸ *Id.* at 3340-49, App. B.

¹⁹ *Id.* at 3315, ¶ 108 and 3320-22, ¶¶ 119-21, and 3325-26, ¶¶ 126-27.

²⁰ *Liberty-DIRECTV Order*, 23 FCC Rcd at 3325-26, ¶¶ 126-27.

²¹ See *News Corp.-Hughes Order*, 19 FCC Rcd at 531-33, ¶¶ 127-28. The program access rules apply to cable operators that are affiliated with satellite cable programming vendors and vice versa. 47 C.F.R. § 76.1002. News Corp. is a satellite cable programming vendor and, at the time it acquired DIRECTV, was affiliated with a cable operator, Liberty, via Liberty’s investment in News Corp. *News Corp.-Hughes Order*, 19 FCC Rcd at 531, ¶ 127. Thus, News Corp. was subject to the program access rules. However, the program access rules do not apply to affiliations between satellite cable programming vendors and DBS providers even though DBS providers, like cable operators, are MVPDs. The condition required News Corp. to remain subject to the program access rules even if Liberty sold its shares in News Corp. because the policy underpinnings of the program access rules were implicated (continued....)

that the *News Corp.-Hughes* program access condition should remain in place even after News Corp.’s divestiture of DIRECTV.²² In addition, News Corp.’s divestiture of DIRECTV rendered moot a condition that had precluded News Corp. and DIRECTV from discriminating against unaffiliated programming services in the selection, price, terms, or conditions of carriage.²³

6. The *Liberty-DIRECTV Order* did not terminate the two arbitration conditions adopted in the *News Corp.-Hughes Order*, concluding that to do so would be premature because News Corp. had not sought to have them removed.²⁴ Under those conditions, MVPDs that fail to reach mutually acceptable terms with News Corp. for its RSNs or local broadcast signals may submit the dispute to commercial arbitration.²⁵ By their terms, the *News Corp.-Hughes* arbitration conditions apply to News Corp. until January 14, 2010, unless News Corp. can demonstrate that “there has been a material change in circumstance or the condition has proven unduly burdensome, rendering the condition no longer necessary in the public interest.”²⁶

7. The *Liberty-DIRECTV Order* did not address the continued application to News Corp. of the two non-arbitration retransmission consent conditions adopted in the *News Corp.-Hughes Order*. One condition extended the scope of the program access condition by requiring News Corp. to grant non-discriminatory access to any local broadcast station that it owned, operated, or on whose behalf it negotiated retransmission consent. This condition was an extension of News Corp.’s program access commitment, which was tied to News Corp.’s attributable interest in DIRECTV.²⁷ The second condition extended the good faith and exclusivity requirements of the Satellite Home Viewer Improvement Act (“SHVIA”) to News Corp.’s retransmission consent negotiations for as long as the program access rules were in effect.²⁸

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by News Corp.’s control of DIRECTV. The condition, in essence, extended the rules to apply to News Corp.’s affiliation with a DBS provider, DIRECTV, not just with a cable operator.

²² *Liberty-DIRECTV Order*, 23 FCC Rcd at 3325-26, ¶¶ 126-27.

²³ News Corp. committed to allow unaffiliated programmers access to the DIRECTV platform in accordance with this condition. *News Corp.-Hughes Order*, 19 FCC Rcd at 523-24, ¶¶ 107-08; Consolidated Application for Authority to Transfer Control Submitted by News Corp., General Motors Corp., and Hughes Electronics Corp., Attach. G (submitted in Docket 03-124). News Corp. no longer holds an interest in DIRECTV, or any other MVPD, and DIRECTV and its new owner, Liberty Media, are now subject to a comparable provision. *Liberty-DIRECTV Order*, 23 FCC Rcd at 3341, App. B(II) and 3320-22, ¶¶ 119-21 (noting that News Corp. agreed to the condition when it owned an interest in DIRECTV and that Liberty Media and DIRECTV have agreed to the same condition).

²⁴ *Liberty-DIRECTV Order*, 23 FCC Rcd at 3326, ¶ 128.

²⁵ *News Corp.-Hughes Order*, 19 FCC Rcd at 677-83, App. F(III), (IV). The language of the Order describes the circumstances in which the conditions apply, such as once an RSN carriage agreement or retransmission consent agreement has expired. In addition, the Order entitles parties to initiate commercial arbitration 90 days after a first-time request for carriage. *Id.*

²⁶ *Id.* at 679, 682, App. F(III), (IV).

²⁷ *News Corp.-Hughes Order*, 19 FCC Rcd at 572, ¶ 219 and 676, App. F(II).

²⁸ *Id.* at 682-83, App. F(IV). SHVIA was in effect by its terms until January 1, 2006. The sunset dates of those SHVIA requirements were extended until January 1, 2010 by the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”), which also imposed good faith negotiation requirements on MVPDs as well as broadcasters. *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 Reciprocal Bargaining Obligations*, 20 FCC Rcd 5448, 5448-50, ¶¶ 1-8 (2005); see also *Liberty-DIRECTV Order*, 23 FCC Rcd at 3315, ¶ 108 (adopting a condition for Liberty and DIRECTV that was “similar to the commitment agreed to by News Corp. when it acquired DIRECTV”).

III. DISCUSSION

8. *Standard of Review.* The *News Corp.-Hughes Order* articulated a specific standard by which the Commission could terminate News Corp.’s obligation to comply with the arbitration conditions prior to their sunset date. Specifically, News Corp. must demonstrate “that there has been a material change in circumstance . . . rendering the condition[s] no longer necessary in the public interest.”²⁹ In making a decision to terminate a merger condition, the Commission has in the past considered whether post-merger circumstances changed in a material way that undermined the purpose of the condition.³⁰ The Commission evaluates whether the condition remains necessary in the public interest based on that analysis.³¹

9. *Demonstrating a Material Change in Circumstance Rendering the Conditions Unnecessary in the Public Interest.* We agree with News Corp. that the divestiture of its attributable interest in DIRECTV demonstrates that a material change in circumstance has occurred since the Commission’s adoption of the *News Corp.-Hughes Order*.³² DISH Network (“DISH”) and American Cable Association (“ACA”) allege that News Corp.’s management, operation, and carriage relationship with respect to the three RSNs that News Corp. sold to Liberty “effectively maintain the status quo of a vertically integrated conglomerate,” but they offer no evidence in support of their claims.³³ News Corp. maintains that it has no ownership interest in DIRECTV or the transferred RSNs and that it has no ability to control them.³⁴ In the *Liberty-DIRECTV* proceeding, the Commission addressed and rejected the argument that the transitional services agreements and the continuing relationship between FSN and the transferred RSNs would provide News Corp. with an attributable interest in DIRECTV or would serve as a vehicle for News Corp. to retain the benefits of its prior vertical integration with DIRECTV.³⁵ As we

²⁹ *Id.* at 679, 682, App. F(III), (IV). Although the standard permits a petition for modification if conditions can be shown to be unduly burdensome, News Corp. has chosen to submit its petition under the standard that a material change in circumstance has occurred. *See id.*; *see also* News Corp. Petition at 1-2.

³⁰ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee; Petition of AOL Time Warner, Inc. for Relief From the Condition Restricting Streaming Video AIHS*, CS Docket No. 00-30, 18 FCC Rcd 16835, 16837-38, ¶¶ 6-7 and 16841, ¶ 14 (2003) (“AOL Time / Warner Relief Order”); *see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 17 FCC Rcd 8985, 8985-86, ¶¶ 2-3 (2002) (“AT&T-TCI Modification Order”). When parties contend that circumstances other than divestiture warrant modification (rather than termination) of conditions, the Commission has engaged in a similar analysis. *See SBC-Ameritech Modification Order*, 15 FCC Rcd 17521, 17522-23, ¶ 3 and 17532-17537, ¶¶ 21-29 (2000) (concluding that a modification of a merger condition that still applied to the merged firm served the public interest because the modified condition “affirmatively and identifiably promoted the underlying purpose of the condition”).

³¹ *See AOL Time / Warner Relief Order*, 18 FCC Rcd at 16841, ¶ 14; *cf. AT&T-TCI Modification Order*, 17 FCC Rcd at 8985, ¶¶ 2-3 (noting that the Commission had adopted a condition to alleviate regulatory and competition concerns and that a subsequent divestiture meant there was no longer a “regulatory reason” to maintain the condition).

³² News Corp. Petition at 2-4.

³³ DISH Opposition at 3; *see also* ACA Reply at 6.

³⁴ News Corp. Reply at 8. News Corp. contends that opponents are collaterally estopped from raising these claims here because the Commission rejected similar arguments with respect to the program access condition in the *Liberty-DIRECTV* proceeding, adding that neither party challenged the Commission’s findings on reconsideration or appeal. *Id.* at 7.

³⁵ *Liberty-DIRECTV Order*, 23 FCC Rcd at 3325-26, ¶¶ 127 & nn.418-19.

stated in the *Liberty-DIRECTV Order*, neither DIRECTV nor News Corp. would receive “any undue advantage vis-à-vis their competitors as a result of their prior vertical integration,” and the record did not indicate that anything would cause “Liberty Media or News Corp. to act in anything but their own, separate business interests.”³⁶

10. We also agree with News Corp. that its divestiture of DIRECTV renders the arbitration conditions no longer necessary in the public interest. The underlying purpose of the arbitration conditions was to prevent conduct that the Commission found would become more likely when News Corp. acquired an interest in DIRECTV.³⁷ Specifically, the Commission found that News Corp.’s integration with DIRECTV would provide it with an additional incentive and ability to temporarily foreclose its RSN and local broadcast programming from DIRECTV’s MVPD competitors, the cost of which would be offset by the increased subscription revenues resulting from subscriber defections to DIRECTV.³⁸ News Corp.’s ability to temporarily withhold programming and to threaten credibly to do so also gave it the incentive and ability to raise the price of this programming above the levels it could obtain as an un-integrated programmer.³⁹ The Commission found that this, in turn, would harm DIRECTV’s rivals, and ultimately, consumers.⁴⁰ News Corp. argues that the divestiture of its interest in DIRECTV eliminates its transaction-related incentive to temporarily foreclose access to its RSN and local broadcast programming.⁴¹ We agree.

11. Absent vertical integration between News Corp. and DIRECTV, the arbitration conditions serve no transaction-related purpose. The Commission adopted the arbitration conditions to address the same underlying concern as the program access condition – to prevent a vertically integrated News Corp. from using its programming as a means by which to confer on itself and DIRECTV an

³⁶ *Id.* at 3325-26, ¶ 127 and at 3333, ¶ 150.

³⁷ See *News Corp.-Hughes Order*, 19 FCC Rcd at 546-48, ¶¶ 158-62 and 567, ¶ 206; see also News Corp. Petition at 4-6; News Corp. Reply at 2-3.

³⁸ *News Corp.-Hughes Order*, 19 FCC Rcd at 546-48, ¶¶ 158-62 and 567, ¶ 206. We note that arbitration can remedy public interest harms in various contexts, not just the specific harm we found to be likely in the *News Corp.-Hughes Order*. For example, we adopted arbitration as a means by which to mitigate the harmful effects of a uniform price increase strategy, anticompetitive conduct that we found was likely to occur in the *Adelphia Order: Applications for Consent to the Assignment And/Or Transfer of Control of Licenses Adelphia Communications Corp., (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corp., (And Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corp. (Subsidiaries), Assignees and Transferees*, 21 FCC Rcd 8203, 8267-68, ¶ 140 (2006).

³⁹ *News Corp.-Hughes Order*, 19 FCC Rcd at 546-48, ¶¶ 159-62 and 572-73, ¶¶ 218-21.

⁴⁰ See *id.* at 547, ¶ 61 and 568-69, ¶¶ 209-11. The Commission found that the public interest harms flowing from the temporary foreclosure of RSNs would be: (1) an across-the-board price increase to MVPDs “above the level . . . that News Corp. could otherwise expect to obtain,” (2) consumer deprivation of access to RSNs, and (3) forced consumer switching among MVPDs to obtain access to that programming. The Commission found that the public interest harms arising from temporary foreclosure of local broadcast programming would be: (1) higher MVPD rates for consumers, (2) increased likelihood that MVPDs would make their programming selections based on News Corp.’s demands rather than based on consumer preferences, and (3) loss of access to the viewpoint diversity and localism inherent in local broadcast programming during the period of temporary foreclosure. *Id.*

⁴¹ News Corp. Petition at 6; News Corp. Reply at 3-4; Letter from Antoinette Cook Bush and Jared Sher, Counsel to News Corp., to Marlene H. Dortch, Secretary, FCC, at 2-3 (Dec. 4, 2008) (“News Corp. Dec. 4, 2008 *Ex Parte* Letter”).

anticompetitive advantage that would harm the public interest.⁴² As DISH correctly points out, the Commission noted that News Corp. had market power with respect to its RSN and local broadcast programming.⁴³ However, it was News Corp.’s integration with DIRECTV that, combined with its market power, made it more likely that News Corp. would use a strategy of temporary foreclosure to inflate the price of its programming and drive subscribers from competing MVPDs to DIRECTV. Given that the purpose of both types of conditions was to prevent public interest harms associated with the vertical integration of News Corp. and DIRECTV, the Commission’s rationale in the *Liberty-DIRECTV Order* for declining to extend the life of the program access condition beyond divestiture directly supports our decision here. For the same reasons, we find that News Corp.’s obligation to comply with the SHVIA condition, “for as long as the program access rules are in effect,” and the condition that News Corp. provide non-discriminatory access to any local broadcast station that it owned, operated, or on whose behalf it negotiated retransmission consent, should no longer apply to News Corp.⁴⁴

⁴² Cf. *News Corp.-Hughes Order*, 19 FCC Rcd at 529, ¶ 124 and 546-48, ¶¶ 159-62 and 568-69, ¶¶ 209-11 (adopting the conditions based on the likelihood of anticompetitive conduct stemming from News Corp.’s integration with DIRECTV).

⁴³ DISH Opposition at 2-3; *News Corp.-Hughes Order*, 19 FCC Rcd at 534, ¶ 132. ACA also argues that we should retain the conditions because News Corp. has “overwhelming market power” and has posted record revenues. ACA Opposition at 7; ACA Reply at 7. ACA, the National Telecommunications Cooperative Association, and the Organization for the Promotion of Advancement of Small Telecommunications Companies also make note of News Corp.’s profits and contend that such profits undercut News Corp.’s argument that continued compliance with the conditions harms the public interest by placing News Corp. at a competitive disadvantage. Letter from Ross Lieberman, Vice President of Government Affairs, ACA, Jill Canfield, Sr. Regulatory Counsel, National Telecommunications Cooperative Association, Stephen Pastorkovich, Business Development Director, Organization for the Promotion of Advancement of Small Telecommunications Companies, to Marlene H. Dortch, Secretary, FCC, at 2 (Nov. 25, 2008) (“ACA, et al. Nov. 25, 2008 Ex Parte”). News Corp. counters that the fact that its cable networks have earned profits does not support ACA, et al.’s assertion that the “conditions have not harmed the public interest,” contending that News Corp. faces a competitive disadvantage because it is the only independent programming entity subject to these types of conditions. News Corp. Dec. 4, 2008 Ex Parte Letter at 3; see also *infra*, para. 15 (describing News Corp.’s argument that it should not remain subject to the arbitration conditions when other independent programmers are not subject to such requirements).

⁴⁴ The SHVIA condition was designed to “temper increases in News Corp.’s market power arising from *the transaction.*” See *News Corp.-Hughes Order*, 19 FCC Rcd at 572, ¶ 219 (emphasis added). The non-discrimination broadcast condition was designed to prevent “News Corp. from engaging in competitive abuses such as selling programming to DIRECTV’s competitors at prices that are substantially and unjustifiably higher than the price paid by DIRECTV.” *Id.* News Corp.’s divestiture of its interest in DIRECTV returns News Corp. to its pre-transaction position. Therefore, we find that it is unnecessary to require News Corp. to comply with the SHVIA and broadcast non-discrimination conditions going forward.

12. We disagree with commenters who claim that continued application of the conditions would serve the public interest.⁴⁵ The conditions were designed to ensure that News Corp. would maintain its pre-transaction bargaining position with respect to MVPDs seeking to buy its programming.⁴⁶ The divestiture of DIRECTV restores News Corp.’s pre-transaction bargaining position. There is thus no further need for the conditions. Moreover, as News Corp. points out, withholding its programming from MVPDs would cause News Corp. to lose programming revenues that could not be offset by any increase in DIRECTV’s subscription revenues.⁴⁷ We therefore reject the arguments of ACA, DISH, National Cable Television Cooperative (“NCTC”), and Massillon Cable TV, Inc. (“Massillon”), who contend that News Corp. should continue to be subject to the conditions in order to prevent News Corp. from having an unfair advantage in negotiations for the carriage of News Corp.’s broadcast signals and RSNs.⁴⁸ For the same reason, we reject the premise that News Corp. must show that its continued compliance with the conditions harms the public interest. News Corp. has shown that its divestiture of DIRECTV is a material change in circumstance, and we find that the conditions are no longer necessary to serve the public interest purpose that justified their imposition.

13. We also reject allegations that News Corp. exhibited a lack of candor in its dealings with the Commission in the *Liberty-DIRECTV* proceeding because News Corp. claimed it was not seeking to have the arbitration conditions removed at that time.⁴⁹ The Commission in the *Liberty-DIRECTV Order* acknowledged the possibility that News Corp. would submit this petition prior to the expiration date of the conditions, stating that “the conditions shall continue to apply for their full term or until such time as the Commission grants relief.”⁵⁰ Moreover, News Corp. argued in pleadings submitted in the *Liberty-DIRECTV* proceeding that it did “not believe that [the arbitration] conditions remain necessary, since – as a stand-alone program provider – News Corp. will have neither the ability nor the incentive to engage in

⁴⁵ ACA Opposition at 5-6 (contending that the conditions preserve competition by retaining access to “must have” programming and prevent the disruption of customer viewing patterns); ACA, *et al.* Nov. 25, 2008 *Ex Parte* at 2 (agreeing with ACA and noting that the conditions prevent temporary foreclosures); DISH Opposition at 1-3 (contending that the conditions work well and should remain in place).

⁴⁶ See News Corp. Petition at 6; *News Corp.-Hughes Order*, 19 FCC Rcd 546-47, ¶¶ 159-60 and 568, ¶ 209.

⁴⁷ News Corp. Reply at 5; *see also* News Corp. Petition at 6 (arguing that it would face significant economic losses if it withheld programming).

⁴⁸ See ACA Opposition at 2, 5-6 (arguing that the conditions protect small and medium-sized cable companies in negotiations with News Corp., and provide stability to retransmission consent negotiations and RSN renewals with Fox-affiliated networks); *see also* DISH Opposition at 1-3 (contending that the conditions continue to address pre-existing market power); NCTC Opposition at 8 (arguing that the conditions should be retained because they prevent News Corp. from delaying negotiations until the pre-divestiture News Corp.-DIRECTV programming agreements expire); Massillon Reply at 1, 4 (agreeing with NCTC’s arguments and also contending that it would not have been able to obtain any relief in negotiations with News Corp. had it not been for the arbitration conditions). NCTC also notes that, from its perspective, the most important elements of the arbitration conditions were those that enabled bargaining agents to negotiate with Fox on behalf of small cable operators. NCTC Opposition at 2.

⁴⁹ See ACA Opposition at 2-3; ACA Reply at 3; ACA, *et al.* Nov. 25, 2008 *Ex Parte* at 2 (contending that News Corp. deceived the Commission in the *Liberty-DIRECTV* proceeding by leaving the impression that it would continue to comply with the arbitration conditions); News Corp. Reply at 11-12 (disputing that allegation); News Corp. Dec. 4, 2008 *Ex Parte* Letter at 3 (same).

⁵⁰ *Liberty-DIRECTV Order*, 23 FCC Rcd at 3326, ¶ 128 (citing News Corp. Opposition of Apr. 9, 2007 at 14-15, submitted in MB Docket No. 07-18). In a pleading News Corp. submitted in the *Liberty-DIRECTV* proceeding, it noted that “the Commission should defer any further consideration of this issue unless and until News Corp. at some time in the future files a petition seeking to modify or eliminate the conditions.” News Corp. Opposition of Apr. 9, 2007 at 14-15 (submitted in MB Docket No. 07-18).

anticompetitive bargaining practices with regard to carriage of RSNs or broadcast stations.”⁵¹

14. *News Corp. Petition’s Impact on Rulemaking.* Commenters urge us to delay our decision until the Commission decides whether arbitration-style procedures should apply to all program access disputes in the pending *Program Access NPRM*.⁵² ACA and DISH argue that the Commission’s grant of this petition while the arbitration issue is unresolved in the program access proceeding could prejudice that proceeding’s outcome.⁵³ News Corp. counters that a decision to delay action may similarly prejudge the pending proceeding’s outcome.⁵⁴ News Corp. claims it is unfair for the Commission to continue to subject News Corp. to the conditions when the Commission has not determined that similar requirements should be applied industry-wide to programmers or broadcasters that are not affiliated with an MVPD.⁵⁵ We agree. We decline to postpone our decision here until the program access proceeding concludes. As discussed above, the *News Corp.-Hughes Order* sets forth a standard for terminating the arbitration conditions, and we conclude that standard has been met.⁵⁶

15. *Pending Arbitration Matters.* Commenters seek continued application of the arbitration conditions in three special circumstances, even if the Commission decides that those conditions should be removed. NCTC recommends that, at a minimum, the arbitration conditions should continue to apply where an MVPD commenced or gave notice of its intent to commence arbitration proceedings prior to the completion of News Corp.’s divestiture of DIRECTV.⁵⁷ NCTC also proposes a broader carve-out, such that the conditions could be invoked where an MVPD “had entered into negotiations” for RSN programming or local broadcast signals prior to divestiture, but had not yet given notice of intent to commence an arbitration proceeding.⁵⁸ This second option, NCTC contends, would serve the public interest because it satisfies MVPDs’ reasonable expectations that, should current

⁵¹ News Corp. Apr. 9, 2007 Opposition at 14-15 (submitted in MB Docket No. 07-18).

⁵² ACA Opposition at 1, 8; DISH Opposition at 3-4. *See also 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; 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 17791, 17868-70, ¶¶ 134-37 (2007) (“*Program Access NPRM*”) (seeking comment on whether the Commission should add an arbitration-type step as part of the determination of an appropriate remedy for program access violations and whether standstill provisions should be implemented during program access disputes).

⁵³ DISH Opposition at 3-4. ACA also contends that the Commission’s action on the petition now could destabilize ongoing programming negotiations between MVPDs and News Corp. ACA Opposition at 8-9.

⁵⁴ News Corp. Reply at 9.

⁵⁵ *Id.* at 9; *see also supra*, note 43. News Corp. also contends that the market for the sale of video programming is “tremendously competitive.” News Corp. Reply at 9.

⁵⁶ *See supra*, paras. 9-13.

⁵⁷ NCTC Opposition at 5-7; *see also* ACA Reply at 4. NCTC is concerned that termination of the arbitration conditions would cause several MVPDs on whose behalf NCTC is negotiating to lose access immediately to any News Corp. RSN programming subject to the conditions’ “standstill” provisions, which forbid News Corp. from withholding the programming during the pendency of arbitration. NCTC contends that termination would harm small cable companies in particular because, “as the Commission acknowledged in establishing the RSN and [retransmission consent 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.” NCTC Opposition at 5-7.

⁵⁸ NCTC Opposition at 7. Massillon agrees with NCTC, contending that the conditions should continue to apply to “any arbitration proceeding or negotiation commenced prior to [the] divestiture [of News Corp.’s interest in DIRECTV].” Massillon Reply at 1.

negotiations fail, MVPDs could rely on the conditions' provisions to arbitrate.⁵⁹ As a third option, NCTC urges the Commission to apply the conditions to any News Corp. RSN or broadcast station that entered into a new or modified agreement with DIRECTV while News Corp. was integrated with DIRECTV.⁶⁰ NCTC contends that this third option would counterbalance any potentially anticompetitive or discriminatory effects of programming agreements entered into while News Corp. and DIRECTV were vertically integrated and ensure that those negative effects are "not perpetuated in new agreements with other MVPDs."⁶¹ News Corp. contends that the arbitration conditions should only apply to negotiations between News Corp. and MVPDs in which "the arbitration procedures contemplated in the *News Corp.-Hughes Order*" have been triggered prior to the divestiture of its interest in DIRECTV.⁶²

16. The conduct that the arbitration conditions were designed to prevent – temporary foreclosure as a means to raise the price of programming above pre-transaction levels and to attract subscribers away from DIRECTV's competitors – was more likely and more profitable than it was pre-transaction only so long as News Corp. owned an interest in DIRECTV and could recover some of its lost profits by attracting subscribers away from DIRECTV's competitors. Upon divestiture, News Corp. severed its interests in DIRECTV. As explained above, the severance of News Corp.'s interests in DIRECTV constitutes a material change of circumstance that renders the conditions no longer necessary in the public interest.⁶³ In granting News Corp.'s Petition, however, we must balance News Corp.'s interest in immediate relief from a merger-related condition with the impact our grant may have on those MVPDs that have filed a formal demand or provided notice of arbitration in reasonable reliance on the terms of the *News Corp.-Hughes Order*.⁶⁴ In balancing these interests, we note that the Commission explicitly stated in the *Liberty-DIRECTV Order* that "the conditions shall continue to apply for their full term or until such time as the Commission grants relief. If and when News Corp. asks the Commission to terminate the conditions, we will evaluate whether our doing so would serve the public interest."⁶⁵ Thus, on equitable grounds we find that applying the conditions to arbitrations in which a formal demand or notice for arbitration has been provided up to and including the date we release this Order reflects an appropriate balance between the expeditious removal of conditions that we have found to be no longer

⁵⁹ NCTC Opposition at 7 (also noting that MVPDs rely on the right to have a bargaining agent negotiate on their behalf under the terms of the conditions).

⁶⁰ *Id.* at 7-8; *see also* Massillon Reply at 5. As an example, NCTC explains that if a News Corp. RSN entered into a five-year agreement with DIRECTV in 2005, the arbitration conditions (including the small cable operator provisions) would continue to apply to expiring agreements (or new agreements) for that RSN with *any* MVPD for that same programming, until January 14, 2010 (the date the conditions are set to expire and parallel to the five-year programming agreement). NCTC Opposition at 8.

⁶¹ NCTC Opposition at 8. NCTC contends that News Corp. has an incentive to compensate for "any price breaks it may have given DIRECTV by demanding discriminatory or unfair terms and conditions from other MVPDs." *Id.*

⁶² News Corp. Reply at 5 & n.15. News Corp. states that it does not propose termination of arbitration proceedings that were commenced prior to the divestiture of its interest in DIRECTV. *Id.* at 5.

⁶³ *See supra*, paras. 9-13.

⁶⁴ By the terms of the *News Corp.-Hughes Order*, an MVPD has five business days following the expiration of an existing RSN contract or retransmission consent agreement to notify News Corp. that it intends to request commercial arbitration. The MVPD's formal demand for arbitration, which shall include a final offer, may be filed with the American Arbitration Association no earlier than 15 business days after expiration of the contract or agreement, and no later than the 20th day following such expiration. *News Corp.-Hughes Order*, 19 FCC Rcd at 677, App. F(III) & 680, App. F(IV).

⁶⁵ *Liberty-DIRECTV Order*, 23 FCC Rcd at 3326, ¶ 128.

necessary in the public interest and the expectations of parties who have relied upon them to date.⁶⁶

17. In so doing, we reject NCTC's proposals to broaden the scope of the circumstances in which the conditions would continue to apply. NCTC's proposed broader preservation of the conditions would have the effect of allowing arbitrations to proceed even if an MVPD were to file a formal demand or notice of intent to arbitrate after the conditions are removed. There is no public interest rationale, however, for allowing arbitrations to proceed after the conditions have been removed, except to allow for the continuation of arbitrations that were noticed or for which formal demands were filed, either prior to divestiture or between the date of divestiture and the release date of this Order.⁶⁷ As we have explained above, News Corp.'s divestiture of DIRECTV eliminates the transaction-related basis for the conditions and restores News Corp. to its pre-transaction bargaining position.⁶⁸ News Corp.'s ability to temporarily or permanently foreclose an MVPD arises only upon the expiration of an MVPD's programming carriage or retransmission consent agreement or in connection with first time requests. News Corp. no longer owns an interest in DIRECTV and thus, when existing program carriage or retransmission consent agreements expire or when new requests arise in the future, it has no additional incentive or ability to deny its programming to MVPDs – the harm the arbitration conditions were intended to remedy. We broaden the application of the conditions beyond the date of divestiture only to preserve a remedy that was assumed to be available, based on the *News Corp.-Hughes* and *Liberty-DIRECTV* orders, until it expired or was removed.

18. *Conclusion.* For the reasons discussed above, we find that News Corp. has demonstrated that its divestiture of DIRECTV constitutes a material change in circumstance that renders the RSN and retransmission consent arbitration conditions, as well as the two non-arbitration conditions applicable to retransmission consent negotiations, no longer necessary in the public interest. We therefore grant News Corp.'s request to terminate them. With respect to the arbitration conditions, we also conclude that it is appropriate, under the terms of the *News Corp.-Hughes Order*, to permit entities that filed formal demands or provided notice to commence arbitration on or before the release date of this Order to retain all the rights conferred on them under the terms of the conditions.

⁶⁶ According to News Corp., as of November 25, 2008, no arbitrations had been noticed or commenced against News Corp. since News Corp. transferred control of DIRECTV to Liberty on Feb. 27, 2008. Three arbitration proceedings were pending at that time; two arbitrations were still pending on November 25, 2008. Both of these pending arbitrations – one concerning Massillon's carriage of Fox Sports Net and the other concerning NCTC's negotiations for Fox-affiliated RSNs whose carriage agreements expired on Dec. 31, 2006 – are before the Commission for *de novo* review of the arbitrator's award. See Letter from Maureen O'Connell, Sr. VP, Regulatory and Government Affairs, News Corp., to Marlene H. Dortch, Secretary, FCC, at 1-2 (Nov. 25, 2008).

⁶⁷ We decline to resolve in this Order Massillon's arbitration-related dispute with News Corp., which is the subject of a separate proceeding. *Fox Sports Net Ohio, LLC, Petitioner, v. Massillon Cable TV, Inc., Respondent*, Petition for *De Novo* Review of Arbitration Award (filed Sept. 21, 2007). Massillon's and News Corp.'s arguments regarding how we should interpret and apply the arbitration conditions are more appropriately resolved in the proceeding initiated by Fox Sports Net Ohio's petition for *de novo* review of the arbitrator's award.

⁶⁸ See *supra*, paras. 9-13.

IV. ORDERING CLAUSES

19. Accordingly, having reviewed News Corp.'s Petition for Modification of Conditions and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309 and 310(d) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petition filed by News Corporation to remove the remaining conditions adopted in the *News Corp.-Hughes Order*⁶⁹ IS GRANTED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁹ *News Corp.-Hughes Order*, 19 FCC Rcd at 677-682, App. F(III), (IV).