

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

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

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2003

Released: January 14, 2004

By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

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I. INTRODUCTION

1. In this Order, we consider the application (“Application”)¹ of General Motors Corporation (“GM”), Hughes Electronics Corporation (“Hughes”), and the News Corporation Limited (“News Corp.”) (collectively, the “Applicants”) for consent to transfer control of various Commission licenses and authorizations, including direct broadcast satellite (“DBS”)² and fixed satellite space station, earth station, and terrestrial wireless authorizations held by Hughes and its wholly- or majority-owned subsidiaries to News Corp. The proposed transaction involves the split-off of Hughes from GM, wherein Hughes will become a separate and independent company, followed by a series of transactions through which News Corp., through its majority-held subsidiary, Fox Entertainment Group (“FEG”), will acquire a 34% interest in Hughes. The remaining 66% interest in Hughes will be held by three GM employee benefit trusts (managed by an independent trustee), which combined will hold an approximately 20% interest in Hughes, and by the general public, which will hold an approximately 46% interest in Hughes.

2. If approved, the proposed transaction will result in News Corp. holding the single largest block of shares in Hughes, thus providing News Corp. with a *de facto* controlling interest over Hughes and its subsidiaries, including DirecTV Holdings, LLC (“DirecTV”), a wholly-owned subsidiary of Hughes, which provides DBS service in the United States, as well as Hughes Network Systems, Inc. (“HNS”), a facilities-based provider of very small aperture terminal (“VSAT”) network systems, and PanAmSat Corporation (“PanAmSat”), a global facilities-based provider of geostationary-satellite orbit fixed satellite services (“FSS”). As described in the Application, if the proposed transaction is consummated, K. Rupert Murdoch, chairman and chief executive officer (“CEO”) of News Corp., will become chairman of Hughes, and Chase Carey, News Corp.’s former co-chief operating officer, will become president and chief executive officer of Hughes. Hughes’ board of directors will consist of 11 directors, six of whom will be independent directors.

3. Among News Corp.’s video programming assets are 35 owned and operated (“O&O”) full-power television broadcast stations, a television broadcast network, ten national cable programming networks, and 22 regional cable programming networks. With 11.4 million subscribers – 13% of all multichannel video programming distribution (“MVPD”) households – DirecTV is second only to Comcast Corporation in its share of the MVPD market. With its national footprint, DirecTV competes with every single MVPD in the country, in markets of all sizes.

4. Currently, News Corp. supplies programming to DirecTV and other MVPDs, and DirecTV is a buyer of programming content from News Corp. and other programming suppliers. By combining News Corp.’s programming assets with DirecTV’s national distribution platform, the proposed transaction creates a vertically integrated content/distribution platform. It thereby changes the nature of

¹ See *Consolidated Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and the News Corporation Limited, Transferee, for Authority to Transfer Control*, May 2, 2003 (“*May 2003 Filing*”). The term, “Application,” refers to the *May 2003 Filing* and the letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (May 30, 2003) (clarification of Application). The Media Bureau placed the Application on public notice on May 16, 2003, DA 03-1725, MB Docket No. 03-124, establishing a comment cycle for this proceeding. See Appendix A for a list of parties filing in this proceeding and the abbreviations by which they are identified herein.

² DBS is the acronym used in the United States to describe the domestic implementation of the satellite service known internationally as the broadcasting satellite service (“BSS”). See 47 C.F.R. § 25.201.

News Corp.'s relationship with all other MVPDs from that of solely a programming supplier to that of both a supplier of crucial inputs and a direct competitor in the end user MVPD market. As discussed more fully below, our analysis of the principal allegations of competitive harm in the record demonstrates that this vertical integration has the potential to increase the incentive and ability of News Corp. to engage in temporary foreclosure bargaining strategies during carriage negotiations with competing MVPDs for two types of "must have" video programming products – broadcast television station signals and regional cable programming sports networks -- in order to secure higher prices for its programming.³ Although News Corp., like other broadcast networks, engages or attempts to engage in this sort of behavior today, ownership of a competing MVPD platform with a national footprint means that News Corp. stands to gain from any subscriber losses the affected MVPD suffers during the period of foreclosure when those subscribers move over to its competing MVPD platform to access the desired programming.⁴ The ability to gain revenues via its ownership interest in DirecTV thereby helps offset any temporary losses that News Corp. would suffer from withdrawal of its programming from the competing MVPD in terms of lost advertising and/or affiliate fee revenues. This off-setting revenue gain makes use of the strategy more tolerable to News Corp post-transaction than it was pre-transaction and thereby increases the likelihood and frequency of its use. This lowering of the costs of foreclosure to News Corp. from present levels fundamentally and substantially alters the bargaining dynamic between the program supplier and the competing programming distributor to the benefit of the former at the expense of the latter and its subscribers. To the extent that News Corp. succeeds in using temporary foreclosure strategies to extract supra-competitive prices for its programming, these transaction-specific higher programming costs are likely to be passed through as higher MVPD prices, which in turn would harm consumers.

5. Applicants have alleged, and we have found, various public interest benefits from the transaction, including more potent competition to cable, increased innovation and consumer benefits in terms of programming and services, and increased penetration of local-into-local broadcasting service. Our license conditions described below are designed to lessen the impact of the public interest harms outlined above, while preserving the benefits of the transaction for the public. Based on the record before us, we find that on balance and as conditioned, the subject license transfer approvals will serve the public interest. We therefore grant the Application with the conditions specified below.

³ In this Order, "[REDACTED]" indicates confidential or proprietary information, or analysis based on such information, submitted pursuant to the First and/or Second Protective Orders. See *News Corporation, General Motors Corporation, and Hughes Electronics Corporation, Order Adopting Protective Order*, DA 03-1761 (rel. May 22, 2003); *News Corporation, General Motors Corporation, and Hughes Electronics Corporation, Order Concerning Second Protective Order*, DA 03-2376 (rel. July 22, 2003). The unredacted version of this Order is available upon request only to those parties who have executed and filed with the Commission signed acknowledgements of the Second Protective Order. Qualified representatives who have not yet signed the required acknowledgement may do so in order to obtain the unredacted Order.

⁴ See, e.g., *Most Cable MSOs Get Deals Done on Retransmission Consent*, WARREN'S CABLE REGULATION MONITOR, Jan. 13, 2003; Joanne Ostrow, *Denver ABC Affiliate Engages in Big Dispute with AT&T Broadband*, THE DENVER POST, Dec. 31, 2002; Bruce Orwall and Joe Flint, *Disney, Time Warner Sign Deal, Settling Their Nasty, Public Feud*, WALL ST. J., May 26, 2000.

II. DESCRIPTION OF THE PARTIES

A. The News Corporation Limited

6. News Corp. is a corporation formed under the laws of South Australia with securities that are publicly traded on both the New York Stock Exchange and the Australian Stock Exchange.⁵ News Corp. is a diversified international media and entertainment company with operations in a number of industry segments, including: filmed entertainment, television, cable network programming, magazines and inserts, news papers, and book publishing.⁶ Shareholders holding a greater than 10% interest in News Corp. are K. Rupert Murdoch, a U.S. citizen and chief executive of News Corp., who directly and indirectly controls an approximately 16% equity and 30% voting interest in News Corp.,⁷ and Liberty Media Corporation (“Liberty”), a Delaware corporation, which holds preferred limited voting ordinary shares representing approximately 17.6% of the shares of News Corp. but with no voting rights except in limited instances.⁸ Liberty holds interests in domestic and international video programming, interactive technology services, and communications businesses in the United States, Europe, Latin America, and Asia.⁹ Among its holdings are majority ownership interests in Starz Encore Group LLC (100%) and

⁵ See Application, Volume I, C for a chart summarizing the relevant News Corp. ownership structure prior to the proposed transaction; see also News Corporation Limited, SEC Form 20-F, Annual Report for the fiscal year ended June 30, 2003 at 5, 72 (“*News Corp. 20-F 2003 Annual Report*”).

⁶ See *News Corp. 20-F 2003 Annual Report* at 5.

⁷ This approximate percentage is calculated based on 2,097,473,050 ordinary shares outstanding on Sep. 30, 2003, and includes ordinary shares owned by: (1) K. Rupert Murdoch; (2) Cruden Investments, Limited, a private Australian investment company owned by K. Rupert Murdoch, members of his family and various corporations and trusts, the beneficiaries of which include K. Rupert Murdoch, members of his family and certain charities; and (3) corporations which are controlled by trustees of settlements and trusts established for the benefit of the Murdoch family, certain charities, and other persons. In addition, K. Rupert Murdoch, Cruden Investments, Limited and such other entities beneficially own 217,126,040 preferred limited voting ordinary shares. See *News Corp. 20-F 2003 Annual Report* at 5, 70.

⁸ A holder of News Corp. preferred limited voting ordinary shares is entitled to vote on: a proposal to reduce the share of capital of the company; on a proposal to wind up or during the winding-up of a company; a proposal for the disposal of the whole of the property, business, and undertaking of the company; a proposal that affects rights attached to such preferred shares; a resolution to approve the terms of a buy-back agreement; and during a period in which a dividend (or part of a dividend) in respect of the preferred shares is in arrears. See *News Corp. 20-F 2003 Annual Report* at p. F-39; see also Liberty Media Corporation, SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 at p. I-6 (“*Liberty 10-K 2002 Annual Report*”). On October 6, 2003, the News Corp. notified the Commission that Liberty had exercised its right to purchase \$500 million in News Corp. preferred limited voting ordinary American Depository Receipts (“ADRs”), increasing Liberty’s passive interest in News Corp. from approximately 17.6% to approximately 19% of the company’s issued and outstanding stock. If News Corp. were to exercise its right to offer ADRs as consideration in connection with its acquisition of an interest in Hughes to the maximum extent permissible under the documents governing the proposed transaction, Liberty’s ownership interest in News Corp. would be diluted to approximately 17.3%, based on current stock prices. See Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (Oct. 6, 2003).

⁹ See *Liberty 10-K 2002 Annual Report* at p. I-1. On May 12, 2003, EchoStar Satellite Corporation (“EchoStar”) filed a Petition to Require Additional Information requesting that the Commission require the Applicants to submit information concerning the planned involvement of Liberty in the financing of the proposed purchase by News Corp. in Hughes. See EchoStar Petition to Require Additional Information, May 12, 2003 at 2-5. EchoStar also (continued....)

Liberty Satellite and Technology, Inc. (87%), and minority interests in a number of other companies.¹⁰ Liberty also holds a controlling interest in Astrolink International LLC, and the largest plurality interest in Wildblue Communications, Inc., both Commission licensees authorized to construct, launch and operate satellites using frequencies in the Ka-band.¹¹

7. News Corp. holds its U.S. programming interests through its Fox Entertainment Group, Inc. subsidiary, a Delaware corporation, in which News Corp. currently holds an approximately 80.6% ownership and 97% voting interest.¹² The remaining 19.4% equity is publicly traded on the New York Stock Exchange.¹³ The Fox Entertainment Group, Inc. is principally engaged in the development, production and distribution of television broadcasting and cable network programming.¹⁴ Its programming interests include Fox Broadcasting Company, Fox Television Stations, Twentieth Century Fox Film, Twentieth Century Fox Television, Fox News Channel, and Fox Cable Networks.¹⁵ News Corp. indirectly holds interests in a number of direct-to-home (“DTH”) subscription services, all of which operate outside the United States, including a 35% indirect interest in British Sky Broadcasting (“BSkyB”), which operates in the United Kingdom and Ireland.¹⁶ In addition, News Corp. holds an approximately 42.9% interest in Gemstar-TV Guide International, Inc. (“Gemstar”), which, among other things, produces an electronic program guide for on-screen navigation of program offerings.¹⁷ News Corp. also holds an approximately 79% equity interest in NDS Group plc (“NDS”), a supplier of conditional access systems that provide secure solutions for pay television systems.¹⁸

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requested the Commission to require Applicants to provide expert testimony in support of their key economic assertions, including information about assertions concerning the relevant product and geographic markets and the Applicants’ market power in these markets. *Id.* at 5-6. On May 13, 2003, the Applicants filed a Decl. of Lawrence A. Jacobs, Executive Vice President and Deputy Counsel to News Corp., to expand and reiterate on Liberty’s interest in News Corp. and the proposed transaction. *See* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (May 13, 2003), forwarding the Decl. of Lawrence A. Jacobs (“*News Corp. Decl.*”). Both the EchoStar Petition to Require Additional Information and the *News Corp. Decl.* were made part of the record of this proceeding.

¹⁰ Companies in which Liberty holds a minority interest include Discovery Communications (50%), OpenTV Corp. (46%), QVC (42%), Sprint PCS Group (19%), and USA Interactive (20%). Liberty also holds less than a one percent interest in the GMH tracking stock issued by GM. *See Liberty 10-K 2002 Annual Report* at I-5, I-21.

¹¹ *Id.* at I-21.

¹² *See News Corp. 20-F 2003 Annual Report* at 6; *see also* Fox Entertainment Group, Inc., SEC Form 10-K, Annual Report for the fiscal year ended June 30, 2003 at 1 (“*FEG 10-K 2003 Annual Report*”).

¹³ *See FEG 10-K 2003 Annual Report* at 20.

¹⁴ *Id.* at 1-10.

¹⁵ *See* Application, Volume I, F for a list of News Corp.’s national and regional cable programming interests in the United States.

¹⁶ *See News Corp. 20-F 2003 Annual Report* at 18.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 19; Application at 10.

B. General Motors Corporation and Hughes Electronics Corporation

8. Hughes, a Delaware corporation, is a wholly owned subsidiary of GM, also a Delaware corporation.¹⁹ Hughes holds a number of Commission licenses and authorizations directly or through its wholly- or majority-owned subsidiaries.²⁰ Hughes' wholly-owned subsidiaries include both DirecTV, the parent company of DirecTV Enterprises, LLC, and United States Satellite Broadcasting Company, Inc., both Commission DBS licensees.²¹ DirecTV currently provides service to U.S. consumers from seven DBS satellites using 32 channels at 101° W.L. orbital location, three channels at 110° W.L. orbital location, and 11 channels at 119° W.L. orbital location.²² In the United States, DirecTV, together with certain independent distributors, have approximately 11.9 million DBS subscribers.²³ HNS also is a wholly-owned subsidiary of Hughes and holds a number of authorizations for transmit/receive earth stations and VSAT networks for use of frequencies in the C- and Ku-bands, as well as authorizations for the construction, launch and operation of the Ka-band SPACEWAY Satellite System.²⁴ Hughes also indirectly holds an approximately 81% economic and voting interest in PanAmSat, a publicly traded Delaware corporation and the corporate parent of PanAmSat Licensee Corp., a Commission licensee that holds authorizations to operate fixed satellite service systems using the C- and Ku-bands, as well as authorizations for numerous earth stations which are licensed to transmit and receive frequencies in the C- and Ku-bands.²⁵

¹⁹ GM has issued a publicly traded tracking common stock (GM Class H common stock) designed to provide shareholders with financial returns based on the economic performance of the business and assets of GM's wholly-owned Hughes subsidiary. See General Motors Corp., SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 ("*GM 10-K 2002 Annual Report*"); see also Hughes Electronic Corp., SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 ("*Hughes 10-K 2002 Annual Report*").

²⁰ A complete list of licenses and authorizations held by Hughes and subject to this transfer of control Application is set forth in the Application, Volume I, A.

²¹ See *Hughes 10-K 2002 Annual Report* at 3, 85.

²² See *Tempo Satellite Inc. and Hello Enterprises, Inc.*, 14 FCC Rcd 7946 (IB 1999) ("*Tempo-Hello Order*"); see also *Hello Enterprises, Inc.*, 7 FCC Rcd 2728 (IB 1992) and 7 FCC Rcd 6597 (IB 1992).

²³ Of these, approximately 10.3 million subscribe directly to DirecTV, while the remainder subscribe through the National Rural Telecommunications Cooperative ("NRTC"). See Hughes Electronic Corp., SEC Form 10-Q, Quarterly Report for the period ending Sep. 30, 2003 at 32, 37 ("*Hughes 10-Q September 2003 Report*"). Hughes also has an interest in direct-to-home ("DTH") and other satellite services in several foreign countries. See *Hughes 10-K 2002 Annual Report* at 3-4. Licenses for the services provided in foreign countries, however, are not part of the proposed transaction. See Application at 6, n.12.

²⁴ See *Hughes 10-K 2002 Annual Report* at 4.

²⁵ See PanAmSat Corp., SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 at 2 ("*PanAmSat 10-K 2002 Annual Report*"); see also *Hughes 10-K 2002 Annual Report* at 4. See *Hughes Communications, Inc.*, 12 FCC Rcd 7534 (1997). With the exception of six satellite earth station licenses held by PanAmSat, none of the licenses controlled by Hughes is a common carrier or broadcast radio license. See Application at 5, n.7. The Commission granted PanAmSat's applications to remove the common carrier designation from its earth station licenses earlier this year. See FCC Public Notice, Report No. SES-00506 (rel. Jun. 11, 2003) (notice of grant of applications SES-MOD-20030425-00533; SES-MOD-20030425-00534; SES-MOD-20030425-00537); FCC Public Notice, Report No. SES-00510 (rel. Jun. 25, 2003) (notice of grant of applications SES-MOD-20030425-00535 and SES-MOD-20030425-00536; FCC Public Notice, Report No. SES-00514 (rel. Jul. 9, 2003) (notice of (continued....)

C. The Proposed Transaction

9. The transaction will be accomplished in two parts. GM will split off Hughes and divest its interest in Hughes such that Hughes will become a separate and independent company. As a result of these and several related transactions, News Corp. will own a 34% interest in Hughes, and will become the largest single holder of Hughes stock. Three GM employee benefit trusts managed by an independent trustee will own a combined approximately 20% interest in Hughes, and the remaining 46% interest in Hughes will be held by the general public.²⁶

10. *The Split-Off of Hughes.*²⁷ Hughes is currently part of GM. GM has issued a tracking stock, GM Class H common stock (“GMH shares”) to investors who wish to “invest” in Hughes. The GMH shares are held by the public and are traded on the New York Stock Exchange (“NYSE”). The total number of GMH shares issued and outstanding as of the date of the Application represented an approximate 80.1% indirect economic interest in the financial performance of Hughes, the largest block of which is held by three GM employee benefit trusts.²⁸ GM itself owns all of the common stock of Hughes, holds all of Hughes’ voting power, and retains the remaining approximately 19.9% economic interest in Hughes.²⁹ As one of the first steps of the proposed transaction after the payment by Hughes to GM of a \$275 million dividend, GM will distribute to the holders of GMH shares new shares of Hughes common stock in exchange for the outstanding GMH shares – on a share-for-share basis.³⁰ GM’s 19.9% interest in Hughes will be represented by Hughes Class B common stock.³¹

11. *The Stock Purchase.*³² Simultaneous with the Hughes split-off, News Corp. will purchase GM’s approximately 19.9% interest in Hughes for \$14 per share³³ payable in cash, or, at News Corp. election, up to 20% of the total amount may be paid to GM in News Corp. preferred limited voting ordinary American Depository Receipts (“ADRs”).³⁴

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grant of SES-MOD-20030425-00532). PanAmSat also has notified the Commission of discontinuance of service under its inactive section 214 authorizations. See Application at 5, n.7; FCC Public Notice, 18 FCC Rcd 10552 (2003) (public notice of PanAmSat’s intent to surrender authorizations ITC-214-19980102-00004, ITC-93-236, ITC-95-579, ITC-85-221 and ITC-85-069).

²⁶ For details of the proposed transaction, see Application, Volume II, which includes the Separation Agreement, Merger Agreement, and Stock Purchase Agreement; see also Application at 10.

²⁷ See Application, Volume II, Separation Agreement.

²⁸ See Application at 11.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Application, Volume II, Stock Purchase Agreement.

³³ This will amount to approximately \$3.8 billion, subject to adjustments as described in the Application.

³⁴ See Application at 11.

12. *The Merger.*³⁵ News Corp. will form a new subsidiary specially created to merge with Hughes (“merger subsidiary”). Immediately following the split-off and stock purchase described above, the merger subsidiary will merge with and into Hughes, with Hughes being the surviving corporation.³⁶ In connection with the merger, News Corp. will acquire from the former GMH shareholders an additional 14.1% of Hughes for \$14 per share payable at News Corp.’s election in the form of News Corp. preferred ADRs, cash, or a combination of preferred ADRs and cash.³⁷ As a result of the merger, each former GMH shareholder will receive for each of their Hughes shares owned, consideration of which approximately 82.4% will consist of equity in Hughes and 17.6% will consist of News Corp. preferred ADRs and/or cash.³⁸ Automatically upon consummation of the merger, the Hughes Class B common stock acquired by News Corp. from GM will be converted on a share-for-share basis into Hughes common stock with no class. The consequence of these transactions is that after the merger, News Corp. will hold 34% of Hughes common stock and the former GMH shareholders will hold 66% of Hughes common stock.³⁹ Immediately following the merger, the shares of Hughes acquired by News Corp. will be transferred to FEG or a wholly-owned subsidiary of FEG for a combination of a promissory note and stock in FEG. The acquisition of this stock will increase News Corp.’s ownership interest in FEG, currently 80.6%, to approximately 82%.⁴⁰

13. *The Resulting Ownership and Management Structure.*⁴¹ As a result of the proposed transactions, Hughes will become an independent company incorporated in the United States with a single class of publicly traded common stock. News Corp., through its FEG subsidiary, will control the single largest block of shares in Hughes with a 34% interest. The remaining 66% interest in Hughes will be held by the former owners of GMH shares. Of this public shareholding, trusts established under various GM employee benefit plans will hold, in the aggregate, an approximately 20% interest.⁴² The United States Trust Company of New York (“US Trust”) serves as the independent trustee of each of those trusts with respect to such shares, and is therefore expected to initially hold, in the aggregate, approximately 20% of the voting power of Hughes common stock. Subject to its fiduciary duties as trustee, US Trust will have sole discretion in exercising those voting rights. The remaining shares will be widely held by the public. Hughes will continue to own indirectly approximately 81% of the shares of PanAmSat. After the transaction, GM will no longer hold any shares of Hughes common stock.⁴³

³⁵ See Application, Volume II, Merger Agreement.

³⁶ See Application at 12.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Application, Volume I, D, Hughes Simplified Ownership Structure of FCC Licenses (Post-Transaction), Principal Ownership List, Officers and Board of Directors.

⁴² See Application at 12.

⁴³ *Id.* at 13.

14. The Applicants state that, after the closing of the transaction, Hughes' board of directors will consist of 11 members, of which six will be independent.⁴⁴ The parties have agreed upon an initial slate of directors, all of whom are U.S. citizens and include K. Rupert Murdoch as chairman of the board and Chase Carey as CEO.⁴⁵ The board will have an Audit Committee comprised entirely of independent directors. Among its other functions, the Audit Committee will review and approve all related-party transactions in such amounts and related to such matters as the Audit Committee determines. Accordingly, because News Corp. and its programming vendor subsidiaries would be considered related parties, any transaction they might enter into with Hughes or DirecTV may be subject to review and approval by the Audit Committee.⁴⁶ No single shareholder will have a *de jure* controlling interest in the company either through a majority interest in voting stock or majority representation on the board. Because News Corp. will indirectly control a 34% interest in Hughes and its former employee will be CEO, News Corp., for purposes of the Communications Act, will exercise *de facto* control over Hughes.

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

15. The Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of licenses from GM to News Corp. will serve the public interest, convenience, and necessity.⁴⁷ The public interest standard involves a balancing of potential public interest harms of the proposed transaction and the potential public interest benefits.⁴⁸ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.⁴⁹

16. Our public interest evaluation under Section 310(d) necessarily encompasses the "broad aims of the Communications Act,"⁵⁰ which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and

⁴⁴ *Id.*

⁴⁵ There is no corporate governance mechanism that ensures that News Corp. will continue to have four representatives on the board, or that Mr. Murdoch and Mr. Carey will continue to hold the position of chairman and CEO, respectively. See Application at 13, n.23.

⁴⁶ *Id.* at 13.

⁴⁷ 47 U.S.C. § 310(d).

⁴⁸ See, e.g., *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp. (Transferors) to AT&T Comcast Corp. (Transferee)*, 17 FCC Rcd 23246, 23255 (2002) ("*Comcast-AT&T Order*"); see also *EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferees)*, 17 FCC Rcd 20559, 20574 ("*EchoStar-DirecTV HDO*").

⁴⁹ See, e.g., *Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20574. If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, Section 309(e) of the Act requires that we designate the application for hearing. 47 U.S.C. § 309(e).

⁵⁰ *Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575.

accelerating private sector deployment of advanced services.⁵¹ To apply our public interest test, then, we must determine whether the transaction violates our rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal communication policy. That policy is shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.⁵²

17. Our determination of the competitive effects of the proposed transaction under the public interest standard is not limited by traditional antitrust principles.⁵³ The Commission and the Department of Justice (“DOJ”) each have independent authority to examine communications transactions involving mergers and acquisitions, but the standards governing the Commission’s review differ from those of DOJ.⁵⁴ The review conducted by DOJ is pursuant to Section 7 of the Clayton Act, which prohibits transactions that are likely to substantially lessen competition in any line of commerce.⁵⁵ The Commission, on the other hand, is charged with determining whether the transaction serves the broader public interest.⁵⁶

⁵¹ See 47 U.S.C. §§ 157 nt, 254, 332(c)(7), Telecommunications Act of 1996, Preamble; *Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821; cf. 47 U.S.C. §§ 521(4), 532(a).

⁵² See, e.g., *MCI Telecommunications Corporation and EchoStar 110 Corporation*, Order and Authorization, 16 FCC Rcd 21608 (1999) (quoting *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160 at ¶ 14 (1999) (“*AT&T-TCI Order*”)).

⁵³ See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575 (citing *Satellite Business Systems*, 62 F.C.C.2d 997, 1088 (1977) *aff’d sub nom United States v. FCC*, 652 F.2d 72 (DC Cir., 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies “to analyze proposed mergers under the same standards that the Department of Justice . . . must apply”)).

⁵⁴ See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575; *AT&T-TCI Order*, 14 FCC Rcd at 3168-69.

⁵⁵ 15 U.S.C. § 18.

⁵⁶ For example, under our Section 310(d) public interest analysis, we consider whether the transaction is consistent with the Commission’s policies to advance diversity. It has long been a basic tenet of national communications policy that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972). Our public interest analysis may also consider whether the proposed transfer of control will affect the quality of communications services or will result in the provision of new or additional services to consumers (see *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821); whether the applicant has the requisite “citizenship, character, financial, technical, and other qualifications” to hold a Commission license (see, e.g., 47 U.S.C. §§ 310(d) and 308(b)); and we may, in appropriate cases, take foreign ownership into account to determine whether there are public interest harms resulting from foreign investment in Title III licensees. This consideration is in addition to our review of foreign ownership that may otherwise be required under Section 310(a) and (b) of the Act. See, e.g., *Orbital Communications Corporation and ORBCOMM Global, L.P. (Assignors) and ORBCOMM License Corp. and ORBCOMM LLC (Assignees)*, 17 FCC Rcd 4496, 4506-07 (IB 2002) (“*Orbcomm Order*”). Finally, where necessary, we may also consider whether the transaction raises issues of national security, law enforcement, foreign policy and trade policy, including any such concerns that may be raised by the Executive Branch. See *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Service in the United States*, 12 FCC Rcd 24094, 24170 (1997) (“*DISCO II Order*”).

IV. COMPLIANCE WITH COMMUNICATIONS ACT AND COMMISSION RULES AND POLICIES

A. Licensing Qualifications

18. *Background.* As a threshold matter, we must determine whether the Applicants meet the requisite qualifications under the Act and our rules.⁵⁷ Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”⁵⁸ No issues have been raised in this case that would require us to re-evaluate the basic qualifications of Hughes, the transferor, and we thus find that Hughes is a qualified transferor. As to the qualifications of the transferee, Section 310(d) requires that the Commission consider the qualifications of the proposed transferee as if the transferee were applying for the license directly under Section 308 of the Act.⁵⁹ Therefore, our review of the transferee, News Corp., includes examination of whether News Corp. has the requisite “citizenship, character, and financial, technical, and other qualifications” that we require of all applicants for a Commission license.⁶⁰

19. *Position of Parties.* EchoStar is the only party that challenges News Corp.’s qualifications to be a Commission licensee on the basis of character. EchoStar’s assertions relate to a pending criminal investigation, as well as pending civil litigation cases, filed against NDS Group, plc. (“NDS”), a company that is 79% owned by News Corp.⁶¹ EchoStar asserts that NDS is reportedly the subject of a criminal investigation by the U.S. Attorney General’s office for, among other things, the willful violation of criminal statutes outlawing the circumvention of disabling of encryption technology (*i.e.*, hacking).⁶² This investigation, according to EchoStar, may possibly lead to criminal indictments resulting in a felony conviction that could implicate the Commission’s character policy as to News Corp.’s qualifications.⁶³

20. EchoStar also claims that NDS is the defendant in civil law suits brought by EchoStar, Canal+ (Vivendi Universal), DirecTV, and EchoStar and NagraStar L.L.C. (“NagraStar”).⁶⁴ According to EchoStar, these lawsuits involve allegations of, *inter alia*, willful hacking of the security functions of a number of MVPD platforms; unfair competition in the provision of mass media-related services;

⁵⁷ 47 U.S.C. § 310(d).

⁵⁸ See 47 U.S.C. §§ 310(d) and 308.

⁵⁹ See 47 U.S.C. § 308.

⁶⁰ News Corp., through its subsidiaries, already holds Commission licenses under Title III. See, e.g., *Applications of UTV of San Francisco, Inc., et al., (Assignors) and Fox Television Stations, Inc. (Assignee) For Consent to the Assignment of Licenses for Stations KBHK-TV, San Francisco, CA, et al.*, 16 FCC Rcd 14975 (2001) (“*UTV of San Francisco Order*”).

⁶¹ EchoStar Petition at 50-57. See also ¶ 7, *supra*.

⁶² EchoStar Petition at 50-52. EchoStar asserts that the Attorney General’s investigation involves criminal and civil liability under the Digital Millennium Copyright Act and related statutes.

⁶³ *Id.*

⁶⁴ EchoStar Petition at 50, 51, 54. EchoStar notes that Canal + (Vivendi Universal) recently settled its lawsuit against NDS for willful hacking of its encryption software, unfair competition, and violations of the Communications Act of 1934. *Id.* at 55.

corporate sabotage and satellite signal piracy; violations of the California unfair competition statute, the Digital Millennium Copyright Act (“DMCA”), and the Communications Act of 1934; breach of contract, fraud, breach of warranty and misappropriation of trade secrets.⁶⁵

21. EchoStar argues that the pending federal criminal investigation and civil litigation cases involve matters that should be of paramount concern to the Commission.⁶⁶ In addition, EchoStar maintains that a possible finding that NDS has engaged in such alleged activities would be highly relevant to the application of the Commission’s character policy to News Corp.’s qualifications.⁶⁷ Thus, EchoStar submits that the Commission should put the current proceeding on hold while it undertakes its own investigation of these factual allegations⁶⁸ or at least await the outcome of the criminal investigation.⁶⁹ EchoStar surmises that, in the alternative, should the U.S. Attorney General’s investigation result in a felony conviction, the Commission would be faced with an extremely burdensome license revocation proceeding.⁷⁰ Finally, EchoStar asserts that News Corp. failed to report the criminal investigation of NDS’s activities on its FCC Form 312 Application in this proceeding even though these facts are directly relevant to the Commission’s analysis of its qualifications.⁷¹

22. In response, the Applicants point out that EchoStar took the opposite position on the relevance of pending such proceedings just last year when its own qualifications were challenged in connection with its plan to merge with Hughes, based on its alleged failure to engage in collective bargaining and other labor law concerns.⁷² The Applicants point out that in that case, the Commission held that any “unadjudicated non-FCC violations” as to EchoStar “should be resolved by the governmental agency with proper jurisdiction.”⁷³

23. *Discussion.* The Commission has long held that character qualifications of an applicant or licensee are relevant to the Commission’s public interest analysis and that an applicant’s or licensee’s willingness to violate other laws, and in particular to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies. To this end, the Commission has determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to

⁶⁵ *Id.*

⁶⁶ EchoStar Petition at 51.

⁶⁷ *Id.* at 52.

⁶⁸ *Id.* at 56-57.

⁶⁹ EchoStar contends that the Commission has repeatedly stayed its hand to await the result of proceedings that implicate issues key to the assessment of an applicant’s character. *Id.*

⁷⁰ *Id.* at 56.

⁷¹ *Id.* at 57 (citing FCC Form 312, Questions 39, 37).

⁷² Applicants’ Reply at 77.

⁷³ *Id.* (citing *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20579).

governmental units; and (3) violations of antitrust or other laws protecting competition.⁷⁴ The Commission has also stated that it will consider non-FCC related misconduct of the licensee's or applicant's parent or related subsidiary where there is a sufficient nexus between the licensee or applicant and the parent corporation or a related subsidiary.⁷⁵ Further, the Commission has used its character policy in the broadcast area as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings.⁷⁶

24. We do not agree with EchoStar that the alleged pending federal criminal investigation and civil cases against NDS warrant disqualification of News Corp. on the basis of character. Unadjudicated non-FCC violations should be resolved by a court with proper jurisdiction and should not be pre-judged by our processes.⁷⁷ Because the investigation and civil cases cited by EchoStar are pending matters, they are irrelevant to News Corp's character qualifications under the Commission's long-held position that there "must be an ultimate adjudication before an appropriate trier of fact, either by a government agency or court, before we will consider the activity in our character determinations."⁷⁸

25. We also do not agree with EchoStar that we should hold this proceeding in abeyance in order to undertake a separate investigation into the matters alleged, or await the outcome of the criminal investigation by the Attorney General's Office.⁷⁹ The cases cited by EchoStar do not persuade us otherwise.⁸⁰ Both of the cases cited by EchoStar involve previous findings by an appropriate trier of fact of misconduct on behalf of the applicant's or licensee's parent.⁸¹ In those cases, the Commission was justified in its decision to delay resolution of the related license applications to allow consideration of the adjudicated misconduct in its license review process. The instant case involves allegations concerning a pending criminal investigation and various pending civil lawsuits, none of which have been finally

⁷⁴ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1209-10 (1986) ("Character Policy Statement 1986"), modified, 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991), modified in part, 7 FCC Rcd 6564 (1992) (collectively "Broadcast Licensing Character Qualifications").

⁷⁵ See, e.g., *Broadcast Licensing Character Qualifications*, 7 FCC Rcd at 6567, ¶ 16. As a general matter, non-FCC misconduct by parent or related subsidiary is reportable if (a) there is a close ongoing relationship between the parent (or related subsidiary) and the licensee; (b) the two have common principals; and (c) the common principals are actively involved in the operations of the licensee. *Id.* Misconduct directly involving common principals is reportable where the common principal of the licensee or applicant was in control of the other entity or was adjudicated to be directly involved in the other entity's misconduct. *Id.* n.51.

⁷⁶ See *Broadcast Licensing Character Qualifications*, 7 FCC Rcd at 6567; see also *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n.14 (1988).

⁷⁷ See *Character Policy Statement 1986*, 102 F.C.C.2d at 1205.

⁷⁸ *Id.*

⁷⁹ See EchoStar Petition at 56-57.

⁸⁰ See EchoStar Petition at 51, 56-57 (citing *Continental Satellite Corporation*, 4 FCC Rcd 6292, 6299 (1989) ("Continental Order"); *RKO General, Inc.*, 3 FCC Rcd 5057, 5058 (1988) ("RKO Order"), appeal dismissed sub nom. *Los Angeles Television v. FCC*, No. 88-1693 (D.C. Cir. Aug. 4, 1989)).

⁸¹ See *Continental Order*, 4 FCC Rcd at 6298 (citing *Central Telecommunications, Inc. v TCI Cablevision*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied* 480 U.S. 910 (1987); and *RKO Order*, 3 FCC Rcd 5057, 5058).

adjudicated. As we do not typically give consideration to pending matters not involving FCC-related misconduct in reaching character determinations, it would be inappropriate to rely on these pending matters as a basis for delaying resolution of the instant Application.⁸² Indeed, holding this proceeding in abeyance on the grounds advocated by EchoStar would only create uncertainty, delay, and expense that would disserve the public interest.

26. Finally, EchoStar's assertion that News Corp. failed to report the criminal investigation of NDS's activities on FCC Form 312 lacks merit. The Commission's rules do not impose upon applicants a requirement to report *pending* criminal investigations,⁸³ nor does the application filed in this proceeding, FCC Form 312, require specific disclosure of *pending* criminal matters *prior* to conviction.⁸⁴ The pending matters referred to in question 39 of FCC Form 312 relate to cases where there has been a conviction (as may be listed in response to question 37) or adjudication of guilt (as may be listed in response to question 38) of the party to the application or of a party directly or indirectly controlling the applicant.⁸⁵

B. Foreign Ownership

27. *Background.* Generally, foreign ownership interests in Title III licensees are governed by Section 310(a) and (b) of the Act.⁸⁶ The policies and rules implementing these foreign ownership provisions with respect to satellite services are largely articulated in the *DISCO II Order*, and support the Commission's policy objectives of promoting competition in the U.S. market and achieving a more competitive global satellite market.⁸⁷ The *DISCO II Order* and a companion decision, the *Foreign Participation Order*,⁸⁸ are the initial Commission decisions implementing market opening commitments made by the United States in the World Trade Organization ("WTO") Agreement on Basic Telecommunications Services ("WTO Basic Telecom Agreement"),⁸⁹ and remain central to the Commission's overall foreign ownership policy today.

⁸² See *Character Policy Statement 1986*, 102 F.C.C.2d 1205.

⁸³ See 47 C.F.R. § 1.65.

⁸⁴ See *Lockheed Martin Corp., et al.*, 17 FCC Rcd 13160, 13166 ¶ 16 (2002). See also Application for Space and Earth Station Authorizations For Transfer of Control or Assignment, FCC 312 Main Form ("FCC Form 312"), which requires that an applicant or any party directly or indirectly controlling the applicant inform the Commission of a conviction of a felony in any state or federal court (question 37) or a court's final adjudication of unlawful monopolization or unfair methods of competition (question 38). See FCC Form 312, Questions 37, 38.

⁸⁵ See *Lockheed Martin Corp., et al.*, 17 FCC Rcd 13160, 13166 ¶ 16 (2002). Question 39 of FCC Form 312 asks whether the applicant, or any person directly or indirectly controlling the applicant, is currently a party in any pending matter referred to in the preceding two items (*i.e.*, questions 37 and 38). See FCC Form 312, Question 39.

⁸⁶ 47 U.S.C. § 310(a) and (b).

⁸⁷ See *DISCO II Order*, 12 FCC Rcd at 24097.

⁸⁸ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, 23894 (1997) (*Foreign Participation Order*); *Order on Reconsideration*, 15 FCC Rcd 18158 (2000).

⁸⁹ This agreement, which became effective on January 1, 1998, is centered on the principles of open markets, private investment, and competition. See *DISCO II Order*, 12 FCC Rcd at 24096.

28. In the *DISCO II Order*, the Commission implemented a number of measures to foster competition among multiple satellite service providers, including adoption of a rebuttable presumption that entry by WTO Member satellite systems will promote competition in the United States.⁹⁰ The Commission, however, explicitly did not apply this open entry presumption to satellites providing DBS, Direct-to-Home (“DTH”), and Digital Audio Radio Services (“DARS”), as these services were not covered by commitments made as part of the WTO Basic Telecom Agreement (*i.e.*, “non-WTO covered services”).⁹¹ The Commission determined that for all requests to provide non-WTO covered services to the United States using non-U.S. licensed satellites, an evaluation was required to determine whether effective competitive opportunities (“ECO”) for U.S. satellite systems were available in the country in which the foreign satellite was licensed (“ECO-Sat test”).⁹²

29. *Position of Parties.* EchoStar contends that the Commission should determine if Australia provides effective competitive opportunities to U.S. companies to provide the same service News Corp. would be authorized to provide in the United States.⁹³ EchoStar maintains that the underlying rationale for applying the *DISCO II* ECO-Sat test to the provision of non-WTO covered services, *i.e.*, “to encourage open markets for these services and to avoid anti-competitive conduct in the U.S. market,” holds whether the foreign company is attempting to gain entry to the U.S. market through a foreign licensed satellite or through acquisition.⁹⁴ Accordingly, EchoStar argues the Commission should apply the ECO-Sat test in this case.⁹⁵

30. The Applicants respond that the ECO-Sat test is wholly irrelevant to this proceeding. They assert that the ECO-Sat test applies only to parties “requesting authority to operate with a non-U.S. licensed space station to serve the United States.”⁹⁶ Thus, by its terms, Applicants claim the ECO-Sat test does not apply to foreign investments in U.S. licensed DBS providers. They submit that this position is confirmed in the recent *SES-DTH Order*.⁹⁷ Further, the Applicants contend that application of the ECO-

⁹⁰ See *DISCO II Order*, 12 FCC Rcd at 24098. Opposing parties have the burden to rebut the presumption by showing that granting the application would cause competitive harm in the U.S. satellite market. *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See EchoStar Petition at 46-50. EchoStar submits Australia is one of News Corp.’s home markets because it is incorporated in Australia and is a 25% owner of FOXTEL, Australia’s leading subscription television provider. *Id.* at 47.

⁹⁴ *Id.* at 47, quoting *DISCO II Order*, 12 FCC Rcd at 24137, ¶ 98.

⁹⁵ *Id.* EchoStar argues that News Corp. would fail both the *de jure* and *de facto* components of the ECO-Sat test with respect to Australia. EchoStar claims *de jure* barriers exist due to statutory limits on U.S. investments for subscription television broadcasting licenses and programming expenditure requirements. EchoStar claims *de facto* barriers exist due to a content-sharing agreement between an Australian News Corp. affiliate and a major Australian subscription television company. *Id.* at 47-50.

⁹⁶ Applicants’ Reply at 68 (citing 47 C.F.R. § 25.137(a); and *DISCO II*, 12 FCC Rcd at 24136). See also Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (Sept. 5, 2003) (“Applicants’ Sept. 5, 2003 Ex Parte”) at 1-2.

⁹⁷ See *SES AMERICOM, Inc. Applications for Modification of Fixed-Satellite Service Space Station Licenses and Columbia Communications Corp.*, 18 FCC Rcd 18598 (IB 2003) (“*SES-DTH Order*”); see also Applicants’ Sept. 5, 2003 Ex Parte at 1-2.

Sat test to U.S. licensed systems would not make any sense as a matter of policy, especially in view of the Commission's 2002 DBS Report and Order,⁹⁸ which found that there was "no public policy justification for imposing foreign ownership restrictions on DBS providers," in part because such restrictions would prevent DBS from achieving a "more equal regulatory basis with cable," which is not subject to any foreign ownership restrictions.⁹⁹ Alternatively, the Applicants argue that even if the ECO-Sat test did apply, the Commission should find that there is no foreign ownership issue in this proceeding because News Corp.'s "home market" is the United States.¹⁰⁰

31. *Discussion.* Because of the foreign ownership interests presented in this case,¹⁰¹ we first consider the applicability of Section 310(a) and (b) of the Act.¹⁰² We find that neither provision applies to the proposed transaction. No foreign government or its representative would hold any of the subject licenses. Thus, our review does not fall under Section 310(a) of the Act, which prohibits "any foreign government or the representative thereof" from holding a license.¹⁰³ Further, the Application before us involves the transfer of control of earth station licenses, space station licenses for provision of FSS and DBS service, and wireless licenses, all of which are held, and are to be transferred, on a non-common carrier basis.¹⁰⁴ Thus, we find that the proposed transaction does not involve a "broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license," and the statutory provisions of Section 310(b) of the Act do not apply.¹⁰⁵

32. However, in the 2002 DBS Report and Order, the Commission stated that although it would not impose additional foreign ownership rules on providers of DBS subscription services beyond those

⁹⁸ See *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11311, 11348 (2002) ("2002 DBS Report and Order").

⁹⁹ Applicants' Reply at 68, citing 2002 DBS Report and Order, 17 FCC Rcd at 11348.

¹⁰⁰ See Applicants' Sept. 5, 2003 Ex Parte at 2-4.

¹⁰¹ News Corp. is incorporated under the laws of South Australia with securities that are publicly traded on both the New York Stock Exchange and the Australian Stock Exchange. See Application at 7.

¹⁰² See 47 U.S.C. § 310(a) and (b).

¹⁰³ See 47 U.S.C. § 310(a).

¹⁰⁴ See Application at 5 n.7 & 16 n.30. Subscription DBS service is a "non-broadcast" service and where subscription DBS service is provided on a non-common carrier basis Section 310(b) of the Act does not apply. See *Subscription Video Order*, 2 F.C.C.2d 1001, 1007 (1987), *aff'd.*, *National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988); *Subscription Video Order Services*, 4 FCC Rcd 4948 (1989); *MCI Telecommunications Corp.*, 11 FCC Rcd 16275 (IB 1996); *Application of MCI Telecommunications Corp., et. al.*, 14 FCC Rcd 11077 (IB 1999).

¹⁰⁵ Because section 310(b) does not apply to the proposed transaction, we need not consider whether News Corp.'s acquisition of a controlling interest in the subject licenses is consistent with the Commission's decision in *Fox Television Stations* or is otherwise consistent with the public interest under section 301(b)(4) of the Act. See *Fox Television Stations, Inc.*, Second Memorandum Opinion and Order, 11 FCC Rcd 5714 (1995) (*Fox II*) (subject to certain limitations, allowing FTS, as presently structured, to make future indirect investments in broadcast licensees notwithstanding News Corp.'s ownership of FTS in excess of the 25 percent benchmark for indirect foreign ownership set by section 310(b)(4)). See also *UTV of San Francisco Order*, 16 FCC Rcd at 14977-80.

already required by Section 310(a) and (b) of the Act,¹⁰⁶ in deciding questions of access to the U.S. market for provision of DBS service through use of non-U.S. licensed satellites, the Commission concluded that it would apply the requirements set forth in the *DISCO II Order*.¹⁰⁷ As stated earlier, the *DISCO II Order* requires that the Commission apply the ECO-Sat test to all requests to access the U.S. market for the provision of non-WTO covered services (*i.e.*, DTH, DBS and DARS) using non-U.S. licensed satellites.¹⁰⁸ Thus, we note that if News Corp. were seeking to operate a foreign-licensed satellite to provide DBS service in the United States, we would not permit it to do so until we conducted an ECO-Sat analysis.¹⁰⁹ The proposed transaction, however, does not involve a request to use non-U.S. licensed satellites but rather a request to acquire U.S. licensed satellites to deliver DBS service to the U.S. market. As such, the instant transaction does not fall within the analytic framework adopted by the Commission in the *DISCO II Order* and, thus, application of the ECO-Sat test is not required in this case.¹¹⁰

33. Regardless of the applicability of Section 310(a) and (b) of the Act or the ECO-Sat test, the Commission maintains a responsibility pursuant to Section 310(d) to examine and make a finding as to whether a specific transfer or assignment involving Title III licenses will serve the public interest, convenience, and necessity.¹¹¹ Thus, consistent with our responsibilities under Section 310(d), where appropriate, our review considers whether public interest harms are likely to result from foreign investment in Title III licensees.¹¹² Therefore, in this case, we consider whether foreign investment in a U.S. licensee is likely to distort competition in any relevant U.S. market. We also consider whether such foreign investment will further competition in the U.S. market and whether efficiencies and other public interest benefits are likely to result. If we find any harms resulting from foreign investment, these harms will be taken into consideration in the overall balancing of the potential public interest harms and benefits of the proposed transaction.¹¹³

34. EchoStar argues that before granting the instant Application, the Commission should be satisfied that Australia provides effective competitive opportunities to U.S. companies to provide the

¹⁰⁶ *2002 DBS Report and Order*, 17 FCC Rcd at 11346-48.

¹⁰⁷ *See 2002 DBS Report and Order*, 17 FCC Rcd at 11349.

¹⁰⁸ *See DISCO II Order*, 12 FCC Rcd at 24135.

¹⁰⁹ *See DISCO II Order*, 12 FCC Rcd at 24136. *See also Digital Broadband Applications Corp., Consolidated Application for Authority to Operate U.S. Earth Stations with a U.S.- Licensed Ku-Band FSS Satellite and Canadian-Licensed Nimiq and Nimiq 2 Satellites to Offer Integrated Two-Way Broadband Video and Data Service Throughout the United States*, 18 FCC Rcd 9455 (2003) (“*DBAC Order*”).

¹¹⁰ In addition, we note that the Commission has concluded that there is no public policy justification for imposing foreign ownership restrictions on DBS providers that are not subject to such restrictions under Section 310(b) of the Act. *See 2002 DBS Report and Order*, 17 FCC Rcd at 11348. Licensees using FSS satellites to provide subscription DTH service, an almost identical service to DBS, are not subject to foreign ownership restrictions. In addition, because cable operators also are not subject to foreign ownership restrictions, eliminating additional foreign ownership-licensing restrictions not otherwise required under the Act, allows DBS to compete on a more equal regulatory basis with cable operators. *Id.*

¹¹¹ 47 U.S.C. § 310(d).

¹¹² *See, e.g., Orbcomm Order*, 17 FCC Rcd 4507 ¶ 18; *SES-DTH Order*, ¶ 10.

¹¹³ *See Section IX, infra.*

same services News Corp. would be authorized to provide in the United States.¹¹⁴ We are not persuaded by EchoStar's arguments that there is a need in this case for the Commission to take steps to ensure that U.S. companies can compete effectively in Australia.¹¹⁵ The nature of our inquiry here focuses on whether the provision of Title III services by a U.S. licensee (with a controlling interest held by a foreign incorporated entity) would harm competition in the U.S. market. EchoStar's argument, at best, advances the position that U.S. licensees could be at a competitive disadvantage in the Australian market due to Australia's statutory and regulatory foreign ownership limitations on subscription television.¹¹⁶ EchoStar does not provide any evidence or arguments to show how Australia's requirements could cause competitive distortions or competitive harm in the U.S. market. For example, EchoStar does not argue or show how News Corp.'s investment could limit competitive choices for U.S. consumers; nor does EchoStar argue or show how the acquisition of a controlling interest in a U.S. licensee by News Corp. could result in increased concentration in the global market, and thereby cause competitive harm in the U.S. market. No evidence was provided, for example, that DirecTV, because of its relationship with News Corp., could provide DBS services to the U.S. market that a U.S.-owned operator could not provide. Based on our review of the record, we find that the proposed acquisition of Hughes by News Corp. is not likely to create competitive distortions in the U.S. market based upon News Corp.'s incorporation or activities in Australia.¹¹⁷

C. National Security, Law Enforcement, Foreign Policy and Trade Policy Concerns

35. As part of our public interest analysis, our review takes into consideration concerns relating to national security, law enforcement, foreign policy and trade policy that may present public interest harm, including any such issues raised by the Executive Branch.¹¹⁸ If the Executive Branch raises

¹¹⁴ EchoStar Petition at 47.

¹¹⁵ *Id.* at 46-50.

¹¹⁶ *Id.* at 48-50. In response to EchoStar's arguments, the Applicants submit that the Australian foreign ownership provisions are similar to the U.S. limitations imposed on direct foreign investment in U.S.-licensed broadcast and common carrier licensees under Section 310(b)(3) of the Act, and that under Australian law, there is no limit on or prohibition against foreign control of a subscription DTH licensee company. By contrast, the Applicants contend that under U.S. law, even indirect ownership in a broadcast or common carrier licensee is presumptively limited to no more than a non-controlling 25% interest absent authorization from the Commission to exceed that benchmark. Thus, Applicants state, that taken as a whole, the Australian subscription DTH market is at least as open to foreign investors as is the U.S. market. *See Applicants' Sept. 5 Ex Parte at 5, 6.*

¹¹⁷ According to the Applicants, News Corp. conducts its business activities principally in the United States, Continental Europe, the United Kingdom, Australia, Asia and the Pacific Basin. In addition, News Corp. states that it derives 7% of its operating income and 8% of its revenues from a combined Australian/Asian market, and has three members on its Board of Directors who are citizens of Australia and one member on the Executive Management Committee who is a citizen of Australia. *See Applicants' Sept. 5 Ex Parte at 2-4; see also Application, Attachment C.*

¹¹⁸ *See DISCO II Order*, 12 FCC Rcd at 24170-72. *See also, e.g., Lockheed Martin Global Telecommunications, Inc., et al.*, 16 FCC Rcd 20502, 20508-20510 ¶¶ 12, 16 (2001); *Orion*, 5 FCC Rcd at 4939 ¶ 20; *Application of General Electric Capital Corporation and SES Global S.A. for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214(a) and 310(d) of the Communications Act*, 16 FCC Rcd 17575, n.78 (2001); *TMI Communications and Company, L.P. and SatCom Systems Inc., File No. 647-DSE-P/L-98 et al*, 14 FCC Rcd 20798 at 20824 ¶ 57 (1999).

national security, law enforcement, foreign policy or trade policy concerns, we accord deference to its expertise on such matters.¹¹⁹ On November 25, 2003, the DOJ, and the Federal Bureau of Investigation (“FBI”), with the concurrence of the Department of Homeland Security (“DHS”) (collectively referred to as the “Executive Agencies”), filed a “Petition to Adopt Conditions to Authorizations and Licenses” (“Petition to Adopt Conditions”),¹²⁰ along with attachments in this proceeding.¹²¹

36. Specifically, in the Petition to Adopt Conditions, the Executive Agencies state that their ability to satisfy their obligations to protect the national security, to enforce the laws, and to preserve the safety of the public could be significantly impaired by transactions in which foreign entities will own or operate a part of the U.S. communications system, or in which foreign-located facilities will be used to provide domestic communications services to U.S. customers.¹²² The Executive Agencies note, that News Corp., the foreign entity acquiring control of Hughes (through its controlling interest in FEG), is organized under the laws of Australia.¹²³

37. According to the Executive Agencies, after discussions with the Applicants, the Executive Agencies concluded that the commitments set forth in the Hughes By-law Amendment, the Proposed Resolutions, and the Letter Agreement were adequate to ensure that the Executive Agencies and other entities with responsibility for enforcing the law, protecting the national security and preserving public safety can proceed in a legal, secure and confidential manner to satisfy these responsibilities.¹²⁴ Accordingly, DOJ and FBI, with the concurrence of DHS, advised the Commission that they have no objections to the grant of the Applicants’ transfer of control applications, provided that the Commission condition the grant of the transfer of control applications on (i) GM causing Hughes to adopt, and Hughes adopting, prior to the closing of the subject transaction, the Hughes By-law Amendment; (ii) the adoption by the Board of Directors of News Corp. of the Proposed Resolutions; and (iii) compliance by Hughes and News Corp., respectively, with the commitments set forth in the Hughes By-laws Amendment, the Proposed Resolutions, and the Letter Agreement.¹²⁵

¹¹⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23918-21.

¹²⁰ See Petition to Adopt Conditions to Authorizations and Licenses, MB Docket No. 03-124 (filed Nov. 25, 2003).

¹²¹ The attachments include Exhibit 1, Hughes Electronics Corporation, Amended and Restated By-laws (“Hughes By-law Amendment”); Exhibit 2, Proposed Resolution of the Board of Directors of The News Corporation Limited (“Proposed Resolutions”); and Exhibit 3, Letter Agreement, dated November 3, 2003, reached between Hughes and the Executive Agencies (“Letter Agreement”). See Petition to Adopt Conditions at 2. These exhibits are set forth in Appendix E of this Order and Authorization.

¹²² See Petition to Adopt Conditions at 4.

¹²³ The Executive Agencies also note that K. Rupert Murdoch, a United States citizen, directly and indirectly controls approximately a 16% equity/30% voting interest in News Corp. and that apart from Liberty Media Corporation, a Delaware corporation which according to the Applicants holds a purely passive interest in News Corp., there is no other shareholder with a greater than 10% interest in News Corp. *Id.* at 4-5.

¹²⁴ Appendix E to this Order and Authorization attaches the three exhibits as Exhibit 1(Hughes By-laws Amendment); Exhibit 2 (Proposed Resolutions); and Exhibit 3 (Letter Agreement).

¹²⁵ See Petition to Adopt Conditions at 5-6. See also Appendix E.

38. In assessing the public interest, we consider the record and accord the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.¹²⁶ As the Commission stated in the *Foreign Participation Order*, foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch.¹²⁷ In the context of this particular proceeding, we consider these concerns independent of our own separate analysis. Therefore, in accordance with the request of the Executive Agencies, in the absence of any objection from the Applicants, and given the discussion above, we condition our grant of the Applications on compliance with the following conditions: (i) GM causing Hughes to adopt, and Hughes adopting, prior to the closing of the subject transaction, the Hughes By-law Amendment; (ii) the adoption by the Board of Directors of News Corp. of the Proposed Resolutions; and (iii) compliance by Hughes and News Corp., respectively, with the commitments set forth in the Hughes By-laws Amendment, the Proposed Resolutions, and the Letter Agreement.¹²⁸

V. INTRODUCTION TO THE VIDEO PROGRAMMING AND MVPD MARKETS

A. Background

39. The proposed transaction involves the acquisition by News Corp., a major owner of both broadcast and cable video programming content and programming-related technologies, of a 34% interest in Hughes Electronics, owner of DirecTV, a DBS provider that is the second largest MVPD in the United States and the largest MVPD that has a national service footprint. News Corp. presently has no MVPD assets in the United States; its' primary domestic business is the provision of video programming to MVPDs in every area of the country. Similarly, Hughes currently does not participate in the video programming market as a programming supplier;¹²⁹ rather, its DirecTV subsidiary functions purchaser and distributor of multichannel video programming to subscribing customers.¹³⁰ By acquiring DirecTV, News Corp. immediately transforms itself from a supplier of video programming MVPDs to a vertically integrated MVPD competitor. News Corp. thus becomes a vertically integrated supplier of broadcast and cable video programming to all of its' MVPD competitors in every region of the country.

40. Applicants have alleged that a combination of economic forces, existing regulatory constraints and their own program access and program carriage commitments will suffice to protect competition and consumers against potential competitive harms arising from the transaction.¹³¹ Commenters and opponents argue, among other things, that News Corp.'s acquisition of a controlling

¹²⁶ See *Foreign Participation Order*, 12 FCC Rcd at 23919-21 ¶¶ 61-66.

¹²⁷ See *Foreign Participation Order*, 12 FCC Rcd at 23919 ¶ 62.

¹²⁸ See Appendix E. A complete list of all the conditions imposed on the Applicants is contained in Appendix F.

¹²⁹ Although Hughes does not supply programming content, it is involved in the provision of fixed satellite services ("FSS") through PanAmSat. Most distribution of video programming to MVPD service providers (and to over-the-air television broadcasters) is carried over FSS. PanAmSat is a significant provider of FSS services and is 81% owned by Hughes. The impact of the transaction on FSS is discussed at Section VI.C.4.e below.

¹³⁰ Hughes' only programming interest is a 5% passive equity interest in the Hallmark Channel. See Application at 46.

¹³¹ Application at 47-48; Applicants' Reply at iii-iv.

interest in the second largest MVPD will increase the incentive and ability of News Corp. to seek and obtain supra-competitive prices for its video programming services through retransmission consent negotiations for its local broadcast television station signals and in affiliate agreement negotiations for its regional sports cable networks. This, they contend, will increase rival MVPD costs, who will in turn seek to recover these increased costs through end-user rate increases, a result not foreclosed by either the program access or retransmission consent rules, or the Applicants' offered additional commitments.¹³² Before assessing these claims, we first provide some background on relevant Commission rules concerning the distribution of video programming, including our program access rules, program carriage rules, and the must-carry/retransmission consent requirements, and on economic theory concerning horizontal and vertical transactions. We then define the relevant upstream and downstream markets and consider whether the transaction is likely to have adverse competitive effects in those markets.

B. Applicable Regulatory Framework

1. Program Access Requirements

41. The program access provisions, contained in Section 628 of the Communications Act, were adopted as part of the Cable Television Consumer Protection and Competition Act of 1992.¹³³ At the time, Congress was concerned that most cable operators enjoyed a monopoly in program distribution at the local level.¹³⁴ Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.¹³⁵ Section 628 is intended to foster the development of competition to traditional cable systems by governing the access of competing MVPDs to cable programming services. DBS was among the technologies that Congress intended to foster through the program access provisions.¹³⁶ As a general matter, the program access rules prohibit a cable operator, a satellite cable programming vendor¹³⁷ in which a cable operator has an attributable interest, or a satellite broadcast programming vendor from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming or satellite broadcast programming to subscribers of consumers."¹³⁸ Thus, Congress in 1992 acknowledged that access to satellite cable programming was critical to ensure

¹³² See, e.g., ACA Comments at 7-23; Cablevision Comments at 8-30; CDD Comments; CFA Reply Comments at 3-12; Consumers Union Sept. 23, 2003 Ex Parte; EchoStar Petition at 11-39, 58-67; JCC Comments at 13-65; NAB Comments at 5-9, 15-26; NRTC Petition at 7-15; RCN Comments at 4-11; Pegasus Comments.

¹³³ Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

¹³⁴ H.R. Conf. Rep. No. 102-862, at 93 (1992).

¹³⁵ 1992 Cable Act § 2(a)(5).

¹³⁶ H.R. Rep. No. 102-628, at 165-66 (1992) (additional views of Messrs. Tauzin, Harris, Cooper, Synar, Eckart, Bruce, Slattery, Boucher, Hall, Holloway, Upton and Hastert).

¹³⁷ "Satellite cable programming" is video programming which is transmitted via satellite to cable operators for retransmission to cable subscribers. 47 C.F.R. § 76.1000(h). A "satellite cable programming vendor" is an entity engaged in the production, creation or wholesale distribution for sale of satellite cable programming. 47 C.F.R. § 76.1000(i).

¹³⁸ Communications Act § 628(b); 47 U.S.C. § 548(b).

competition and diversity in the satellite programming and MVPD markets by prohibiting permanent foreclosure of satellite cable programming and requiring non-discrimination in its provision by vertically integrated cable operators and satellite cable programming vendors. As required in the statute, the Commission, in 2002, examined the developments and changes in the MVPD marketplace in the ten years since the enactment of the program access statute.¹³⁹ The Commission concluded that the competitive landscape had changed for the better since 1992, but that vertically integrated programmers continued to have the incentive and ability to favor affiliated cable operators over other MVPDs.¹⁴⁰

42. The program access rules specifically prohibit cable operators, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite cable programming vendor from:

- Engaging in unfair acts or practices which hinder significantly or prohibit an MVPD from providing satellite cable programming to subscribers or consumers.¹⁴¹
- Discriminating in the prices, terms and conditions of sale or delivery of satellite cable programming.¹⁴²
- Entering into exclusive contracts with cable operators unless the Commission finds the exclusivity to be in the public interest.¹⁴³

43. Aggrieved entities can file a complaint with the Commission.¹⁴⁴ Remedies for violations of the rules may include the imposition of damages and the establishment of reasonable prices, terms and conditions for the sale of programming.¹⁴⁵ Broadcast programming is not subject to the program access rules.

44. The Commission's 2002 examination of whether the exclusivity prohibition should sunset placed substantial weight on whether, in the absence of the exclusivity prohibition, vertically integrated programmers would currently have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and program distributors using other technologies and, if they would, whether such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming.¹⁴⁶ Commission held that access to all vertically integrated satellite cable programming continues to be necessary in order for competitive MVPDs to remain viable in the

¹³⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12123 (2002) (“*Program Access Order*”).

¹⁴⁰ *Program Access Order*, 17 FCC Rcd at 12153.

¹⁴¹ 47 C.F.R. § 76.1001.

¹⁴² 47 C.F.R. § 76.1002(b).

¹⁴³ 47 C.F.R. § 1002(b)(4). The exclusivity prohibition sunsets on October 5, 2007, unless extended by the Commission. 47 C.F.R. § 1002(c)(6).

¹⁴⁴ 47 C.F.R. § 76.1003.

¹⁴⁵ 47 C.F.R. § 76.1003(g) and (h).

¹⁴⁶ *Program Access Order*, 17 FCC Rcd at 12130 ¶15.

marketplace.¹⁴⁷ The Commission further found that an MVPD's ability to provide service that is competitive with an incumbent cable operator is significantly harmed if denied access to "must have" vertically integrated programming for which there are no good substitutes, such as regional news and sports networks.¹⁴⁸ The Commission also found that vertically integrated programmers retain the incentive to favor their affiliated cable operators over competing MVPDs.¹⁴⁹ In that regard, the Commission found that cable operators continue to dominate the MVPD marketplace and that horizontal consolidation and clustering combined with affiliation with regional programming, have contributed to cable's overall market dominance.¹⁵⁰ In addition, the Commission determined that an economic basis for denial of access to vertically integrated programming to competitive MVPDs continues, and that such denial would harm such competitors' ability to compete for subscribers.¹⁵¹ The prohibition on exclusive contracts for satellite-delivered cable or satellite-delivered broadcast programming was therefore extended for five years, until October 5, 2007.¹⁵²

2. Program Carriage Rules

45. Our rules implementing section 616 of the 1992 Cable Act¹⁵³ prohibit all MVPDs from: (1) demanding a financial interest in any program service as a condition of carriage of the service on its system; (2) coercing any video programming vendor to provide exclusive rights as a condition of carriage; and (3) unreasonably restraining the ability a video programming vendor to compete fairly by discriminating on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions of carriage.¹⁵⁴ The program carriage rules also specify complaint procedures and remedies for violations of these requirements. Complaints may be brought by aggrieved video programmers or MVPDs.¹⁵⁵

¹⁴⁷ *Id.* at 12138 ¶ 32.

¹⁴⁸ *Id.* at 12125 ¶ 4.

¹⁴⁹ *Id.* at 12143 ¶ 45.

¹⁵⁰ *Id.* at 12125 ¶ 4.

¹⁵¹ *Id.*

¹⁵² *Id.* at 12124 ¶ 1.

¹⁵³ See 47 U.S.C. § 536(a). Congress enacted section 616 based on findings that some cable operators had required certain non-affiliated program vendors to grant exclusive rights to programming, a financial interest in the programming, or some other additional consideration as a condition of carriage on the cable system. *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 ¶ 1 (1993).

¹⁵⁴ See 47 C.F.R. § 76.1301; see also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 (1993).

¹⁵⁵ Section 76.1302 authorizes video programming vendors and MVPDs to file program carriage complaints with the Commission. 47 C.F.R. § 76.1302; see also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 ¶ 1 (1993). On reconsideration, the Commission amended 47 C.F.R. § 76.1302 to specifically afford standing to MVPDs aggrieved by carriage agreements between other MVPDs and programming vendors that violate section 616 of the 1992 Cable Act or the Commission's rules. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 4415, 4418-19 ¶ 24 (1994).

3. Must-Carry and Retransmission Consent

46. In adopting the mandatory carriage provisions of the 1992 Cable Act, Congress recognized the importance of local television broadcast stations as providers of free local news and public affairs programming.¹⁵⁶ Congress found that cable service was rapidly penetrating television households, and increasingly was competing with free over-the-air television for advertising dollars.¹⁵⁷ Congress recognized that television broadcast stations rely on advertising dollars to provide free over-the-air local service, and that competition from cable television posed a threat to the economic viability of television broadcast stations, and mandated cable carriage to ensure the continued economic viability of free local broadcast television.¹⁵⁸

47. Pursuant to these rules, commercial television broadcast station signals are carried by their local MVPDs pursuant to either mandatory carriage or retransmission consent.¹⁵⁹ For cable systems, a broadcast station is entitled to mandatory carriage (*i.e.* “must-carry”) on all cable systems within their local markets.¹⁶⁰ Where a television broadcast station has elected must-carry, the cable operator is not required to compensate the broadcaster.¹⁶¹ Alternatively, the station and the cable operator can negotiate the terms of carriage through retransmission consent negotiations.¹⁶² The must-carry obligations of DBS operators differ slightly from those of cable operators. In markets where a DBS operator carries any station to subscribers within the station’s local market (*i.e.*, “local-into-local” carriage), pursuant to the Statutory Copyright license all broadcast stations in the market have a right to mandatory carriage by that DBS operator (*i.e.* the “carry-one, carry-all” requirement).¹⁶³ Broadcasters also have the option of negotiating terms of retransmission with the DBS operator. Under the Act and the Commission’s rules, television stations are prohibited from entering into exclusive retransmission agreements, and must negotiate in good faith with MVPDs.¹⁶⁴ By statute, the exclusivity and good faith negotiation requirements are effective “until January 1 2006.”¹⁶⁵

48. By the time Congress enacted the must-carry/retransmission consent provisions of the

¹⁵⁶ House Committee on Energy and Commerce, H.R.Conf.Rep. No. 102-862 (“Conference Report”), 102d Cong., 2d Sess. (1992), reprinted at 138 Cong. Rec. H8308 (Sept. 14, 1992) at 2.

¹⁵⁷ Conference Report at 3.

¹⁵⁸ Conference Report at 3.

¹⁵⁹ Noncommercial television stations do not have retransmission consent rights.

¹⁶⁰ 47 C.F.R. § 76.56.

¹⁶¹ 47 C.F.R. § 76.60.

¹⁶² 47 C.F.R. § 76.64.

¹⁶³ 47 C.F.R. § 76.66.

¹⁶⁴ See 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65; *Implementation of Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity* 15 FCC Rcd 5445, 5463 ¶ 45 (“*Good Faith Negotiation Order*”).

¹⁶⁵ See 47 U.S.C. § 325(b)(3)(C). See also, 47 C.F.R. § 76.65(f)(good faith negotiation requirement sunsets at midnight on Dec. 31, 2005).

Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), Congress had recognized the importance of local television broadcast signals not only as providers of a valuable public service, but as “must-have programming” critical to a DBS offering. By permitting DBS operators to carry local television broadcast signals, Congress sought to place DBS operators on a level playing field with their cable counterparts so that they could compete more effectively with cable operators.¹⁶⁶ To ensure that broadcasters negotiated fairly with these relatively new entrants into the MVPD market, Congress enacted the good faith negotiation requirement and prohibition exclusive retransmission consent agreements. Congress explicitly stated that good faith negotiation did not equate to a requirement that broadcasters grant retransmission consent on the same terms and conditions to all MVPDs.¹⁶⁷

C. Relevant Markets

49. DirecTV is one of two full-CONUS DBS providers and the second largest MVPD in the U.S, providing service in all 50 states.¹⁶⁸ It offers more than 825 channels of sports, news, movies, and family programming, including local broadcast channels in 64 television markets, high definition and foreign-language programming to nearly 12 million customers.¹⁶⁹ News Corp. is a global media corporation owning a wide variety of video programming products from cable and broadcast networks to broadcast television stations which they sell to MVPDs across the country. Included in its suite of video programming products are the Fox broadcast network, one of the four major national broadcast networks, 35 owned and operated (O&O) full-power local television broadcast stations, including two stations in three of the top five and five of the top ten markets, 10 nationally distributed cable networks, 12 owned and managed regional cable networks,¹⁷⁰ and 171 independently owned local television stations that are affiliated with the Fox Network.¹⁷¹ News Corp.’s cable programming assets include the Fox News Channel, Speedvision, FX, Fox Movie Channel, and the National Geographic Channel. News Corp. controls a wide array of regional and national sports programming channels, as well as valuable program

¹⁶⁶ See H.R. Rep. No. 106-79 at 11-15 (1999); Satellite Home Viewer Improvement Act, Pub.L. No. 106-113, 113 Stat.1501, at App. I at 1501A-523 & 544.

¹⁶⁷ 47 U.S.C. §325(b)(3)(C)(ii) (stating that “it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations”).

¹⁶⁸ As of the end of the third quarter, DirecTV had 11.85 million subscribers. See *Hughes Announces Third Quarter Growth of 17% in Revenues and 33% in Operating Profit Before D&A; Operating Profit Quadruples; DirecTV Adds 326,000 Owned and Operated Subscribers in the Quarter, a 58% Increase Over Last Year*, Oct. 14, 2003, available at: http://www.hughes.com/ir/releases/2003_results/q3_2003/default.asp (viewed Nov. 14, 2003). DirecTV has surpassed the total subscribers of Time Warner Cable, Inc., which had 11.4 million subscribers as of September 30, 2003. See *Time Warner Inc. Consolidated Balance Sheet*, available at: http://www.timewarner.com/investors/quarterly_earnings/2003_3q/pdf/3q2003charts.pdf (viewed Nov. 14, 2003). Thus, DirecTV is now second only to Comcast in terms of subscribership.

¹⁶⁹ Hughes Electronics Corporation, *General Overview* at <http://www.hughes.com/ir/general/default.asp> (visited Nov. 5, 2003).

¹⁷⁰ Since filing the application for transfer of control, News Corp. has launched an additional network, Fuel, which brings the number of nationally distributed channels to 11.

¹⁷¹ *FEG 10-K 2003 Annual Report* at 7.

production assets.¹⁷² News Corps' broadcast stations carry UPN and Fox programming, which includes the World Series and other Major League Baseball post-season games, the 16 National Football Conference ("NFC") teams of the National Football League ("NFL"), and popular shows like "The Simpsons," "American Idol" and "Joe Millionaire."¹⁷³ In addition, News Corp. controls the national broadcast rights to National Association of Stock Car Auto Racing ("NASCAR") races and several major packages of college basketball and football games nationwide.¹⁷⁴

50. In evaluating the potential competitive effects of the transaction, it is necessary to first define the product and geographic markets.¹⁷⁵ A relevant market is defined as a product or group of products and a geographic area in which the product or products are produced or sold such that a hypothetical profit-maximizing monopolist would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant.¹⁷⁶

1. Product Markets

51. In analyzing vertical issues in MVPD transactions, as the Applicants note, the Commission has generally examined two separate but related product markets: (1) the acquisition of programming ("the programming market"); and (2) the distribution of programming to consumers ("the distribution market").¹⁷⁷ We agree that the Applicants are significant participants in both of these product markets, and therefore analyze them in detail in this section.

a. MVPD Services

52. *Positions of the Parties.* The Applicants begin by observing that the Commission has previously found that DBS operators compete in a market composed of all MPVD providers,¹⁷⁸ and that although the Commission has considered at times that a more narrowly drawn market may be appropriate, it has continued to use the MPVD product market for its competition analysis in recent cases. Accordingly, Applicants propose that the MVPD market is the relevant product market for purposes of

¹⁷² News Corp.'s sports networks include Fox Sports World, Fox Sports en Espanol, Fox Sports Digital Networks, and 12 RSNs—Fox Sports Net Arizona, Fox Sports Net Detroit, Fox Sports Net Midwest, Fox Sports Net North, Fox Sports Net Northwest, Fox Sports Net Pittsburgh, Fox Sports Net Rocky Mountain, Fox Sports Net Southwest, Fox Sports Net West, Fox Sports Net West 2, and the Sunshine Network. See Application at Attachment F.

¹⁷³ Application at 47; *FEG 10-K 2003 Annual Report* at 7, 27. See also *FEG Presentation, Bear Stearns Media, Entertainment, and Information Conference*, slide 19 (Mar. 4, 2003), available at: <http://www.newscorp.com/investor/download/bearstearns03/sld019.gif> (visited on Dec. 12, 2003).

¹⁷⁴ JCC Comments at 38.

¹⁷⁵ *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20605-06 ¶ 106; *Comcast-AT&T Order*, 17 FCC Rcd 23260-61 ¶ 42.

¹⁷⁶ *DOJ/FTC Guidelines* § 1.0.

¹⁷⁷ Application at 47 (citing *2002 Annual Video Competition Report*, 17 FCC Rcd. at 26910 (distribution market); *id.* at 26953 (programming market); *MCIT*, 16 FCC Rcd. at 21613-14 (1999) (finding that DBS operators "compete in two product markets").

¹⁷⁸ Application at 44.

analyzing the issues presented by this transaction.¹⁷⁹ Intelsat agrees, asserting that the Commission and antitrust authorities have traditionally defined markets in a technology-neutral manner,¹⁸⁰ and urging the Commission to recognize the interchangeability of space and terrestrial transmission facilities when defining the appropriate product market in its analysis of the Application.¹⁸¹ NRTC, on the other hand, contends that the decision of whether to consider cable systems with low channel capacities in the same product market as DBS should be determined by an administrative law judge at hearing.¹⁸² CFA asserts that DBS and cable occupy “somewhat different product spaces” due to the lack of local channels on DBS in many markets, the unavailability of DBS in urban areas because of line of sight problems, and cost.¹⁸³ CFA asserts that this is best evidenced by the fact that competition from DBS has not constrained cable prices.¹⁸⁴ CFA does not urge the Commission to define the product market differently, but seeks to emphasize the lack of constraint on cable prices as part of its broader claim that the transaction will raise prices of DBS and cable.¹⁸⁵

53. *Discussion.* In the *EchoStar-DirectTV HDO*, the Commission determined that the relevant product market that includes services offered by DBS providers was no broader than the entire MVPD market, but may well be narrower.¹⁸⁶ For the purpose of analyzing the competitive effects of the transaction before us we may again safely presume that the relevant downstream product market is no broader than the MVPD market. As we have noted, and our analysis below demonstrates, by purchasing Hughes and its DirecTV unit, News Corp. becomes a vertically integrated competitor to all of its MVPD programming purchasers in every MVPD market. To the degree that the transaction increases News Corp.’s incentive and ability to act anticompetitively, it does so with respect to all of its MVPD customer/competitors.

b. Video Programming

¹⁷⁹ Application at 44-45.

¹⁸⁰ Intelsat Comments at 2-5.

¹⁸¹ Intelsat Comments at 6.

¹⁸² NRTC Petition at 2. NRTC states that we should consider whether the “relevant geographic market” should be divided into three categories—markets not served by any cable system; markets served by low capacity cable systems; and markets served by high-capacity cable systems. *Id.* NRTC states that this determination also should factor in the number of households and subscribers in each market. *Id.* Although NRTC characterizes its concern as a definition of the relevant geographic market, it actually proposes that we consider whether to vary our analysis according to the types of products available in different markets, which concerns product markets, rather than geographic markets.

¹⁸³ CFA Reply Comments at 6-8. CFA asserts that DBS is more expensive than cable, and that customers often subscribe in order to receive high-end services not provided (until the recent advent of digital cable) on cable systems, such as high-end sports packages, out of region programming, and foreign language channels. *Id.*

¹⁸⁴ CFA Reply Comments at 7-8.

¹⁸⁵ CFA Reply Comments at 2, 4-5, Attachment at 2.

¹⁸⁶ *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20609 ¶ 115. The United States Department of Justice (“DOJ”) identified this same MVPD product market in its complaint against the proposed merger of EchoStar and DIRECTV. *DOJ/EchoStar Complaint* ¶ 24.

54. *Background.* Companies that own cable or broadcast programming networks both produce their own programming and acquire programming produced by others. Companies that own cable networks package and sell this programming as a network or networks to MVPD providers for distribution to consumers.¹⁸⁷ Companies that own broadcast networks distribute their programming through owned or affiliated television broadcast stations. Television broadcast stations affiliated with broadcast networks combine network programming with their own locally originated programming and/or programming secured from other sources to provide over-the-air service.¹⁸⁸ They redistribute such programming via cable or DBS pursuant to an election of mandatory carriage or a retransmission consent agreement.¹⁸⁹ MVPDs combine cable programming networks or broadcast television signals with transport on their cable, satellite, or wireless distribution networks to provide delivered multichannel video services to subscribers.¹⁹⁰

55. Participants in the market for video programming consist of entities of various sizes, from unaffiliated packagers that own one programming network to large corporations with multiple 24-hour networks.¹⁹¹ Cable programming networks sell programming to MVPDs that range in size from small “mom and pop” cable systems offering tens of channels of programming to fewer than a hundred subscribers, to large vertically integrated cable companies offering hundreds of channels of programming to tens of millions of subscribers in dozens of states. Owners of cable programming networks are compensated in part through license fees that are based on the number of subscribers served by the MVPD. These license fees are negotiated based on “rate cards”¹⁹² that specify a top fee, but substantial discounts are negotiated based on the number of MVPD subscribers and on other factors, such as placement of the network on a particular programming tier.¹⁹³ Most cable programming networks and MVPDs also derive revenue by selling advertising time during the programming.¹⁹⁴

56. Commercial local broadcast television stations elect to be carried on MVPDs pursuant to must-carry status or retransmission consent on a schedule that tracks the three-year statutory must-carry/retransmission consent election timeframe.¹⁹⁵ The broadcast stations most likely to elect must carry

¹⁸⁷ *Comcast-AT&T Order*, 17 FCC Rcd 23258 ¶ 34.

¹⁸⁸ *Review Of The Commission's Regulations Governing Television Broadcasting*, 10 FCC Rcd 3524 at 3545 ¶ 48 (1995).

¹⁸⁹ We have described the must-carry/retransmission consent provisions of the Act and our rules at Section V.B., *supra*.

¹⁹⁰ *Comcast-AT&T Order*, 17 FCC Rcd at 23258 ¶ 34; *EchoStar-DirecTV HDO*, 17 FCC Rcd 20653 ¶ 248.

¹⁹¹ *EchoStar-DirecTV HDO*, 17 FCC Rcd 20654 ¶ 249 (citing *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312, 17321-22 (2001) (“*Ownership Further Notice*”)).

¹⁹² Such rate cards are not publicly available.

¹⁹³ *EchoStar-DirecTV HDO*, 17 FCC Rcd 20654 ¶ 249 (citing *Ownership Further Notice*, 16 FCC Rcd at 17322).

¹⁹⁴ *EchoStar-DirecTV HDO*, 17 FCC Rcd 20654 ¶ 249 (citing *Ownership Further Notice*, 16 FCC Rcd at 17322).

¹⁹⁵ Broadcasters must elect either must-carry or retransmission consent every three years (except for the very first DBS carriage election cycle, which commenced in 2001 and ends on Dec. 31, 2005). See 47 C.F.R. §§ 76.64(f), (continued....)

are those that are not affiliated with one of the four major networks and those in smaller markets.¹⁹⁶ Those stations that elect retransmission consent negotiate the terms of carriage with MVPDs. Owners of local television broadcast stations that elect retransmission consent are generally compensated by one or more of the following: (1) retransmission consent fees; (2) cable advertising availabilities; and/or (3) where the station owner also owns cable programming networks, it may grant retransmission consent rights in exchange for carriage of its cable programming networks by the MVPD.¹⁹⁷ At least one study finds that historically, most broadcasters have opted for (or settled for) in-kind compensation from cable operators in exchange for retransmission consent—the right to program a channel on the cable system or some cable advertising availabilities.¹⁹⁸ Because they are generally retransmitted in their entirety, broadcast television station signals already contain advertising sold by the station owner, the network with which the station is affiliated (if any), or other program suppliers.¹⁹⁹

57. Some cable programming networks offer programming of broad interest and depend on a large, nationwide audience for profitability; others also seek large nationwide audiences but offer content that is more focused in subject; yet others still seek nationwide distribution, but offer narrowly tailored programming, focusing on a “niche within a niche.”²⁰⁰ Some cable programming networks do not seek a national audience but are regional or even local in scope, including RSNs and local or regional news networks. Some cable programming networks likely can survive with distribution to a few million subscribers within a certain region, while others may need nationwide distribution in order to remain viable.²⁰¹

58. *Positions of the Parties.* Applicants describe the video programming market as national or international in geographic scope, although they do not offer a product market definition.²⁰² EchoStar complains that Applicants “postulate a single product market encompassing all programming” but offer no economic evidence to support this view.²⁰³ Commenters identify and discuss various segments of the

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76.66(c). The most recent cable carriage election was made on Oct. 1, 2002, became effective on Jan. 1, 2003, and the election cycle will end on Dec. 31, 2005. 47 C.F.R. § 76.64(f).

¹⁹⁶ *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd 15092 at 15110 (1998) (“*DTV Must-Carry Notice*”). As we explain above, electing must-carry entitles a station to carriage but not compensation. See Section V.B.3., *supra*.

¹⁹⁷ FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 29.

¹⁹⁸ FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 29.

¹⁹⁹ FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 11 (broadcast networks, broadcast stations, and syndicators sell time to national advertisers; broadcast stations also sell time to local advertisers).

²⁰⁰ *EchoStar-DirecTV HDO*, 17 FCC Rcd 20654 ¶ 250 (citing *Ownership Further Notice*, 16 FCC Rcd at 17322-23. Examples of the first type of programming include TNT and USA; examples of the second type include ESPN for sports and CNN for news; and examples of this third type of programming include Discovery Health, the Golf Network, and Home and Garden. *Id.*

²⁰¹ *EchoStar-DirecTV HDO*, 17 FCC Rcd 20654 ¶ 250 (citing *Ownership Further Notice*, 16 FCC Rcd at 17323); *Comcast-AT&T Order*, 17 FCC Rcd at 23258 ¶ 35.

²⁰² Application at 45.

²⁰³ EchoStar Petition at 31.

video programming market, including broadcast network programming and RSN programming. Several commenters contend that News Corp. has market power in some or all segments of the video programming market.²⁰⁴

59. *Discussion.* The record in this proceeding makes clear that the video programming networks offered to MVPDs differ significantly in their characteristics, focus and subject matter. Thus, for example, there are over-the-air broadcast stations, national cable networks, including news, entertainment and hobby networks, as well as various regional networks, including, in particular, regional sports networks. The record further makes clear that these various networks are not viewed as perfect substitutes by either MVPDs or their subscribers.²⁰⁵ Accordingly, we find that the market(s) that include video programming networks are classic differentiated product markets.²⁰⁶ As discussed in greater detail below, the record further indicates that at least a certain proportion of MVPD subscribers view certain types of programming as so critical or desirable that they are willing to change MVPD providers in order to gain or retain access to that programming.²⁰⁷

60. Nothing in the record suggests a need for us to define rigorously all the possible relevant product markets for video programming networks; the primary alleged harm involves a unilateral vertical restraint, and there is sufficient data in the record for us to analyze the potential profitability of News Corp.'s engaging in such temporary foreclosure with respect to certain of its video programming products. For purposes of this analysis, we will separate the video programming products offered by News Corp. into three broad categories: (1) national and non-sports regional cable programming networks;²⁰⁸ (2) regional sports cable networks;²⁰⁹ and (3) local broadcast television programming.²¹⁰

²⁰⁴ See, e.g., EchoStar Petition at 31 (News Corp. has market power in “a number of relevant segments of the programming market, including regional sports and [broadcast] network programming”); CFA at 4-5 (“One of News Corp./Fox’s most important weapons is significant control over regional and national sports programming.”); Cablevision Comments at 12-17 (discussing News Corp.’s market power in the broadcast network programming segment).

²⁰⁵ See, e.g., JCC Comments at 20, 36 (discussing lack of substitutes for Fox broadcast programming and sports programming).

²⁰⁶ Differentiated products are products whose characteristics differ and which are viewed as imperfect substitutes by consumers. See Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 281 (2d ed. 1991).

²⁰⁷ [REDACTED] Technical Appendix Sections A.3 and B.3, [REDACTED].

²⁰⁸ The national and non-sports regional cable programming network category includes 11 nationally distributed networks owned and managed by News Corp. These networks are Fox News Channel, FX, National Geographic Channel, Speed Channel, Fox Movie Channel, Fox Sports World, Fox Sports en Espanol, Fox Sports Digital Networks, TV Guide Channel, TV Games Channel, and Fuel.

²⁰⁹ The regional sports cable networks category includes the 12 RSNs owned and managed by News Corp. These networks are Fox Sports Net Arizona, Fox Sports Net Detroit, Fox Sports Net Midwest, Fox Sports Net North, Fox Sports Net Northwest, Fox Sports Net Pittsburgh, Fox Sports Net Rocky Mountain, Fox Sports Net Southwest, Fox Sports Net West, Fox Sports Net West 2, and the Sunshine Network.

²¹⁰ The broadcast television programming category includes the 35 O&Os and the 171 Fox affiliates. See *supra* n.171.

61. *Other Relevant Product Markets.* News Corp. also owns substantial interests in firms selling programming-related technologies. As with the video programming products, there is no need to engage in a rigorous market definition in order to analyze the potential anticompetitive effects of the transaction. Rather, we will separate these products into three programming-related technologies product categories: (1) electronic and interactive program guides; (2) interactive television programming and associated technologies; and (3) conditional access technologies. We address issues arising from News Corp.'s acquisition of an interest in PanAmSat in Section VI.C.4.e., *infra*.

2. Relevant Geographic Markets

a. MVPD Services

62. Applicants assert that the Commission has consistently found that the geographic scope of the multichannel video programming distribution market is local or regional.²¹¹ Cablevision and EchoStar assert that the proper geographic market is local.²¹² In the past, we have concluded that the relevant geographic market for MVPD services is local²¹³ because consumers make decisions based on the MVPD choices available to them at their residences and are unlikely to change residences to avoid a small but significant increase in the price of MVPD service. In order to simplify the analysis, we have aggregated consumers that face the same choice in MVPD products into a larger, more manageable relevant geographic market. We find it appropriate to continue this approach here. Because the major MVPD competitors in many cases are the local cable company and the two DBS providers, we find that the franchise area of the local cable company can be used as the relevant geographic market for purposes of this analysis.

b. Video Programming

63. Applicants assert that the geographic scope of the video programming market is national and possibly international. The Applicants do not divide the video programming market into different types of video programming, and therefore do not provide geographic definitions for different types of programming. EchoStar critiques Applicants' failure to identify or analyze various segments of the video programming market.²¹⁴ Although they do not provide detailed descriptions of how the geographic markets for each programming segment should be defined for purposes of our analysis, MVPD commenters identify at least two segments of the video programming market that have a geographic scope narrower than the "national or international" scope of the programming market described by Applicants. MVPDs contend that access to one or both of these segments is critical to their ability to compete within the geographic areas where such programming is popular: broadcast network programming delivered by free over-the-air television stations (within a Nielsen Designated Market Area ("DMA")); and RSN programming (within the region where the sporting events featured on the RSN take place).²¹⁵

²¹¹ Application at 44 (citing *2002 Video Competition Report*, 17 FCC Rcd at 26852-55; *Comcast-AT&T Order*, 17 FCC Rcd at 23282; *MCIT*, 16 FCC Rcd at 21613-14).

²¹² Cablevision Comments at 12, n.22; EchoStar Petition at 12.

²¹³ *EchoStar-DirecTV HDO*, 17 FCC Rcd 20610 ¶ 119; *Comcast-AT&T Order*, 17 FCC Rcd at 23282 ¶ 90.

²¹⁴ EchoStar Petition at 31.

²¹⁵ See, e.g., JCC at 41-43 (discussing the effects of temporary withholding of RSN programming from cable operators on the relevant system and competitors serving the same region); EchoStar at 15 (discussing the effects (continued....))

64. Because video programming is a non-rival good²¹⁶ that can be distributed large distances at relatively little cost, the relevant geographic market potentially could be the national or international in scope. As a practical matter, however, demand for particular types of programming varies from region to region. Moreover, owners of programming have the right to decide in which areas to license the programming for distribution, and they generally limit distribution to smaller areas where the demand for programming is greatest. Given this, we find it reasonable to approximate the relevant geographic market for video programming by looking to the area in which the program owner is licensing the programming.

65. Applying this approach, we conclude that in the case of broadcast television programming, it is reasonable to use DMAs to define the relevant geographic market for each individual broadcast station. Contracts between broadcast stations and the providers of programming, as well as FCC regulations and broadcasting technology, limit the extent to which broadcast station signals can be distributed outside of the assigned market area.²¹⁷ DMAs are widely used to represent these areas, so we will use them as reasonable approximations.

66. With respect to national cable programming networks the relevant geographic market is at least national in scope. These networks are generally licensed to MVPDs nationwide, and in some cases they are licensed internationally. The widespread demand that is evidenced for such programming and the corresponding widespread distribution suggests that the relevant geographic market is at least national in scope. In contrast, with respect to RSNs, we conclude, as we did in the Comcast-AT&T merger, that the relevant geographic market for RSNs is regional.²¹⁸ In general, contracts between sports teams and RSNs limit the distribution of the content to a specific "distribution footprint," usually the area in which there is significant demand for the specific teams whose games are being transmitted.²¹⁹ MVPD subscribers outside the footprint thus are unable to view many of the sporting events that are among the most popular programming offered by RSNs. We thus find it reasonable to define the relevant geographic market as the "distribution footprint" established by the owner of the programming.

67. Finally, we find that the geographic market for programming-related technologies is at least national in scope, and possibly international. These technologies are composed of software and hardware components which have high value and low transportation costs and can be easily delivered and are delivered to many widespread locations in the U.S. and the world.

VI. ANALYSIS OF POTENTIAL HARMS IN THE RELEVANT MARKETS

A. Introduction

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on EchoStar's penetration rates in DMAs where it lacked access to the signals of all four major network affiliated stations).

²¹⁶ A good is said to be "non-rival" if one individual's consumption of the good does not diminish the supply of the good to other individuals. See THE MIT DICTIONARY OF MODERN ECONOMICS 308 (David W. Pearce, ed., 4th ed. 1999).

²¹⁷ Broadcasters have the right to prevent cable operators from carrying certain programming from the signals of broadcast stations from other markets. See 47 C.F.R. §§76.92-76.95 (network non-duplication rule); 47 C.F.R. §§ 76.101-76.110 (syndicated exclusivity rule).

²¹⁸ *Comcast-AT&T Order*, 17 FCC Rcd at 23267 ¶ 59.

²¹⁹ DirecTV, *Blackout Information* at http://www.directvsports.com/Blackout_Info/ (visited Oct. 3, 2003).

68. In this section, we consider the potential harms of the proposed transaction in the relevant product markets that include video programming and MVPD services. In particular, we consider whether, as a result of the transaction, the post-transaction entity will have an increased incentive and ability to engage in anticompetitive foreclosure strategies with respect to national and non-sports regional cable programming networks, regional sports cable programming networks, broadcast television station signals, programming-related technologies, including electronic and interactive programming guides and fixed satellite services. Where we find that the proposed transaction is likely to result in anticompetitive harms, we also analyze and explain our decision to impose conditions that are narrowly targeted to address those harms.

69. Transactions involving the acquisition of a full or partial interest in another company may give rise to concerns regarding “horizontal” concentration and/or “vertical” integration, depending on the lines of business engaged in by the two firms. A transaction is said to be horizontal when the firms in the transaction sell products that are in the same relevant markets and are therefore viewed as reasonable substitutes by purchasers of the products. Horizontal transactions are of antitrust concern because they eliminate competition between the firms and increase concentration in the relevant markets.²²⁰ The reduction in overall competition in the relevant markets may lead to substantial increases in prices paid by purchasers of products in the markets.

70. Vertical transactions raise slightly different competitive concerns. At the outset, it is important to note that antitrust law and economic analysis have viewed vertical transactions more favorably in part because vertical mergers, standing alone, do not increase concentration in either the upstream or downstream markets.²²¹ In addition, vertical mergers may generate significant efficiencies. For example, a vertical transaction may produce a more efficient organization form, which can reduce transaction costs, limit free-riding by internalizing incentives, and take advantage of technological economies.²²² Where both the upstream and downstream firms possess enough market power to set prices above marginal costs, a vertical transaction also may reduce prices through the elimination of this “double marginalization.” The reduction occurs because the integrated firm, in determining the costs of producing the downstream product and consequently the final price charged to consumers, will consider the real economic cost of the input rather than the higher price (including the upstream profit margin) previously charged by the unintegrated upstream firm.²²³

²²⁰ 4 AREEDA & HOVEMKAMP 5-6; *see also* 1 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 317 (4th ed. 1997) (hereinafter ANTITRUST LAW DEVELOPMENTS); KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., ECONOMICS OF REGULATION AND ANTITRUST 192 (3d ed. 2000) (“VISCUSI ET AL.”).

²²¹ In the simple case where there are two levels of production, an upstream market is a market for inputs, while a downstream market is a market for end-user outputs. We will sometimes refer to the upstream and downstream markets as the input and output markets.

²²² VISCUSI ET AL. at 219-221; Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L. J. 513, 523-26 (1995) (“Riordan & Salop”).

²²³ Double marginalization occurs when an upstream firm sells an input to a downstream firm at a price that exceeds marginal cost, and the downstream firm then sells its product in the downstream market at a price that exceeds its marginal cost. The margin charged by the upstream firm increases the marginal cost of the downstream firm, which results in a higher end-user price than would occur if the input had been priced at marginal cost. Vertical integration in theory reduces the problem of double marginalization because the integrated firm, in determining the uniform price at which it will sell the downstream product, will consider the real economic cost of producing the input. Because vertical integration effectively reduces the marginal cost of the (continued....)

71. Nevertheless, as discussed in greater detail below, vertical transactions also have the potential for anticompetitive effects. In particular, a vertically integrated firm that competes both in an upstream input market and a downstream output market, such as post-transaction News Corp., may have the incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (*e.g.*, by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets. We first address potential horizontal harms and then analyze, with respect to each affected product and geographic market, potential vertical harms arising from the proposed transaction.

B. Potential Horizontal Harms

72. *Positions of the Parties.* Applicants explain that the satellite assets of Hughes and its subsidiaries in the United States complement the non-U.S. satellite interests of News Corp., completing News Corp.'s global network for the distribution of programming without creating any domestic overlap of satellite assets or MVPD participation.²²⁴ In contrast with the failed EchoStar-DirecTV merger, this transaction, Applicants aver, does not involve the affiliation of two domestic MVPD systems.²²⁵ Similarly, they allege that there is no effect on potential competition because News Corp. has no plans for independently entering the domestic distribution market.²²⁶ Following the transaction, DirecTV will continue to face competition from cable operators in most local markets, as well as continued competition from EchoStar in every local market.²²⁷

73. Nor does the proposed transaction create horizontal overlap in programming, according to the Applicants, because DirecTV does not produce or own any programming (beyond Hughes' 5% passive equity interest in the Hallmark Channel), and has no plans to expand its programming interests.²²⁸ For its part, News Corp. will continue to face competition in regional, national, and international programming markets from the same array of well-established and well-funded companies with which it currently competes.²²⁹

74. Cablevision disagrees, claiming that the combination presents horizontal concentration issues because it adds to News Corp.'s existing means of distributing Fox content—television broadcast stations. Cablevision asserts that by giving News Corp. a new outlet for its content in addition to the broadcast station outlets it already controls, the transaction will provide News Corp. with greater opportunities to

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input, it is likely to result in the integrated firm's setting a lower price for the downstream product, which will benefit consumers. The extent of this benefit, however, will depend crucially on the elasticity of demand for the downstream product. The less elastic is the demand, the greater is the benefit. JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* (MIT Press 1988) at 174-75; Riordan & Salop, 63 *ANTITRUST L. J.* at 526-27.

²²⁴ Application at 45.

²²⁵ Application at 45.

²²⁶ Application at 46.

²²⁷ Application at 46.

²²⁸ Application at 46.

²²⁹ Applicants note that Liberty indirectly holds a controlling interest in one Ka-band satellite system. Liberty will not, however, have control over any Commission license held by any Hughes subsidiary following the transaction. Application at 46.

leverage the power of its broad range of media assets.²³⁰ Cablevision asserts that, for example, in the New York DMA, where it competes with DirecTV, post-transaction News Corp. will have three platforms to distribute its content—two broadcast licenses, and a DBS platform.²³¹ Cablevision states that if Fox denies retransmission consent for its broadcast stations to Cablevision, it will still have two different platforms—over-the-air and DBS—for reaping a return on this “must have” programming, while Cablevision will lack any means of providing this content to its subscribers.²³²

75. *Discussion.* We agree with the Applicants that the instant transaction does not present horizontal concentration issues. The Commission has previously held that broadcast television is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases, and hence, is not in the same relevant product market.²³³ The concern Cablevision raises—access to Fox network programming delivered via television broadcast stations for Cablevision’s MVPD product—demonstrates that broadcast signals are an input used to produce a downstream product—MVPD service. We view access to News Corp.’s broadcast signals not as a horizontal concentration issue, but as a vertical integration issue, and we address it as part of our potential vertical harms discussion below. We therefore conclude that, because the Applicants do not offer the same products or services, the transaction does not present horizontal combination issues.²³⁴

C. Potential Vertical Harms

1. Background

76. *Background.* In this section, we consider the potential vertical harms of the proposed transaction. In particular, we consider whether, as a result of the transaction, Applicants will have an increased incentive and ability to engage in anticompetitive foreclosure strategies with respect to national and non-sports regional cable programming networks, regional sports cable programming networks, broadcast television station signals, programming-related technologies, including electronic and interactive programming guides and fixed satellite services.

77. Applicants present a series of economic and legal arguments in support of their overall claim

²³⁰ Cablevision Comments at 12, 18-19.

²³¹ Cablevision Comments at 18-19.

²³² Cablevision Comments at 18-19.

²³³ See *Competition, Rate Deregulation, and the Commission’s Policies Relating to the Provision of Cable Television Services*, 5 FCC Rcd 4962 ¶ 69 (1990); *EchoStar-DirecTV HDO* ¶¶ 109-115.

²³⁴ The vertical nature of the proposed transaction distinguishes it from the proposed merger of EchoStar-DirecTV. The proposed acquisition of DirecTV by EchoStar presented a classic example of a horizontal merger, in which the only two existing providers of high-powered, full-CONUS DBS service sought to merge. After careful analysis of the record, we declined to approve the requested license transfers and designated the proposed transaction for hearing on analysis of the record indicating that the likelihood of the merger significantly harming competition in the MVPD market outweighed any potential merger-specific benefits alleged by the applicants. In that case, we found that such loss of competition in the MPVD market would be likely to harm consumers by: (1) eliminating an existing viable competitor in every market; (2) creating the potential for higher prices and lower service quality; and (3) negatively impacting future innovation. *EchoStar-DirecTV HDO*, 17 FCC Rcd 20615-16 ¶ 138.

that the proposed transaction poses no competitive harms in the affected markets. In general, they contend that: (1) economic forces are sufficient to ensure that the proposed transaction will have no anticompetitive effect in any relevant market; (2) neither News Corp. nor Hughes has sufficient power in any relevant market that would give it the ability or incentive to pursue a vertical foreclosure strategy; and (3) even if this were not true, structural corporate governance checks and regulatory constraints, including their proposed program access conditions, would safeguard against such conduct.²³⁵ Most commenters and opponents of the transaction argue that News Corp. will use its control of DirecTV to disadvantage its MVPD rivals and harm consumers.²³⁶ Commenters and opponents of the transaction assert that the transaction poses a significant likelihood that News Corp. will use its control of Hughes and DirecTV to disadvantage its MVPD competitors and ultimately harm consumers in several relevant product markets.²³⁷ In particular, several opponents of the transaction contend that consumer demand for local broadcast television station signals and regional sports network programming is so strong as to make profitable a strategy of temporary vertical foreclosure in order to drive up prices for those programming packages.²³⁸

78. With respect to vertical foreclosure, which is the main harm alleged in the record, a vertically integrated firm, as the result of a transaction, may have the incentive and ability (or an increased incentive and ability) to foreclose downstream competitors from important inputs.²³⁹ That is, where a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals' costs either by foreclosing supply of the input it sells downstream competitors or by raising the price at which it sells the input to competitors.²⁴⁰ By doing so, the integrated firm may be able to increase its profits by raising prices in the downstream market, or increasing its market share in that market, or both.

79. The economic literature suggests that an integrated firm will engage in *permanent foreclosure* only if the present discounted value of the increased profits it earns in the downstream market as the result of foreclosure exceeds the present discounted value of the losses it incurs from reduced sales of the input

²³⁵ Application at 47-48; Applicants' Reply at iii-iv.

²³⁶ See, e.g., ACA Comments at 7-23; Cablevision Comments at 8-30; CDD Comments; CFA Reply Comments at 3-12; Consumers Union Sept. 23, 2003 Ex Parte; EchoStar Petition at 11-39, 58-67; JCC Comments at 13-65; NAB Comments at 5-9, 15-26; NRTC Petition at 7-15; RCN Comments at 4-11; Pegasus Comments.

²³⁷ See, e.g., ACA Comments at 7-23; Cablevision Comments at 8-30; CDD Comments; CFA Reply Comments at 3-12; Consumers Union Sept. 23, 2003 Ex Parte; EchoStar Petition at 11-39, 58-67; JCC Comments at 13-65; NAB Comments at 5-9, 15-26; NRTC Petition at 7-15; RCN Comments at 4-11; Pegasus Comments.

²³⁸ See, e.g. EchoStar Petition at 22-24, 30-32; JCC Comments at 15-44; Pegasus Dec.16, 2003 Ex Parte; RCN Dec. 18, 2003 Ex Parte.

²³⁹ A vertically integrated firm also may attempt to foreclose upstream competitors from the vertically integrated firm's downstream affiliate in order to reduce the competitors' customer base. If the downstream affiliate had previously purchased significant amounts of inputs from other independent suppliers, this foreclosure could raise the costs of upstream rivals and possibly cause them to exit the market. See, e.g., Riordan & Salop, 63 ANTITRUST L. J. at 519.

²⁴⁰ See, e.g., Riordan & Salop, 63 ANTITRUST L. J. at 527-38. See also Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L. J. 209, 234-38 (1986).

in the upstream market.²⁴¹ If an integrated firm calculates that permanent foreclosure would be unprofitable, it nevertheless might find it profitable to engage in *temporary foreclosure* in certain markets. In markets exhibiting consumer inertia,²⁴² among other things, temporary foreclosure may be profitable even where permanent foreclosure is not, because, during the period of foreclosure, downstream customers may switch to the integrated firm's downstream product and, due to inertia, then not immediately switch back to the competitor's product once the foreclosure has ended. Consumers choosing an MVPD are subject to inertia and partial lock-in, because, among other things, there are switching costs associated with changing providers and some MVPDs, including DirecTV generally require one-year contracts.²⁴³ Thus, temporary foreclosure may generate profits that continue for a longer period than the period of upstream losses caused by the reduction in demand for the input.

80. There is an additional reason why temporary foreclosure may be profitable. Specifically, by temporarily foreclosing supply of the input to a downstream competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher input price from the downstream competitor than it could have negotiated if it were a non-integrated input supplier. In order for an integrated firm successfully to employ temporary foreclosure or the threat of temporary foreclosure as a strategy to increase its bargaining position, the foreclosure strategy must be credible. This means that competitors must believe that temporary foreclosure is profitable (whether or not it actually is)²⁴⁴ in order to extract a higher input price. For example, if the vertically integrated firm, by temporarily withholding an input from a competitor, can cause the competitor to lose sufficient revenue or suffer other competitive harms, the competitor might agree to pay a higher price for the input, which could lead to higher prices for the output, thus injuring consumers. Even if the vertically integrated firm suffered a loss in profits from engaging in a specific instance of temporary foreclosure, it might nevertheless find it to be a profitable strategy over the longer run. Specifically, if by temporarily foreclosing certain competitors, the vertically integrated firm may signal to other downstream competitors its willingness to foreclose, which may cause other downstream competitors to agree to a higher price without the vertically integrated firm's having to actually engage in repeated foreclosures.²⁴⁵ Temporary foreclosure may result in a widespread increase in the input price

²⁴¹ See, e.g., Riordan & Salop, 63 ANTITRUST L. J. at 528-31 (1995).

²⁴² More specifically, the market must be one where consumer choice is subject to some inertia and "lock-in." Cf. Roy Radner, *Viscous Demand*, 112 J. ECON. THEORY 189 (2003).

²⁴³ In contrast, temporary foreclosure would not be profitable in a market in which consumers made frequent and repeated purchases of a product and could change providers each time they made a purchase. Finally, we note that, where customers make a one-time, long-term commitment, such as by purchasing a long-lived durable good, temporary foreclosure resembles permanent foreclosure. A second requirement for temporary foreclosure to be profitable is that the withdrawal of the input (subject to foreclosure) must cause a change in the characteristics of the downstream product, such that some customers will shift to competing downstream products.

²⁴⁴ Where downstream competitors have incomplete information about the integrated firm's revenues and costs, the integrated firm may have an incentive to engage in temporary foreclosure even where it is not profitable, because it will send a signal to downstream purchasers of the input. See generally Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust* in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 556-61 (Richard Schmalensee & Robert Willig, eds. 1989).

²⁴⁵ The analysis of the incentives to engage in temporary foreclosure is similar to the incentive for union to engage in the temporary withholding of labor in the economic analysis of strikes. See, e.g., Peter Cramton and Joe Tracy *Strikes and Holdouts in Wage Bargaining: Theory and Data*, AMERICAN ECONOMIC REVIEW Vol. 82 at 100-121 (Mar. 1992).

and thus upstream profits in the longer-run. In addition, if the increase in the input price affects the marginal cost of producing the downstream product, prices in the downstream market will rise as well.

81. The underlying purpose of temporary foreclosure generally is to extract a higher price for the integrated firm's upstream input and thus raise its downstream rivals' costs. It is recognized that this raising rivals' costs strategy may take two forms. First, an integrated firm, if it can, will generally seek to discriminate in the price it charges downstream rivals for its upstream input. Specifically, it will have an incentive to charge a higher input price to its downstream competitors than it charges itself or non-competing firms in ancillary markets.²⁴⁶ In many cases, however, either legal or regulatory constraints or market forces will limit the ability of the integrated firm to engage in price discrimination.

82. Where the downstream affiliate is wholly owned, the integrated firm can always raise the internal transfer price of an input so that it equals the price charged to downstream competitors. Under these conditions, however, the increase in the internal transfer price is not particularly meaningful, since the integrated firm in making business decisions will consider the real economic cost of the input and not its nominal transfer price.²⁴⁷ Thus, in the case of a wholly owned downstream affiliate, it may be difficult to detect if price discrimination is occurring and anti-discrimination rules may not function effectively.

83. Where, as in this case, the upstream input supplier holds only a *partial ownership interest* in the downstream firm, matters become even more complicated. The Applicants note that corporate law generally requires that the transfer price not be set in a manner that disadvantages the other shareholders of the downstream firm.²⁴⁸ As our discussion of corporate governance in the following section demonstrates, the protections afforded by corporate law are neither absolute nor omniscient. Even when corporate law effectively limits the ability of the upstream firm to enter into arrangements that disadvantage the minority shareholders of the downstream firm, it is equally true that the upstream firm can circumvent this problem if it can effectively compensate the downstream firm and its shareholders for any increase in the transfer price of the input. This compensation is frequently referred to as a "side-payment."²⁴⁹ As a result, the upstream firm will likely be willing to incur any transaction costs associated with arranging such side-payments if the expected revenues from the uniform input price increase exceed the expected transaction costs of arranging the requisite side payments. If the transaction costs associated with designing the compensation scheme exceed the expected revenues from the uniform price increase, then again, it will not find it profitable to attempt such a strategy.

84. The above discussion confirms that the program access rules (and other non-discrimination safeguards) serve several useful functions with respect to the video programming subject to the vertically integrated firm's control. First, the program access rules prohibit permanent foreclosure with respect to all satellite cable programming. Second, they can prevent overt discrimination in the prices the integrated firm charges for such inputs. Finally, they can also prevent uniform increases in satellite cable

²⁴⁶ Cf. Riordan & Salop, 63 ANTITRUST L. J. at 535-38 (discussing the incentive of an integrated firm to discriminate and charge higher prices to its direct rivals).

²⁴⁷ We ignore for purposes of this discussion other regulations that may constrain the setting of transfer prices.

²⁴⁸ In Section VI.C.2. we analyze the likelihood that internal controls and corporate law will limit the ability of News Corp. to set transfer prices that disadvantage the remaining Hughes shareholders.

²⁴⁹ See Daniel P. O'Brien and Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L. J. 581-582 (2000).

programming input prices where the downstream affiliate is partially owned and where the cost of compensating the affiliate exceeds the expected profits resulting from the price increase. Because, under the proposed transaction, News Corp. will acquire only a partial ownership interest in DirecTV, we believe that our program access rules and the Applicants' proposed program access commitments can help prevent permanent foreclosure, discriminatory input price increases and, in some cases, non-discriminatory uniform input price increases with respect to satellite cable programming of general interest. Conversely, the above discussion suggests that these safeguards will not prevent an upstream firm that partially owns the downstream affiliate from uniformly raising the price of its input to both its downstream affiliate and downstream competitors when it has both the economic incentive and ability to do so. Thus, the partially integrated firm may be able to execute a *uniform* input price increase without running afoul of corporate law and despite such non-discrimination safeguards especially if it is able to profitably arrange a mechanism for side-payments to occur. It would certainly be able to execute such a uniform price increase for video programming inputs not subject to such safeguards and for which it has significant market power, and may even risk shareholder litigation to do so.

85. *Roadmap and Summary of Decision.* At the outset, we note that local MVPD markets already are highly concentrated.²⁵⁰ Changes in vertical relationships between a major input and output supplier in such a market can therefore have significant competitive effects. Because Applicants have asserted corporate governance and related securities laws as a global defense against all potential forms of vertical foreclosure, we address this matter at the outset of our analysis. Next, our discussion will address each relevant product market in turn and, with respect to each, the defenses raised by Applicants. For each relevant type of video programming and programming-related technologies, we will examine whether: (1) the Applicants possess market power and, if so, (2) whether the transaction increases the Applicants' incentive and ability to gain from withholding a given input, either permanently or temporarily, which could lead to increases in end user prices.²⁵¹ For markets in which we find that Applicants lack market power, we conclude that no potential public interest harms will arise with respect to that market. For markets in which the Applicants have market power, we will analyze whether the transaction increases Applicants' incentive and ability to withhold a given input. Based on our review and analysis of the record, we do not agree with Applicants that the proposed transaction will result in no public interest harms in any of these areas absent appropriate conditions.

86. Our review of the record, using the approach described above, demonstrates that, with respect to national and non-sports regional cable programming, the program access rules, together with the Applicants' program access-like commitments should adequately protect against permanent foreclosure and overt price discrimination. Further, there is no evidence in the record that significant numbers of customers will shift MVPDs if such programming is temporarily withdrawn from their current MVPD. This suggests that temporary foreclosure will not significantly increase downstream profits of DirecTV or that this increase in profits will exceed the sum of the loss in revenues in the upstream market plus the transaction costs associated with arranging compensation for DirecTV's other shareholders. As a result,

²⁵⁰ *EchoStar-DirecTV HDO*, 17 FCC Rcd 20616 ¶ 139.

²⁵¹ We analyze the incentive and ability of the Applicants to engage in a temporary or permanent foreclosure strategy using the following methodology, described in detail in the Technical Appendix: (1) estimate the incentives to engage in foreclosure by calculating the number of consumers that must shift to the Applicants' downstream product in order to compensate for the revenues that would be lost due to foreclosure; (2) consider whether the necessary numbers of consumers are likely to switch to the Applicants' downstream product in the event of foreclosure.

we find it unlikely that News Corp. will have an incentive to temporarily withhold such programming in an effort to secure a uniform increase in the price of its general interest cable programming.

87. In contrast, we find substantial evidence in the record that a temporary withdrawal of regional sports programming networks and local broadcast television station signals would cause a significant number of customers to shift from their current MVPD, which is subject to the foreclosure, to DirecTV. In addition, there is significant evidence in the record that the per-subscriber profits generated by each additional DirecTV subscriber are sufficiently large that the increased downstream revenues resulting from temporary foreclosure are likely to exceed the costs of foreclosure in many local markets. Accordingly, we find that, as a result of the transaction, the increased profits accruing to DirecTV and News Corp. as a result of the temporary withdrawal of regional sports programming and broadcast signals will give News Corp. an increased incentive to adopt a strategy of temporary foreclosure in order to uniformly raise the price of its broadcast television and regional sports programming and/or obtain other carriage concessions. News Corp.'s post-transaction ability to act anti-competitively to increase its competitors' programming costs is greater than it would otherwise be due to News Corp.'s post-transaction ability to off-set temporary revenue losses arising from foreclosure with increased profits accruing to DirecTV as subscribers drop the affected MVPD and subscribe to News Corp.'s affiliated MVPD. This increased ability and incentive to seek and obtain higher programming rates through unilateral temporary foreclosure would likely lead to higher prices to MVPD consumers than would otherwise occur and thereby harm the public interest. To avoid public interest harms that would result from such conduct, we impose several conditions to maintain the balance of bargaining power between News Corp. and other MVPDs at roughly pre-transaction levels.

88. In this section, we first address Applicants' claims with respect to the role of corporate governance and associated legal requirements in protecting against anticompetitive harms. We next examine, sequentially, concerns raised in the record with respect to the potential for Applicants to discriminate against or foreclose access to unaffiliated programming on the DirecTV platform and their potential for discrimination against or foreclosure of unaffiliated rivals in the video programming and MPVD markets, as appropriate, with respect to access to Applicants': (a) national and non-sports regional cable programming networks; (b) regional sports cable programming networks; (c) local broadcast television stations signals; (d) programming-related technologies; and (e) fixed satellite services.

2. Role of Corporate Governance

89. *Background.* Applicants allege that corporate governance and related legal requirements will protect against all forms of vertical foreclosure alleged in the record and will guard against harmful self-dealing within the vertically integrated entity.²⁵² With respect to the latter, and in order to avoid a charge that they might engage in discriminatory conduct against other MVPDs, News Corp. and Hughes have hypothesized that News Corp. could employ a strategy of raising its programming prices to DirecTV which would then set a benchmark that other MVPDs would have to accept or lose the right to carry News Corp. programming.²⁵³ To counter this hypothesis the Applicants state that, among other things,

²⁵² Application at 58, Applicants' Reply at 53.

²⁵³ Application at 58.

they intend to use the Audit Committee to review related-party contracts, and that the Audit Committee, in its sole discretion, will ensure that such contracts are on an arms' length basis.²⁵⁴

90. All publicly-traded corporations are required to have an audit committee comprised of at least three independent directors.²⁵⁵ The proposed Hughes Amended and Restated By-Laws that will come into effect upon consummation of the transaction confirm that the Audit Committee will “. . . have the sole authority to consider and pass upon any Related Party Transaction. . .”²⁵⁶

91. *Positions of the Parties.* Some commenters question the effectiveness of the Applicants' proposal. CDD suggests that the so-called independent directors will, in fact, not be independent, pointing out that the initial nominations for such directors include persons that have longstanding relationships with Mr. Murdoch or News Corp.²⁵⁷ JCC contends that the Applicants purported reliance on the Sarbanes-Oxley Act²⁵⁸ as providing a level of protection is misplaced. They allege that there is nothing in Sarbanes-Oxley that would prevent a controlling stockholder from exerting undue influence over the company that it controls.²⁵⁹ They further suggest that the Audit Committee will not have the necessary expertise to be able to understand fully complicated programming contracts to ensure that the prices are the same as an arms' length transaction. JCC also suggest that News Corp. has offered no indication as to how the Audit Committee will function or when related-party contracts will be subject to review.²⁶⁰ They conclude that, as a practical matter, independent directors are likely to be dominated and defer to the controlling stockholder and that to resist the controlling stockholder could result in a loss of a board seat.²⁶¹

92. Applicants respond that the GM stockholders would not affirmatively vote to approve the transaction if the commenters' allegations were true. Applicants argue that the claimed vagueness of the By-Laws is actually a strength, as the Audit Committee will have the flexibility to respond to changing conditions and areas of concern that could not have been predicted when the By-Laws were adopted.²⁶² Responding to allegations that the Audit Committee lacks the expertise to properly review related-party contracts, the Applicants assert that the Audit Committee can retain experts, counsel and consultants to assist it with its task.²⁶³ They further note that, as a public company, Hughes will be subject to extensive

²⁵⁴ Application at 59.

²⁵⁵ 17 C.F.R. § 240.10A-3, New York Stock Exchange Rules (the “NYSE Rules”) §§ 303A.06 & 07.

²⁵⁶ Proposed Hughes Amended and Restated By-Laws, Article III, §3(d) filed with the SEC on June 5, 2003. A “Related Party Transaction” is defined as one that encompasses transactions between Hughes, on the one hand, and News Corp. or its subsidiaries, on the other hand.

²⁵⁷ CDD Petition at item #5.

²⁵⁸ Sarbanes-Oxley Act of 2002, 107 Pub. L. No. 204, 116 Stat. 745, is a wide ranging corporate governance and accounting reform law.

²⁵⁹ JCC at 59.

²⁶⁰ JCC at 62.

²⁶¹ JCC at 62-3 (citing to Stout Aff.).

²⁶² Applicants' Reply at 55.

²⁶³ Applicants' Reply at 56.

disclosure obligations under federal securities laws, including disclosure requirements relating to related-party contracts.²⁶⁴ Finally, they contend that Hughes' non-controlling shareholders will be able to bring derivative shareholder suits against the company if self-dealing is suspected; that covenants contained in certain of Hughes' debt agreements require that a related-party transaction be on an arms' length basis; and that certain transactions, in addition, require an independent fairness opinion from an outside financial advisor.²⁶⁵

93. *Discussion.* Applicants contend that, because the Audit Committee will have the sole power to pass upon related-party contracts, any attempt by News Corp. or its programming subsidiaries to compel Hughes to accept anything other than an entirely fair contract for the carriage of Fox programming would be unsuccessful. This in turn would result in the protection of both the non-controlling shareholders of Hughes and, ultimately, protecting Hughes' consumers from higher prices.²⁶⁶ The NYSE Rules state that an audit committee must consist of at least three directors each of whom must be "independent."²⁶⁷ As set forth in the NYSE Rules, an audit committee's responsibility is to select and oversee the company's outside auditors.²⁶⁸ In the case of Hughes, however, the Audit Committee will be asked to undertake the additional function of passing on related-party contracts. Neither the NYSE Rules nor Hughes' proposed By-Laws state the qualifications necessary for an Audit Committee member to fulfill that function. Although there is no requirement that the member have any special expertise or even knowledge of programming contracts, the Applicants claim that this does not matter as the Audit Committee will be allowed to hire experts in order to assist it. We remain concerned, however, that, if the Audit Committee members do not have a good understanding of complicated programming contracts, they might not be aware when issues arise that require an expert's attention.²⁶⁹

²⁶⁴ Applicants' Reply at 56.

²⁶⁵ Applicants' Reply at 57-58.

²⁶⁶ Application at 58-59. It should be noted that Hughes is a Delaware corporation and is therefore subject to the General Corporation Law of the State, 56 Del. Laws, c. 50 ("DGCL"). Under section 144 of the DGCL, a contract between a corporation and another corporation that share one or more officers or directors in common is not void or voidable solely due to that fact, provided that the contract is fair as to the corporation as of the time it is authorized, approved or ratified by the board of directors, a committee or the shareholders (§ 144(a) DGCL) Thus, while the DGCL does not require a contract between related-parties to be approved, it would be a reasonable thing for a corporation to do as it provides a level of protection for the corporation should the contract be challenged. In a similar fashion, the Applicants have stated that the Audit Committee will have the sole power to pass on a related-party contract. As with the DCGL, the Audit Committee may give its approval either before or after the fact (By-Laws, Article III 3 (d)). At bottom, therefore, it appears that the Applicants are offering only to comply with a discretionary provision of the DGCL that would be prudent for them to follow in any event.

²⁶⁷ To be "independent," *inter alia*, the board of directors must affirmatively determine that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). NYSE Rules § 303A.02.

²⁶⁸ NYSE Rules § 303A.07.

²⁶⁹ The Applicants point out that covenants in a loan agreement and public debt documents require a "fairness opinion" to be obtained concerning related-party contracts in excess of \$100 million. See Applicants' Reply at 58. Accordingly, the Applicants assert that the Commission should rely on these checks to assuage any concerns that it may have. If the Applicants had included such provisions in the proposed By-Laws we might have more confidence in their assertions. The credit facility, on the other hand, could be repaid the day after closing and (continued....)

94. Both the Applicants and the JCC have provided affidavits from law professors explaining Delaware law and how the Audit Committee will or will not function as an independent reviewer of related-party contracts.²⁷⁰ The experts disagree about three main issues.²⁷¹ The first concerns the effect of judicial review of related-party transactions. The JCC expert asserts that “‘independent’ director review and approval of transactions between a controlling shareholder and a firm. . . cannot suffice to give a clean bill of health to transactions that are by their very nature tainted with conflict of interest.”²⁷² The Applicants’ expert responds that, at the very least, independent director review and approval of a related-party transaction can shift the burden of proof from the company to the stockholder challenging the transaction to establish unfairness. While we agree with the Applicants that the effect of compliance with section 144 of the Delaware General Corporation Law will be to shift the burden of proof to the complaining shareholder, we do not find that argument responsive. Independent director approval is, in no sense, determinative of the issue as a complaining stockholder would still be able to file a lawsuit and allege the transaction is unfair to the company. The Applicants further attempt to counter the JCC argument is dealt with below.

95. The second issue concerns the effectiveness and value of stockholder derivative litigation as a check on self-dealing transactions. Shareholder derivative litigation is brought on behalf of a company by a non-controlling shareholder. The Applicants allege that, for various reasons, related-party transactions would be easy to detect, and suspect transactions would be prosecuted by a “vibrant” plaintiffs’ bar.²⁷³ JCC argue that, if the plaintiffs’ bar is so vibrant, “it is hard to see why such frauds and violations still occur.”²⁷⁴ We agree with the JCC on this issue. Not all violations will be detected, even by an alert plaintiffs’ bar. Moreover, litigation may not be brought for a variety of reasons that have nothing to do with the merits of the case. In the final analysis, this Commission, not the private bar, is the guardian of the public interest in these matters.

96. The final and most contentious disagreement concerns the extent to which an independent director is actually “independent.” The Applicants contend that Delaware corporate law, the federal securities laws, the NYSE Rules, and other federal statutes will ensure that independent directors will be effective in reviewing the fairness of related-party contracts to Hughes and to all of its shareholders and thus, ultimately, to the public. We disagree. As we have already discussed, the Delaware Law provides a

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public debt is regularly retired. If this were to happen, these checks on the Applicants behavior would be removed, rendering the value of such protections somewhat uncertain.

²⁷⁰ See generally, JCC Comments at Affidavit of Lynn A. Stout (“Stout Aff.”); Applicants’ Reply, Exhibit C, Affidavit of Lawrence A. Hamermesh (“Hamermesh Aff.”); Letter from Christopher J. Harvie, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Aug. 20, 2003) (“Joint Cable Commenters Aug. 20 Ex Parte”), Attachment, Reply Affidavit of Lynn A. Stout (“Stout Reply”); Letter from William m. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Sept. 10, 2003), Reply Declaration of Lawrence A. Hamermesh (“Hamermesh Reply Decl.”).

²⁷¹ Hamermesh Aff. ¶¶ 6-11.

²⁷² Stout Aff. ¶ 23.

²⁷³ Hamermesh Aff. ¶ 11.

²⁷⁴ Stout Aff. ¶ 15.

safe harbor for companies entering into related-party contracts.²⁷⁵ Further, although federal securities laws provide that material contracts must be disclosed, they do not bar such contracts from being entered into in the first place.²⁷⁶ On the Applicants' own admission, the Sarbanes-Oxley Act does not operate "to protect consumers from alleged controlling shareholder self-dealing."²⁷⁷ Finally, the NYSE Rules set forth the requirements of an audit committee and define who is eligible to be a member of the committee. As we have already discussed, the requirements set forth in the NYSE Rules consist of matters relating to the company's outside auditors, they do not consist of requirements concerning related-party contract review.

97. The NYSE Rules also provide a definition of an independent director.²⁷⁸ JCC argue that, while Delaware law, the Sarbanes-Oxley Act and the NYSE Rules set forth requirements that are designed to ensure that independent directors are independent from the firm's management in transactions involving the company and its management, such provisions do not deal with the situation presented by the instant transaction, namely, the independent directors' independence from the company's controlling shareholder.²⁷⁹ Applicants argue that News Corp. is not a controlling shareholder, with the consequence that News Corp. cannot influence the choice and election of the independent directors.²⁸⁰ Applicants attempt to distinguish between Delaware law, which they assert presumes that shareholders owning less than a majority of a company's shares do not control a company, and Commission precedent.²⁸¹ Applicants state that the presumption could be overcome only "if it were supported by specific facts of record that overcome the Delaware law presumption against non-majority stockholder control."²⁸² We believe that there is sufficient evidence in the record to overcome the presumption. Indeed, Applicants implicitly concede, by having filed the Application presently before us, that News Corp. will be considered to have *de facto* control of Hughes under Commission precedent.²⁸³ Accordingly, we find that News Corp.'s influence is likely to be such that an independent director will be cautious before taking any step that could cause offense to News Corp. for fear that he or she might be ousted.

98. Even assuming that News Corp. will not "control" Hughes in a legal sense, it is beyond doubt that it will have enormous influence over Hughes. The Hughes board of directors will consist of 11 individuals; five appointed by the Applicants and six independent directors.²⁸⁴ Applicants and the JCC

²⁷⁵ See note 266, *supra*.

²⁷⁶ Hamermesh Aff. ¶ 11.

²⁷⁷ Applicants' Jul. 28 Response at I.6.

²⁷⁸ See note 267, *supra*.

²⁷⁹ Stout Reply Aff. ¶ 3.

²⁸⁰ Hamermesh Aff. ¶ 8(b); Hamermesh Reply Decl. ¶¶ 3-5.

²⁸¹ *Id.*

²⁸² Hamermesh Reply Decl. ¶ 5.

²⁸³ In addition, C. Carey on behalf of News Corp., at a press conference on April 9, 2003 at 5:00 p.m., stated that by obtaining 34% of Hughes' shares it will obtain effective control of Hughes. See Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (Nov. 19, 2003), Transcript at 29.

²⁸⁴ Application at 13.

discuss at length whether News Corp. will have the power to replace or dismiss an independent director that displeases it.²⁸⁵ In order to do so, News Corp. would need to muster a majority of votes in support of an appropriate resolution. News Corp. will have only 34% of the votes, so, on the face of it, News Corp. would need other shareholders to cast their votes in favor of the resolution. We do not think that it is far-fetched to suggest that a sufficient number of shareholders might follow the lead of the largest single stockholder and vote the way that News Corp. voted.

99. Even if our concern about News Corp.'s influence on the board of directors is overstated, it is unlikely that related-party contracts will get the necessary scrutiny to unearth wrongful self-dealing. As a prominent corporate law treatise states, "[t]he nominations for outside directors are controlled by the nomination committee of existing directors, which may in turn be controlled . . . by outside directors who were selected by and acceptable to the insiders. Nomination of a person by the official committee virtually insures his election by the shareholders. The persons nominated are in fact often friends of the chief executive or other insiders..."²⁸⁶ The treatise further points out that frequently independent directors are the corporation's bankers or lawyers and have a direct financial interest in their relationship with the corporation. Such relationships are often "controlled by the chief executive and other insiders."²⁸⁷ Along these lines, CDD claims that several of the so-called independent directors have long-standing relationships with either Mr. Murdoch or News Corp.²⁸⁸

100. We therefore conclude that, notwithstanding the best intentions of the Applicants in assigning the task of related-party contract review to the Audit Committee, a significant risk remains that unfair self-dealing transactions may occur and go uncorrected. We also observe that the principal purpose of an audit committee is to protect shareholders from inappropriate management conduct -- its function is not to protect consumers. Thus, even if the Audit Committee performed its task perfectly, which, as we have noted, we do not think likely, consumers would not be protected from artificially inflated prices that are "entirely fair" to DirecTV and its shareholders but are not necessarily so to its customers.²⁸⁹ We therefore discount the likelihood that corporate governance, corporate law or securities laws in general may be relied upon to adequately protect MVPD and video programming competitors from potential anti-competitive vertical foreclosure behavior on the part of Applicants.

3. Discrimination Against Unaffiliated Programming

(i) Positions of the Parties

101. Applicants acknowledge that competitive concerns could arise if a transaction were to create an entity with sufficient market power in the distribution of programming that it would have the incentive and ability to foreclose access to its distribution network by refusing to buy programming that viewers' desire from unaffiliated programmers.²⁹⁰ Applicants assert, however, that DirecTV's post-

²⁸⁵ Stout Aff.; Hamermesh Aff.

²⁸⁶ Clarke, *Corporate Law* § 5.4 at 183.

²⁸⁷ *Id.*

²⁸⁸ CDD Petition at Issue #5.

²⁸⁹ Consumers Union Comments at 5, and Stout Reply Aff. ¶ 16.

²⁹⁰ Application at 49.

transaction ability and incentive to engage in such conduct is significantly constrained by DirecTV's small share of the MVPD market. Applicants assert that DirecTV's share of the national MVPD market—13%—is too low for the transaction to result in harm to unaffiliated cable networks,²⁹¹ and they note that, in every local market, DirecTV competes against a “dominant” cable operator, as well as EchoStar.²⁹² Applicants maintain that the primary purchasers of video programming are cable operators, including Comcast, which alone controls 29% of the MVPD market.²⁹³ Applicants claim that it would be economically irrational for DirecTV to refuse to carry attractive unaffiliated programming in favor of programming produced by its new affiliate, News Corp. They claim that it is DirecTV's primary economic incentive to increase subscribership by distributing the widest possible variety of content to the widest possible audience, and thus it has no incentive to discriminate against unaffiliated content providers, either now or after consummation of the transaction. Nonetheless, Applicants state, “if the Commission deems it necessary,” News Corp. and Hughes have agreed to accept the following enforceable undertaking as a condition of grant of their Application:

Neither News Corp. nor DirecTV will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage.²⁹⁴

With respect to potential discrimination against broadcast stations, Applicants point to statutory mandatory carriage requirements, which would prevent them from engaging in such a strategy, even if they had the incentive to do so.²⁹⁵

102. Several commenters contend that the transaction would give DirecTV the incentive and ability to favor News Corp.'s content and discriminate against competing cable networks and television broadcast stations.²⁹⁶ CFA asserts that, although Applicants have proposed safeguards to ensure MVPD access to cable programming, they have proposed no safeguards to ensure that DirecTV does not discriminate against unaffiliated programmers.²⁹⁷ CFA asserts that News Corp. also might use its bargaining power to pressure other MVPDs to discriminate against competing programming by offering MVPDs reduced prices for its affiliated programming.²⁹⁸ CDD contends that, given Liberty's significant investments in News Corp., the transaction will give the two programmers the incentive and ability to place competing program suppliers at a competitive disadvantage.²⁹⁹

103. EchoStar asserts that the transaction will raise barriers for new entrants into the video

²⁹¹ Application at 48-52.

²⁹² Application at 49.

²⁹³ Application at 49.

²⁹⁴ Application at 53, Attachment G.

²⁹⁵ Applicants' Reply at 63.

²⁹⁶ NAB Comments at 20-21; CFA Reply Comments at 3, 5; NRTC Petition at 14-15; EchoStar Petition at 39-40; CDD Petition at 3.

²⁹⁷ CFA Reply Comments at 3.

²⁹⁸ CFA Reply Comments at 3, 5.

²⁹⁹ CDD Petition at 4.

programming market in two ways. First, EchoStar contends that integration of News Corp.'s programming with DirecTV's distribution will reduce or eliminate DirecTV's incentives to carry new programming that competes with News Corp.'s programming.³⁰⁰ EchoStar also asserts that the transaction will foreclose an important outlet for new entrants, because DirecTV is currently the largest MVPD that is not affiliated with a programmer, and because DirecTV offers a nationwide distribution network which allows niche programming to reach a target audience that is geographically broad.³⁰¹ CDD agrees, claiming that independent producers, unaffiliated motion picture studios, and syndicators will be competitively disadvantaged by News Corp. after the transaction.³⁰² Victory Sports, which operates an RSN and is not vertically integrated with an MVPD, expresses concern that the vertical integration of DirecTV's satellite distribution platform and News Corp.'s RSNs could discourage good faith negotiations for fair market value prices for independent RSN offerings.³⁰³ Similar concerns were expressed with respect to the ability of Latino-themed English language and bilingual networks to gain access to DirecTV by the Congressional Hispanic Caucus.³⁰⁴

104. Commenters contend that News Corp.'s discrimination against unaffiliated cable networks will harm the public by reducing the diversity of programming available to viewers. NRTC is particularly concerned about the transaction's effects on viewers in rural areas. NRTC asserts that if the Application is approved, News Corp. could become an essential facility for content developers' distribution of programming to rural America.³⁰⁵ According to NRTC, as one of only two MVPDs serving un-cabled rural areas and the only such MVPD with programming holdings, News Corp. could control the programming available in rural areas by denying distribution to competing content providers.³⁰⁶ CDD asserts that if the transaction is approved, certain safeguards must be imposed to ensure that unaffiliated programmers have access to DirecTV's platform, including requiring Applicants to make "channel and related capacity" available on a non-discriminatory basis to unaffiliated programmers that lack market power; requiring that non-broadcast local (commercial and non-commercial) programmers have access to Applicants' spot-beam capacity; and requiring Applicants to increase the amount of national footprint capacity available to non-commercial entities beyond what is required by our public interest obligations for DBS licensees.³⁰⁷

105. NAB asserts that the transaction will give DirecTV the incentive and ability to

³⁰⁰ EchoStar Petition at 39.

³⁰¹ EchoStar Petition at 39-40. *See also* NRTC Petition at 14 (asserting that competing content developers may need access to the DirecTV platform to reach enough people to make distribution economically feasible).

³⁰² CDD Petition at 3.

³⁰³ *See* Letter from Kathleen M.H. Wallman, counsel to Victory Sports, LLC, to Marlene H. Dortch, Secretary, FCC (Oct. 17, 2003).

³⁰⁴ *See* Letter from Ciro Rodriguez, Chairman, Congressional Hispanic Caucus to John Ashcroft, U.S. Attorney General, U.S. Department of Justice, Michael K. Powell, Chairman, FCC and Commissioners (Dec. 9, 2003) at 2.

³⁰⁵ NRTC Petition at 14.

³⁰⁶ NRTC Petition at 14.

³⁰⁷ CDD Nov. 7, 2003 Ex Parte at 3. *See also* 47 CFR § 100.5.

discriminate against broadcast stations other than Fox O&Os.³⁰⁸ NRTC asserts that News Corp. will have less economic incentive to deliver local signals in markets where it does not have an O&O or an affiliate.³⁰⁹ NAB and NRTC claim that consumers will be harmed by the resulting reduction in programming, particularly local programming and programming available to rural consumers. Commenters contend that News Corp.'s discrimination against competing television broadcast stations will harm the public by reducing the diversity of programming available to viewers and by limiting viewer access to local programming.³¹⁰ With respect to the Applicants proposed condition that the merged entity will not discriminate against "unaffiliated programming vendors with respect to price, terms, or conditions of carriage on the DirecTV platform,"³¹¹ NAB contends the proposed condition is inadequate because it does not address potential discrimination against broadcasters, and urges the Commission to expand this condition to prohibit discrimination against broadcast stations as well as cable programmers.³¹²

106. Applicants respond that these claims of vertical foreclosure against unaffiliated programmers are flawed because DirecTV simply lacks a large enough share of the MVPD market to foreclose an unaffiliated programmer. Such programmers would still be able to sell to MVPDs serving approximately 87% of subscribers nationwide. Moreover, such a strategy would only hurt DirecTV by reducing the attractiveness of its channel lineup. DirecTV's refusal to carry programming valued by consumers, regardless of its source, would only drive subscribers to competing MVPDs.³¹³ Applicants note that, even where this issue has arisen in the context of an MVPD with much higher market share – as in the proposed EchoStar-DirecTV merger, where the combined market share would have been about 20%—the Commission concluded that the transaction would not create purchasing market power over national or regional programmers.³¹⁴ Because the Commission has previously found 20% to be well below levels of concentration at which the Commission has historically had cause for concern, Applicants argue DirecTV's 13% MVPD market share should be dispositive.³¹⁵

(ii) Discussion and Condition

107. Applicants have offered that "neither News Corp. nor DirecTV will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage." We conclude that Applicants' proposed commitment to allow unaffiliated programmers access to the DirecTV platform on nondiscriminatory terms and conditions adequately addresses concerns raised regarding unaffiliated video programmers' access to the DirecTV platform. We will therefore condition our grant of the

³⁰⁸ NAB Comments at 20-24. NAB asserts that News Corp. will have the ability and incentive to act as a gatekeeper to the detriment of unaffiliated content providers, including broadcast stations. *Id.*

³⁰⁹ NRTC Petition at 15.

³¹⁰ NAB Comments at 20-24; NRTC Petition at 15.

³¹¹ NAB Comments at 26.

³¹² NAB Comments at 26.

³¹³ Applicants' Reply at 49.

³¹⁴ Applicants' Reply at 49 (citing *EchoStar-DirecTV HDO*, 17 FCC at 20655).

³¹⁵ *Id.*

Application on compliance with this access commitment.³¹⁶ At this time, we will not prescribe standards of conduct pursuant to which DirecTV must act to comply with this condition although we expect DirecTV to act reasonably when dealing with unaffiliated programmers. We note that Applicants' proposed commitment is not unlike the nondiscrimination requirement in the Act and our program carriage rules.³¹⁷ Similar to our treatment of the remainder of Applicants' proposed program access commitments in the following section, we clarify that aggrieved programmers and MVPDs may seek relief for any alleged violations of this condition by using the existing enforcement mechanisms found at Section 76.1003 of the Commission's rules.³¹⁸

108. As to broadcast programming, we find it unlikely that, after the transaction, DirecTV would discriminate against competing television broadcast stations. The applicable statutory and regulatory provisions³¹⁹ thoroughly address satellite carriage of broadcast television programming. In any market in which DirecTV offers local-into-local service pursuant to the statutory copyright license, it is required to carry all television broadcast stations within that local market that request carriage.³²⁰ The Commission's rules detail the technical terms of carriage, certain anti-discrimination provisions based on SHVIA, and the complaint process by which aggrieved parties can seek Commission redress if DirecTV has failed to meet its carriage obligations.³²¹ Alternatively, television broadcast stations that provide retransmission consent can negotiate the terms and conditions of carriage.³²² We reiterate that, under the SHVIA, we will, in reviewing carriage complaints against any MVPD, consider any unreasonable terms or conditions or negotiating procedures.³²³

4. Discrimination Against Unaffiliated MVPDs

a. Access to National and Non-Sports Regional Cable Programming Networks

(i) Position of Parties

109. News Corp. has interests in several satellite cable programming networks, including

³¹⁶ See Appendix F.

³¹⁷ We note that Applicants' proposed condition is not unlike the nondiscrimination requirement in the Act and our program carriage rules. See 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

³¹⁸ See 47 C.F.R. § 76.1003.

³¹⁹ See, e.g., Satellite Home Viewer Improvement Act of 1999, PL 106-113, 113 Stat. 1501, Appendix I (1999).

³²⁰ 47 C.F.R. § 76.66(b)(1).

³²¹ See 47 C.F.R. § 76.66(i) (channel position); 47 C.F.R. § 76.66(j) (manner of carriage) 47 C.F.R. § 76.66(m) (remedies).

³²² 47 C.F.R. § 76.65.

³²³ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 16 FCC Rcd 1918, 1928 (2000). In addition, as discussed in Section VI.C.4.c., below, we extend the good faith and non-exclusivity provisions of SHVIA as a condition of license transfer approval for so long as the program access rules are also in effect.

national programming networks offering sports, news, or general entertainment,³²⁴ and regional programming networks that do not offer sports.³²⁵ Applicants acknowledge that a vertical relationship could lead to anti-competitive results in the distribution market if a programmer discriminated against or refused to sell to unaffiliated MVPDs in order to gain competitive advantage for its affiliated MVPD. Applicants claim, however, that any such concern would be extremely attenuated in this case for five principal reasons: (1) News Corp. has no market power in the sale of video programming that would enable it to carry out such a strategy; (2) it would be commercially irrational for News Corp. and DirecTV to attempt foreclosure; (3) the program access rules prohibit News Corp. from engaging in such discriminatory conduct; (4) the parties are willing to accept a series of program access-like undertakings that will remain enforceable even if News Corp. ceases to be subject to the Commission's program access rules; and (5) vertical foreclosure strategies that involve News Corp. attempting to force its "sophisticated partners", including Hughes and the various co-owners of many News Corp. programming networks, to act against their self-interests, would not work because such self-dealing behavior is adequately protected against by "existing corporate governance and legal requirements."³²⁶

110. Applicants maintain that News Corp's affiliates' combined share of the programming market is too small for News Corp. to be able to exercise any type of market power. They cite prior Commission findings that the programming supply market is extremely competitive, with the growth rate of new programmers outpacing the growth of new channels on MVPD systems,³²⁷ and they state that News Corp.'s share of national video programming services is relatively small (3.9%, or 10 of 257 services listed in the *2002 Video Competition Report*). Similarly, News Corp. holds an interest in only 32 of 339 (9.4%) of the national and regional services listed, and its interest in 12 of the 22 regional services is a non-controlling minority interest.³²⁸ News Corp. claims that, under these circumstances, it lacks the ability, either now or after the transaction closes, to harm DirecTV's rivals.

111. Furthermore, Applicants claim that News Corp. lacks the incentive to do so, because a programmer's interests are in securing the widest possible dissemination of its programming in order to maximize the value of those assets – a value based on its ability to generate advertising revenue and per-subscriber fees. Affiliation with DirecTV would not change this, according to Applicants, because News Corp. would have to forgo programming sales to the remaining 87% of the MVPD market if it were to engage in foreclosure strategies. "Moreover, to the extent News Corp. denies unaffiliated MVPDs access to its programming, it gains only a fraction of any benefits generated for DirecTV (because of its minority

³²⁴ The following is a list of national programming networks affiliated with News Corp. (News Corp.'s ownership share appears in parentheses only if it is less than 100%): Fox News Channel; FX; National Geographic Channel (66 2/3%; remaining 33 1/3% National Geographic Society); Speed Channel; Fox Movie Channel; Fox Sports World; Fox Sports en Espanol (37.8%; remaining 62% Liberty (10.6%) and Hicks Muse (51.6%)); Fox Sports Digital Networks; TV Guide Channel (42.9% indirectly owned through Gemstar, which owns 100%); TV Games Network (42.9% indirectly owned through Gemstar, which owns 100%). See Application at Attachment F.

³²⁵ The following is a list of non-sports regional programming networks affiliated with News Corp. News Corp. holds a 40% interest in each network, while the remaining interest is held by Rainbow: MSG Metro Guide; MSG Metro Learning; MSG Traffic and Weather. See Application at Attachment F.

³²⁶ Application at 54; Reply at 59.

³²⁷ Application at 54, (citing *Cable Horizontal Order*, 14 FCC Rcd at 19104).

³²⁸ Application at 55.

interest in Hughes), while it incurs most of the costs (through its 82% interest in FEG).³²⁹

112. Applicants attempt to rebut allegations that News Corp. could raise prices for its programming to supra-competitive levels for all MVPDs by forcing DirecTV to accept such supra-competitive rates to use as a “benchmark” that other MVPDs must either also accept or face the loss of News Corp. programming. In addition to Applicants’ argument that corporate governance will guard against such behavior, discussed in Section VI.C.2, *supra*, they also contend that such benchmarking should not be a concern for at least two other reasons: (1) News Corp. lacks the requisite market power to raise programming prices; and (2) the Commission has consistently found that its program access rules are sufficient protection against potential abuse in other transactions involving vertically integrated MVPDs.

113. Applicants concede that all of News Corp.’s national and regional satellite cable programming networks are already subject to the Commission’s program access rules due to Liberty’s approximately 17.6% interest in News Corp., and, in some cases, direct interests in those networks held by Liberty or another cable operator, and will continue to be if the proposed transaction is completed.³³⁰ They also acknowledge that the program access rules would not apply to all of Fox’s national satellite cable programming if Liberty Media divests its interest in News Corp. or sells its cable systems. Similarly, for the jointly-owned, regional networks to fall outside of the program access rules, the joint owner cable operators also would have to divest their interests for this programming.³³¹ Nonetheless, as a condition of approval, News Corp. offers to continue to be bound by the program access rules applicable to satellite cable program vendors should any or all of its programming otherwise fall outside of the Commission’s program access jurisdiction.³³² News Corp. submits that it will not offer any of its existing or future programming services on an exclusive basis to any MVPD and will continue to make such services available on a non-exclusive basis and non-discriminatory terms and conditions.³³³

114. In addition, Applicants commit to not entering into exclusive arrangements for the distribution of an affiliated programming rights holder’s satellite cable programming.³³⁴ Applicants submit that this condition prevents them from making exclusive arrangements for Liberty’s programming in the event Liberty is no longer bound by the program access rules for as long as Liberty holds its attributable interest in News Corp.

115. Similarly, Applicants state that they will not unduly or improperly influence the decision of an affiliated programming rights holder to sell its satellite cable programming to other MVPDs or the prices, terms and conditions of such sale. This condition extends the unfair practices prohibitions

³²⁹ *Id.* at 57.

³³⁰ *Id.* at 57; citing 47 C.F.R. §76.1000-76.1003.

³³¹ *Id.* at 58.

³³² *Id.* An attributable ownership by a cable operator is the triggering point for application of the program access rules to satellite cable programming vendors.

³³³ *Id.*

³³⁴ Applicants define affiliated programming rights holder as either (1) a satellite cable programming vendor in which either Applicant holds a non-controlling attributable interest (*i.e.* 5% or greater), or (2) a satellite cable programming vendor holding a non-controlling, attributable interest in either Applicants. *Id.* at 61.

applicable to cable operators to News Corp.'s and DirecTV's dealings with affiliated programmers. Applicants propose that these commitments apply for as long as News Corp. has an attributable interest in DirecTV and the program access rules are in effect.³³⁵

116. Commenters assert that, because of harms arising from News Corp.'s increased incentive and ability to withhold its broadcast or cable network programming, the Application should be designated for hearing, denied, or, if approved, conditioned to prevent such harms.³³⁶ EchoStar contends that News Corp. has market power in key segments of the programming market through its control of Fox News, Fox movies, and the non-news Fox Cable Networks such as FX.³³⁷ EchoStar and ACA state that such content is among the "must have" programming that any MVPD needs if it is to be an effective competitor.³³⁸ EchoStar also argues that Liberty, which has a strategic relationship to the Applicants and the instant transaction, controls other key programming assets, including the several Discovery and Encore channels.³³⁹ ACA argues that transaction-specific program access problems include imposing more costly terms and conditions of program access on smaller cable operators and using "volume" discounts to justify favorable pricing for DirecTV and entering into exclusive programming arrangements targeted at DirecTV's smaller cable system competitors.³⁴⁰ EchoStar maintains that News Corp. could bypass the program access rules by delivering its programming to its uplink facility terrestrially.³⁴¹ Commenters also question the ability of the Audit Committee to monitor every term of every agreement with an unaffiliated MVPD and do not consider the committee as a sufficient guard against the threat of unreasonable terms.³⁴²

117. To remedy the claimed deficiencies in the conditions proposed by Applicants, parties urge the Commission to adopt several revisions and additions. We will discuss revisions and additions suggested to apply to News Corp.'s cable programming in general here, and address these suggestions and proposed conditions specific to RSN or broadcast programming separately below.

118. Several commenters urge applying the program access rules permanently to News Corp. programming even if the general application of the rules terminates.³⁴³ In addition, commenters and opponents contend that neither the program access rules nor the Applicants' proposed program access

³³⁵ Application at Attachment G.

³³⁶ ACA Comments at 16, 20, 23; JCC Comments at 55-63; Cablevision Comments at 27-30; EchoStar Petition at 58-62; NRTC Petition at 20-22.

³³⁷ EchoStar Petition at 22.

³³⁸ EchoStar Petition at 22; ACA Comments at 16.

³³⁹ EchoStar Petition at 22, 35, 71. *See also* CDD Petition at 4 (describing investments by Liberty in News Corp.).

³⁴⁰ *See* Letter from Christopher C. Cinnamon and Emily A. Denney, Cinnamon Mueller, to Marlene H. Dortch, Secretary, FCC (Oct. 17, 2003) ("ACA Oct. 17, 2003 Ex Parte") at 7.

³⁴¹ EchoStar Petition at 59.

³⁴² Cablevision Comments at 29-30.; JCC Comments at 59-63; Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) at 5-6 ("Consumers Union Sept. 23, 2003 Ex Parte").

³⁴³ ACA Comments at 19; EchoStar Petition at 65; NRTC Petition at 21.

commitments will adequately protect against potential harms arising from the transaction.³⁴⁴ They argue that the proposed program access conditions do not prevent News Corp. from raising the price of programming above competitive levels by simply requiring DirecTV to compensate News Corp. for its programming at unreasonably high prices with unreasonably favorable terms of carriage.³⁴⁵ These parties observe that such a “sweetheart deal” would then establish unreasonable terms for agreements with all other MVPDs, without harm to DirecTV or News Corp., because it is effectively compensating itself.³⁴⁶ Commenters and opponents are not convinced that the Applicants’ Audit Committee will be able to monitor every term of every agreement with an unaffiliated MVPD and do not consider the committee as a sufficient guard against the threat of unreasonable terms.³⁴⁷ ACA contends that the proposed commitment does not prevent News Corp. from offering different or more costly terms to small cable operators, because although the commitment requires nondiscrimination, News Corp. is likely to offer the same prices/terms/conditions only to MVPDs with as many subscribers as DirecTV.³⁴⁸

119. ACA urges the Commission to seek an enforceable commitment from Applicants that News Corp. will not use programming prices, terms and conditions to disadvantage smaller market cable companies.³⁴⁹ Cablevision asks the Commission to revise the proposed program access commitment to prevent News Corp. from using “sweetheart deals” with DirecTV as an inflated benchmark programming price for the industry.³⁵⁰ RCN requests that the Commission clarify that the term “Affiliated Program Rights Holder” refers not only to existing programming affiliates, but also to programmers that become affiliated with News Corp. or DirecTV in the future.³⁵¹ RCN also urges the Commission to clarify that, for enforcement purposes, aggrieved MVPDs may bring program access complaints against Applicants using the procedures found at Section 76.1003 of the Commission’s rules.³⁵²

120. Consumers Union explains that News Corp.’s non-discrimination condition can be useful in preventing egregious competitive abuses such as selling Fox programming to DirecTV’s competitors at prices that are substantially and unjustifiably higher than the price paid by DirecTV.³⁵³ Non-

³⁴⁴ ACA Comments at 16, 20, 23; JCC Comments at 55-63; Cablevision Comments at 27-30; EchoStar Petition at 58-62; NRTC Petition at 20-22.

³⁴⁵ Cablevision comments at 27-28; EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5-6.

³⁴⁶ Cablevision comments at 27-28; EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5.

³⁴⁷ Cablevision Comments at 29-30.; JCC Comments at 59-63; Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) (“Consumers Union Sept. 23, 2003 Ex Parte”) at 5-6.

³⁴⁸ ACA Comments at 19.

³⁴⁹ ACA Comments at 20-21; ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

³⁵⁰ Cablevision Comments at 2, 30; *See also* NRTC Petition at 21; Consumers Union Sept. 23, 2003 Ex Parte at 4-5.

³⁵¹ RCN Comments at 9; RCN Oct. 24, 2003 Ex Parte at 7.

³⁵² RCN Comments at 9-10. NRTC also urges the Commission to adopt enforcement mechanisms. NRTC Petition at 21.

³⁵³ Consumers Union Sept. 23 Ex Parte at 5.

discrimination requirements alone, however, will not stop News Corp. from charging DirecTV an artificially high price for Fox programming and then requiring any MVPDs seeking to carry the programming to either pay a rate based upon that same high rate or allow DirecTV to become the major distributor of that programming in the MVPD's market, according to Consumers Union.³⁵⁴ Consumers Union recommends that the Commission impose a restriction similar to what the Federal Trade Commission ("FTC") applied in the Time Warner/Turner merger. In that instance, Consumers Union avers, the FTC established a cable programming price index mechanism to evaluate whether the merging companies were raising programming prices at a more accelerated pace than their historic pattern.³⁵⁵

121. Pegasus urges us to condition approval of the Application on the following requirements designed to supplement those proposed by Applicants: (i) contracts between Fox and DirecTV would have to be approved by a majority of the independent directors of DirecTV and parent Hughes; (ii) all contracts between Fox and DirecTV would be filed with the Commission and available to the public; (iii) the economic terms of any contract between Fox and DirecTV would have to be set at the average of those charged to Fox's three largest, non-affiliated MVPDs. The CEO and directors of Fox, DirecTV, and Hughes would be required to certify compliance with these conditions annually. Pegasus asserts that these conditions should apply for a period of five years.³⁵⁶

122. EchoStar asserts that to the extent News Corp.'s ownership interest in Hughes is anticompetitive, any additional ownership interest would only exacerbate the problem. Accordingly, EchoStar urges the Commission to limit News Corp.'s equity position in Hughes to 34%.³⁵⁷ EchoStar also urges the Commission to mandate independent programming authority at the DirecTV level by means of an independent board of directors that can withstand News Corp.'s influence,³⁵⁸ and suggests several other measures to strengthen the Applicants' proposed program access conditions. These include: prohibiting satellite exclusives of any kind for News Corp. programming; applying the requirement to programming delivered terrestrially; extending the requirement to News Corp.'s current and future non-video and broadband offerings; making the requirement permanent; applying the access condition to Liberty's programming assets; clarifying that the nondiscrimination requirement applies to all non-price terms; requiring News Corp. to offer all programming separately, at published rates that are pre-approved by the Commission.³⁵⁹ EchoStar further proposes that the Commission prohibit the sharing of information between News Corp.'s programming divisions and DirecTV about any programming

³⁵⁴ Consumers Union Sept. 23 Ex Parte at 5.

³⁵⁵ CU Sept. 23 Ex Parte at 5-6 (citing Agreement Containing Consent Order, In the Matter of Time Warner Inc., Turner Broadcasting System Inc., Tele-Communications, Inc., and Liberty Media Corporation, File No. 961-004, Before the Federal Trade Commission (Sept. 12, 1996) at <http://www.ftc.gov/os/1996/09/timewar.pdf>).

³⁵⁶ See Letter from Kathleen M.H. Wallman, counsel to Pegasus Communications, to W. Kenneth Ferree, Chief, Media Bureau, FCC and Barbara S. Esbin, Associate Chief, Media Bureau, FCC at 2-3, transmitted by letter from Kathleen M.H. Wallman to Marlene H. Dortch, Secretary, FCC (Sept. 30, 2003) ("Pegasus Sept. 30, 2003 Ex Parte"); Letter from Kathleen M.H. Wallman, counsel to Pegasus Communications, to Marlene H. Dortch, Secretary, FCC (Dec. 10, 2003) (Pegasus Dec. 10, 2003 Ex Parte).

³⁵⁷ EchoStar Petition at 62-63.

³⁵⁸ EchoStar Petition at 63.

³⁵⁹ *Id.* at 64-66. ACA, JCC and NRTC also support a program access condition that does not sunset with the program access rules. ACA Comments at 19; JCC Comments at 65; NRTC Petition at 20-21.

negotiation with a competing MVPD, subject to penalties.³⁶⁰

123. Applicants respond that they have neither the incentive nor the ability to engage in an anti-competitive strategy for any of their cable programming.³⁶¹ Applicants restate that DirecTV and News Corp. have insufficient power in their respective markets to support a strategy of withholding programming or abnormally raising its prices, and further the creation of an independent audit committee will prevent some of the claimed anti-competitive conduct. Likewise, Applicants repeat that the program access rules and their proposed program access conditions are effective to prevent abuses, and therefore there is no need to regulate DirecTV differently than incumbent cable operators.³⁶² Applicants argue that all of the claimed anti-competitive strategies envisioned by the commenters assume either that the Commission's rules are totally ineffectual, or that News Corp. would simply violate the rules without being discovered. If there is a systematic flaw in the rules, Applicants contend the Commission should conduct a rulemaking instead of imposing conditions solely on one party.³⁶³

(ii) Discussion and Conditions

124. We conclude that the program access rules, combined with the Applicants' proposed program access conditions, will be sufficient to eliminate any potential for anti-competitive conduct due to the vertical relationship between News Corp.'s satellite cable programming networks and DirecTV's distribution platform with respect to News Corp.'s general national and non-sports regional programming. Accordingly, we adopt the Applicants' proposed conditions and decline to impose additional program access restrictions for this programming.

125. In enacting the program access provisions of the 1992 Cable Act, Congress found that extensive vertical integration between cable operators and cable programming vendors created an imbalance of power, both between cable operators and programming vendors and between incumbent cable operators and their multichannel competitors.³⁶⁴ Congress determined that this imbalance of power limited the development of competition among MVPDs and limited consumer choice.³⁶⁵ Congress expressed its concern that unaffiliated MVPDs faced difficulties gaining access to programming required to provide a viable alternative to cable. Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators.³⁶⁶ In response, Congress imposed specific conduct restrictions, including limits on exclusive contracts, to ensure market entrants could gain access to all vertically integrated satellite cable programming.³⁶⁷ The competitive concerns addressed through the program access statute are similar to many of the concerns expressed by commenters

³⁶⁰ EchoStar Petition at 63-64.

³⁶¹ Reply at 48.

³⁶² *Id.* at 61.

³⁶³ *Id.* at 61.

³⁶⁴ 1992 Cable Act § 2(a)(2).

³⁶⁵ *Id.*

³⁶⁶ 1992 Cable Act § 2(a)(5).

³⁶⁷ *See* 47 U.S.C. § 548.

regarding fair and non-discriminatory access to News Corp.'s cable programming. That is, Congress essentially recognized that access to all vertically integrated satellite cable programming on non-discriminatory terms and conditions was needed by all MVPDs and that until competitive conditions significantly altered, the Commission must enforce prohibitions on unfair and discriminatory terms and conditions of carriage. Because Congress' focus at the time was the market power in incumbent cable operators, it additionally imposed a prohibition on exclusive carriage arrangements among cable operators and vertically integrated satellite cable programming vendors.

126. In its 2002 examination of whether to permit the exclusivity prohibition to sunset, the Commission reiterated that "access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace," and that "failure to secure even a portion of vertically integrated programming would put a nonaffiliated cable operator or MVPD at a significant disadvantage *vis-à-vis* a competitor with access to such programming."³⁶⁸ In addition, the Commission observed that "cable programming – be it news, drama, sports, music or children's programming -- is not akin to so many widgets," and explained that complete loss of access to certain highly popular programming networks may harm the foreclosed unaffiliated competitor in the marketplace.³⁶⁹ The Commission explained, "there is a continuum of vertically integrated programming, ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's program lineup would have a substantial negative impact)."³⁷⁰ The Commission concluded that despite the progress made in the last ten years in terms of the availability of cable programming, "a considerable amount of vertically integrated programming in the marketplace today remains "must have" programming to most MVPD subscribers," such that the program access rules, including particularly the exclusivity provision, continue to be necessary to prevent anticompetitive foreclosure of access to all of the vertically integrated satellite programming covered by the rules.³⁷¹ Further, although the Commission recognized that "certain programming services, such as sports programming, or marquee programming, such as HBO, may be essential and for practical purposes, 'must haves' for program distributors and their subscribers," it recognized "the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition." The Commission therefore declined to narrow the scope of the exclusivity prohibition to apply only to certain types of programming that may be considered "essential programming services."³⁷²

127. *Permanent Foreclosure.* We note at the outset that all of News Corp.'s satellite cable programming networks are currently covered by the non-discrimination and unfair practices prohibitions in the program access rules, and will continue to be subject to the rules based on the proposed ownership structure of the post-transaction entity.³⁷³ News Corp. meets the definition of a "satellite cable

³⁶⁸ *Program Access Order*, 17 FCC Rcd at 12138 ¶ 32.

³⁶⁹ *Program Access Order*, 17 FCC Rcd at 12139 ¶ 33.

³⁷⁰ *Program Access Order*, 17 FCC Rcd at 12139 ¶ 33.

³⁷¹ *Program Access Order*, 17 FCC Rcd at 12139 ¶ 33.

³⁷² *Program Access Order*, 17 FCC Rcd at 12156 ¶ 69.

³⁷³ This includes News Corp.'s satellite-delivered regional sports networks. We address those programming assets separately because, as described in the next section, in contrast to our findings here with respect to national and (continued....)

programming vendor in which a cable operator holds an attributable interest” due to attribution of Liberty Media’s interest in News Corp.³⁷⁴ Some of News Corp’s regional sports networks are also subject to the program access rules based upon either Liberty Media’s or another cable operator’s direct ownership interest.³⁷⁵ The rules prohibit permanent foreclosure and overt discrimination in pricing of satellite cable programming, thus addressing outright concerns raised by EchoStar and others regarding continued access to News Corp.-owned or controlled national and non-sports regional cable programming. Indeed, as the Commission observed in its 2002 review, that “there [has been] little direct evidence of anticompetitive foreclosure of access to vertically integrated programming” in the ten years following enactment of the program access rules.³⁷⁶ In addition, several other specific concerns raised by commenters are addressed explicitly by News Corp.’s offered program access commitments, such as a prohibition on satellite exclusives for News Corp. programming. To ensure that the access and non-discrimination requirements of the program access rules will continue to apply to News Corp.’s national and regional cable programming, and to obtain the additional protections encompassed by the Applicants’ related commitments, we adopt the following conditions proposed by Applicants:

- News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions.³⁷⁷
- DirecTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.³⁷⁸
- As long as Liberty Media holds an Attributable Interest in News Corp., DirecTV will deal with Liberty Media with respect to programming services it controls as a vertically integrated programmer subject to the program access rules.³⁷⁹

(Continued from previous page) _____

non-sports regional programming, we find that News Corp. has significant market power with respect to regional sports programming the will be increased by the transaction, requiring remedies in addition to those provided by the program access rules and the Applicants’ offered commitments.

³⁷⁴ Under the program access attribution rules, an ownership interest greater than 5% is cognizable. See 47 C.F.R. § 501, note 2(a). Liberty Media owns 17.6% of News Corp and 100% of Liberty Cablevision of Puerto Rico which has 119,000 subscribers.

³⁷⁵ For example, Comcast has a 50% ownership interest in Fox Sports Net New England.

³⁷⁶ *Program Access Order*, 17 FCC Rcd at 12135 ¶ 25.

³⁷⁷ In committing not to offer its programming services on an exclusive basis, News Corp. voluntarily foregoes the right enjoyed by all other vertically integrated programmers to seek approval of an exclusive programming contract under the public interest standard established in 47 U.S.C. § 548(c)(4).

³⁷⁸ “Affiliated Program Rights Holder” includes (i) a program rights holder in which News Corp. or DirecTV holds a non-controlling “Attributable Interest” (as determined by the FCC’s program access attribution rules); and (ii) a program rights holder in which an entity holding an non-controlling Attributable Interest in News Corp. or DirecTV holds an Attributable Interest, provided that News Corp. or DirecTV has actual knowledge of such entity’s Attributable Interest in such program rights holder. Liberty Media is the only entity currently covered by this definition. Nonetheless this commitment goes beyond the program access rules as DBS operators are not included within the exclusivity prohibition. See 47 C.F.R. § 1002(c).

- DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (e.g., NFL Sunday Ticket)³⁸⁰
- Neither News Corp. nor DirecTV (including any entity over which either exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.
- These commitments will apply to News Corp. and DirecTV for as long as the FCC deems News Corp. to have an Attributable Interest in DirecTV and the FCC's program access rules applicable to satellite cable programming vendors affiliated with cable operators are in effect (provided that if the program access rules are modified these commitments shall be modified to conform to any revised rules adopted by the FCC).³⁸¹

128. We reject as unwarranted the suggestion of certain commenters that the exclusivity ban should continue to apply to the post-transaction entity even if in the program access exclusivity ban sunsets for the rest of the industry.³⁸² To let the ban sunset, the Commission must find that there is sufficient competition in the MVPD market so that the exclusivity prohibition is no longer necessary.³⁸³ If MVPD competition is found to be sufficient, then there is no need to restrain the Applicants alone in the manner suggested. Additionally, we address the concern raised by NRTC and RCN regarding an appropriate enforcement mechanism by clarifying that, for enforcement purposes, aggrieved MVPDs may bring program access complaints against Applicants using the procedures found at Section 76.1003 of the Commission's rules.³⁸⁴

129. *Temporary Foreclosure.* As we have found, the program access rules, together with the offered conditions, will prohibit permanent foreclosure as well as overt discrimination in the prices News Corp. charges for national and non-sports regional cable programming. Commenters express concern, however, that the proposed conditions will be inadequate to prevent News Corp. from uniformly raising programming prices to unreasonable levels. Our analysis, however, indicates that such a result is only achievable for programming in which News Corp. has significant market power. As we noted earlier, video programming in general, and cable programming in particular, are differentiated products, for

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³⁷⁹ This condition would only be of significance in the event either Applicant or Liberty Media otherwise ceases to be subject to the Commission's program access jurisdiction.

³⁸⁰ See Discussion *infra* at Section VII.D. concerning exclusive arrangements with unaffiliated programmers.

³⁸¹ Although *most* of the program access rules will remain applicable unless terminated by Congress, Section 76.1002(c), the prohibition on exclusive contracts, sunsets on October 5, 2007 unless the Commission finds that the prohibition continues to be necessary to protect competition in the distribution of video programming. See 47 C.F.R. § 76.1002(c)(2). In the year prior to the sunset, the Commission will conduct a proceeding to evaluate the circumstances in the video programming marketplace.

³⁸² ACA Comments at 19; EchoStar Petition at 65.

³⁸³ See 47 U.S.C. 548(c)(5).

³⁸⁴ NRTC Petition at 21; RCN Comments at 9-10; See also 47 C.F.R. 76.1003.

which demand and substitutability may vary greatly across a continuum.³⁸⁵ The record does not support a conclusion that either News Corp. or other MVPDs consider News Corp.'s national and non-sports regional programming networks to be so highly desired by subscribers that they will switch MVPD providers to obtain it if temporarily foreclosed from accessing it on their incumbent providers' systems.³⁸⁶ Nor does the record contain any other evidence that consumers value this type of programming to such an extent that they will change MVPDs rather than substitute different programming carried by their chosen MVPD. Rather, we find that News Corp.'s general entertainment and news cable programming networks participate in a highly competitive segment of programming market with available reasonably close programming substitutes.³⁸⁷

130. Further, we find no evidence in the record that News Corp. has attempted to temporarily foreclose an MVPD's access to its national and non-sports regional programming in order to achieve better carriage conditions or higher rates. To the contrary, in most, if not all, instances the record indicates that News Corp. has used negotiations for carriage of other programming that does have significant market power for which there are no close substitutes – its regional sports networks and local broadcast television station programming -- to ensure carriage of many of its general entertainment and other cable networks.³⁸⁸ [REDACTED].³⁸⁹ There is no evidence in the record to suggest that News Corp.'s acquisition of a controlling interest in DirecTV is likely to give it any additional market power with respect to carriage negotiations for its national and non-sports regional cable programming networks. Consequently, we find that News Corp. could not effectively use a controlling interest in DirecTV to increase rates for national and non-sports regional programming to levels above those that would exist absent the transaction.

131. We therefore decline to adopt suggestions from commenters and opponents that: (a) are already addressed by the additional conditions Applicants have offered; (b) intended to remedy situations unrelated to this transaction; (c) calculated to remedy harms that we have determined are unlikely to occur; (d) would not adequately remedy the likely harms of the transaction; (e) single Applicants out for special treatment unwarranted by any likely adverse consequences of the transaction; or (f) would leave Applicants in a worse position following the transaction than they are today.³⁹⁰ The goal of our license

³⁸⁵ See supra at para 59; See also *Program Access Order*, 17 FCC Rcd 12138 ¶ 33.

³⁸⁶ As discussed below, we reach a different conclusion regarding the amount of market power News Corp. possess regarding its RSNs.

³⁸⁷ The *2002 Video Competition Report* reported 208 satellite delivered national programming networks. *2002 Video Competition Report*, 17 FCC Rcd at 26960 ¶ 59. The success of the Fox News Channel demonstrates the competitiveness of the general cable programming segment. Launched in 1996, the network was able to overtake long standing ratings leader CNN, and since 2002 has since consistently finished first among cable news channels in total day ratings. See Statement of Rupert Murdoch, Chairman and CEO, News Corp. Before Senate Commerce Comm. (May 22, 2003).

³⁸⁸ Indeed, the record indicates that News Corp. has achieved unparalleled levels of distribution for some of its cable networks as a direct result of its ability to require carriage of these networks as a condition of access to its regional sports and broadcast television signals. See JCC Comments at 21-29. See also ACA Comments in MB Docket No. 03-172 (*Video Competition Report*) at 6.

³⁸⁹ [REDACTED].

³⁹⁰ For example, EchoStar proposes that the Applicants be prevented from sharing information internally; that program access requirements be extended to apply to Liberty Media's programming assets and to programming (continued....)

transfer application review process is to allow parties to realize the economic efficiencies associated with the transaction, while ensuring that any harms resulting from the license transfer are mitigated and some portion of the benefits of the transfer are passed on to the public. An application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. Those issues are best left to broader industry-wide proceedings.

132. In conclusion, we believe as a general matter that the Commission's program access rules are satisfactory to address any imbalance of power between News Corp. and competing MVPDs with respect to national and non-sports regional cable programming networks. Likewise, our acceptance of the offered conditions ensures that any imbalance that may exist between DirecTV and some of its competitors in the MVPD market is remedied in the same manner as with vertically integrated MVPDs that use cable technology to deliver their product to consumers, regardless of the effect of any post-closing changes in the corporate relationships between News Corp. and its various cable programming affiliates. In contrast, as described below, the record indicates that News Corp. has considerable market power with respect to its regional sports networks and its local broadcast station signals, that the transaction is likely to increase its incentive and ability to use that market power to obtain substantially greater fee increases and other carriage concessions for such programming than it can today, and that additional remedial actions are therefore warranted for such video programming.

b. Access to Regional Sports Cable Programming Networks

(i) Background

133. Since the Commission first began tracking regional cable programming networks in 1998,³⁹¹ it has repeatedly recognized the importance of regional sports programming to MVPD offerings.³⁹² This acknowledgement is based, in part, on the finding that for such programming, there are no readily acceptable close substitutes.³⁹³ 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

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that Congress did not choose to subject to the rules and that News Corp. be limited to offering programming at published rates that are preapproved by the Commission. *See* EchoStar Petition at 64. Pegasus suggests that we impose specialized corporate governance rules and FCC filing requirements on all contracts between Fox and DirecTV for a period of five years. *See* Pegasus Sept. 30, 2003 Ex Parte. Cablevision asks that we revise the program access commitments to prevent News Corp. from using "sweetheart deals" with DirecTV to force higher prices on all other MVPDs. Cablevision Comments at 2, 30.

³⁹¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 24284 (1998) ("1998 Video Competition Report").

³⁹² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1314 ¶ 171 (2002) ("2001 Video Competition Report") (finding that "regional sports programming continues to be an important segment of programming for all MVPDs"); *Program Access Order*, 17 FCC Rcd at 12138 ¶ 32 (finding no readily acceptable substitute for RSN programming).

³⁹³ *Program Access Order*, 17 FCC Rcd at 12148-49 ¶ 54 ("the 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").

substitute for watching their local and/or favorite team play an important game.³⁹⁴ The Commission's extension of the sunset date for the exclusivity program access rules last year was intended, in part, to ensure that competing MVPDs would have continued access to the satellite-delivered regional sports programming owned by vertically integrated cable operators.³⁹⁵ We also have long recognized that the terrestrial distribution of programming—particularly RSN programming—by vertically integrated cable operators could competitively disadvantage competing MVPDs if they were denied access to the terrestrially delivered programming.³⁹⁶

134. News Corp. is a major owner of RSNs. It owns or has an attributable interest in 19 RSNs, 12 of which it manages, which reach 79 million television households.³⁹⁷ According to NCTA's *Cable Developments 2003*, those RSNs produce over 4,700 live events each year, and carry 65 of the 80 professional Major League Baseball ("MLB"), National Basketball Association ("NBA") and National Hockey League ("NHL") teams.³⁹⁸ RSNs wholly owned by News Corp. carry 45 of the 80 professional teams,³⁹⁹ and thus controls a significant amount of professional sports programming on regional sports networks.

(ii) Positions of the Parties

135. Applicants contend that it would be unprofitable for News Corp. to foreclose access to its RSNs. They assert that DirecTV's maximum share of any regional market served by one of the News Corp.'s RSNs is less than 13%, and that denying programming to competing MVPDs would require News Corp. to forego programming sales to at least 87% of each regional market.⁴⁰⁰ They further argue that the

³⁹⁴ "Regional sports programming in particular, has been and continues to be, an important segment of programming for all video programming providers. According to a 2000 survey, between 40 and 48 percent of cable subscribers would be less likely to subscribe to cable service if it lacked local sports. Cable overbuilders have frequently noted that access to sports programming is so essential to the success of a cable system that many operators will pay exorbitant prices and agree to entertain other less attractive business arrangements just to obtain it." FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 124 (citing *2000 Video Competition Report*, 17 FCC Rcd at 1354-1356; *1998 Video Competition Report*, 13 FCC Rcd at 24298-99 and 24380-81).

³⁹⁵ *Program Access Order*, 17 FCC Rcd at 12147-49 ¶¶ 52-55 (finding that vertically integrated MSOs continue to have an incentive and ability to withhold access to their affiliated RSNs).

³⁹⁶ *E.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1252 ¶ 14 (2002) ("*2002 Video Competition Report*"); *2001 Video Competition Report*, 17 FCC Rcd at 1252 ¶ 14; *2000 Video Competition Report*, 16 FCC Rcd at 6013 ¶ 15 (2001); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 15 FCC Rcd 978, 986 ¶ 16 (2000) ("*1999 Video Competition Report*"); *Program Access Order*, 17 FCC Rcd at 12139 n.107 (citing data provided by DirecTV and EchoStar indicating that they have significantly lower subscribership in Philadelphia as compared to other large cities and noting that DirecTV's and EchoStar's claim that "this is directly attributable to their inability to access Comcast SportsNet").

³⁹⁷ *See Application* at 26.

³⁹⁸ NCTA, *Cable Developments 2003* at 83.

³⁹⁹ JCC Comments at 38 (citing www.newscorp.com/management/fsn.html).

⁴⁰⁰ Applicants' Reply, CRA Analysis ¶ 46.

loss in programming revenues from competing MVPDs that would result from a strategy of foreclosure could not be offset by any profits it might earn as a minority owner of an MVPD with a relatively small market share.⁴⁰¹ Applicants further assert that much of its programming is jointly owned by other parties, who could not benefit from, and therefore would not tolerate, such a strategy.⁴⁰² Applicants also maintain that, even if a foreclosure strategy made economic sense, the program access rules in unison with their proposed program access commitments require them to make all existing and future programming available on a nondiscriminatory basis to all MVPDs and prohibit DirecTV from entering into exclusive deals with affiliated programmers.⁴⁰³

136. Competing MVPDs consider RSNs critical to any MVPD offering.⁴⁰⁴ They contend that, if they cannot offer the “must-have” programming which is controlled by News Corp., such as News Corp.’s RSNs, they will be unable to compete with DirecTV.⁴⁰⁵ JCC observe that the “harm to the competitive MVPD . . . is further increased in situations in which there is no readily acceptable substitute for the programming, such as regional sports programming.”⁴⁰⁶ JCC also assert that News Corp. Chairman Rupert Murdoch has “long described sports programming as his ‘battering ram’ to attack pay television industries around the world,” and argue that acquiring DirecTV will give News Corp. the ability to dictate the terms and conditions of carriage for such marquee programming.⁴⁰⁷ In addition, JCC cite reports that News Corp. has raised the cost of its Fox Sports content by more than 30% in one year for some systems and has already demonstrated its willingness to withhold its RSNs’ programming signal from cable operators unwilling to adhere to its demands for higher carriage fees.⁴⁰⁸ RCN argues that lack of access to local sports programming works particular hardships upon competitive MVPDs, citing results of surveys conducted for it by professional polling organizations as confirming “the vital importance of local sports programming to a cable operator’s success: the data show that some 40-48% of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming and, in one survey, an additional 12% of subscribers said they were not sure whether the absence of local sports programming would impact their decision whether to take the service.”⁴⁰⁹ According to RCN, in rough terms this indicates that a competitive MVPD that does not have local sports programming will have little or no chance of winning as subscribers as much as 40-70% of its potential subscriber base, with the result

⁴⁰¹ *Id.*

⁴⁰² Applicants’ Reply, Lexecon Analysis ¶ 62.

⁴⁰³ See Application at 54.

⁴⁰⁴ JCC Comments at 34-44; ACA Comments at 16, 18-21; EchoStar Petition at 22-24, 31; RCN Comments at 3-4.

⁴⁰⁵ EchoStar Petition at 22-23; ACA Comments at 18; JCC Comments at 55.

⁴⁰⁶ *Id.* (citing *Program Access Exclusivity Report and Order*, 17 FCC Rcd at 12145 ¶ 47).

⁴⁰⁷ JCC Comments at 34 (citing David D. Kilpatrick, *Murdoch’s First Step: Make Sports Fans Pay*, N.Y. Times, Apr. 14, 2003, at C1).

⁴⁰⁸ JCC Comments at 39-42 (noting three disputes in which a Fox RSN was withdrawn from cable subscribers homes: 1) Fox Sports North to 150,000 Time Warner customers, 2) Fox Sports’ Sunshine Network to almost 2 million Time Warner customers, and 3) certain sporting events on Fox Sports Net West).

⁴⁰⁹ See Letter from Kathy L. Cooper and L. Elise Dieterich, Swidler, Berlin, Shereff, Friedman, LLP, to Marlene H. Dortch, Secretary, FCC (Oct. 24, 2003) (“RCN Oct. 24, 2003 Ex Parte), Attachment at 2-3.

being that without local sports, RCN must try to reach a break-even penetration rate of 30% of the market from a potential subscriber base that only includes 30-60% of the market to begin with.⁴¹⁰

137. JCC contend that DirecTV already uses its sports programming offerings as an important marketing tool and a competitive strategy.⁴¹¹ Further, they argue that DirecTV siphons customers away from cable every time a cable MSO fails to come to terms with an RSN.⁴¹² After the transaction, JCC maintains, this increase in DirecTV subscriptions from customers who regard RSNs as “must have” programming will generate additional profits for News Corp, thus increasing News Corp.’s incentive to precipitate carriage disputes over RSNs with rival MVPDs.⁴¹³ JCC also claim that by “picking and choosing its targets and timing with care, News Corp. would also send powerful signals to the marketplace,” which is likely to cause other competing MVPDs simply to accept News Corp.’s price increases.⁴¹⁴ Commenters claim that the increased price of News Corp.’s RSN programming is likely to harm consumers through higher cable rates in the short term, and diminished competition in the MVPD marketplace in the long term.⁴¹⁵ Commenters also contend that despite the program access rules, News Corp.’s inflexibility over rates, terms and conditions of carriage of its RSNs and its willingness to withhold those networks from cable operators if a carriage agreement cannot be reached will be exacerbated by the ability to distribute programming via DirecTV.⁴¹⁶ Additionally JCC argue, News Corp. may insist on bundling carriage of RSNs with other newer or less desirable programming with the result that the “battering ram” of News Corp.’s sports programming delivers a “one-two” punch: higher prices and mandatory carriage of new – and expensive – programming.⁴¹⁷ Absent intervention from the Commission, they claim, News Corp.’s acquisition of a controlling interest in DirecTV can be expected to lead to higher prices and more high-profile “showdown” negotiations such as those that have occurred with negotiations over Fox Sports Net North in January 2003 and Fox Sports Net West in 2001.⁴¹⁸

138. JCC provide an economic analysis of the competitive effects of the transaction authored by William Rogerson (“Rogerson Analysis”), which finds that RSNs are “must have programming” for

⁴¹⁰ See RCN Oct. 24, 2003 Ex Parte Attachment at 3.

⁴¹¹ JCC Comments at 40; EchoStar at 22-24.

⁴¹² JCC Comments at 40. See also Letter from Pantelis Michaelopoulos, Steptoe & Johnson, to Marlene H. Dortch, Secretary, FCC (Dec. 15, 2003) at 4-5 (“EchoStar Dec. 15 Ex Parte”) (describing increased churn among its New York DMA subscribers after it failed to reach a carriage agreement with YES Network).

⁴¹³ JCC Comments at 42-43.

⁴¹⁴ *Id.*

⁴¹⁵ JCC Comments at 4, 42-43 and Exhibit A, William P. Rogerson, *An Economic Analysis of Competitive Effects of the Takeover of DirecTV by News Corp.* (“Rogerson Analysis”) at 4, 27; Letter from Chris Murray, Legislative Counsel, Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) (“Consumers Union Sept. 23, 2003 Ex Parte”) at 3-5; ACA Reply Comments at 5-7.

⁴¹⁶ JCC Comments at 34; ACA Comments at 18.

⁴¹⁷ JCC Comments at 40.

⁴¹⁸ JCC Comments at 42-43.

which no good substitute exists.⁴¹⁹ According to Rogerson, this means that News Corp. could harm rivals by pursuing exclusionary or cost-raising strategies with respect to this programming.⁴²⁰ Examining several recent incidents where the programming supplier withdrew sports programming from an MVPD during carriage negotiations, the Rogerson Analysis concludes that significant numbers of subscribers leave MVPDs that no longer offer local sports programming.⁴²¹

139. Applicants respond with an economic analysis by Charles River Associates, Inc. (the “CRA Analysis”) that supports their argument that it would not be profitable for post-transaction News Corp. to withhold RSN signals.⁴²² The CRA Analysis concludes that the costs of permanently foreclosing competing MVPDs from access to News Corp.’s RSN programming outweigh the benefits of such a strategy.⁴²³ Specifically, the CRA Analysis finds that, in order for permanent foreclosure to be a profitable strategy, DirecTV would have to more than double its subscribership in the combined RSN footprint.⁴²⁴ Applicants contend that such subscribership increases are implausible.⁴²⁵

140. In support of their claim, Applicants describe the effects of the loss of Yankee games by Cablevision following the formation of the Yankees Entertainment and Sports (“YES”) Network.⁴²⁶ According to the Applicants, Cablevision lost just 30,000 subscribers—1% of its overall subscriber base—as a result of its inability to carry Yankee games during the 2002 season, while DirecTV’s subscribership in the affected region increased by only a few percentage points—far less than the

⁴¹⁹ JCC Comments, Rogerson Analysis at 13-16. JCC submitted a total three exhibits prepared by William P. Rogerson. See Letter from Bruce D. Sokler, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Aug. 4, 2003) (“JCC Aug. 4 Ex Parte”) Attachment, William P. Rogerson, *A Further Economic Analysis of The News Corp. Takeover of DirecTV* (“Rogerson Analysis II”); Letter from Fernando Laguarda, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003), (“JCC Sept. 23, 2003 Ex Parte”), William P. Rogerson, *Economic Analysis of The Takeover of DirecTV by News Corp. – Presentation to the FCC* (Sept. 23, 2003) (“Rogerson Analysis III”).

⁴²⁰ JCC Comments, Rogerson Analysis at 12-13.

⁴²¹ *Id.* at 15-16.

⁴²² Applicants’ Reply, Exhibit B Steven C. Salop *et al* of Charles River Associates, Inc., *News Corporation’s Partial Acquisition of DirecTV: Economic Analysis of Vertical Foreclosure Claims*. See also Applicants’ Reply, Exhibit A, Lexecon, Inc., *Economic Analysis of the News Corp./DirecTV Transaction* (“Lexecon Analysis”)

⁴²³ Applicants’ Reply, CRA Analysis at ¶¶ 44-67.

⁴²⁴ Applicants’ Reply at 28 (citing CRA Analysis at ¶¶ 44-51).

⁴²⁵ Applicants’ Reply at 28-29.

⁴²⁶ YES entered into carriage agreements with DirecTV, Time Warner, and a number of other MSOs prior to the start of the 2002 baseball season. John Brennan, *New Jersey Official Raise Stakes in Battle with Cable-Television Firm*, THE RECORD (Apr. 30, 2002). EchoStar and Cablevision, which had both carried MSGN programming in 2001, did not reach agreements with YES, however, and thus could no longer offer New York Yankees games in 2002. See *RSNs: Keeping it Local*, THE BRIDGE (Aug. 2003), available at: http://www.cabletoday.com/pubs/bridge/the_bridge_archive/bridge082003.pdf (visited Sep. 11, 2003). YES and Cablevision later reached a carriage agreement. Harry Berkowitz and Dan Janison, *Victory for Yanks Fans: Cablevision Agrees to Carry YES Network in Time for Opener*, NEWSDAY (Mar. 13, 2003).

increases in market share that Applicants contend are required for RSN foreclosure to be profitable.⁴²⁷ The second example cited by Applicants involved a carriage dispute between a Fox RSN and a Time Warner cable system in Minnesota, where, according to Applicants, Time Warner reported a loss of only 200 of its 180,000 subscribers in the region during the two months that it lacked the programming.⁴²⁸ Finally, Applicants cite Comcast's ongoing refusal to make its RSN in Philadelphia available to DirecTV or EchoStar. Applicants contend that, although DirecTV has not grown as quickly in this market as in others, neither DirecTV nor EchoStar has exited the market, and, in fact, both DBS operators have continued to grow.⁴²⁹

141. In response to claims that News Corp. will increase prices for its affiliated RSN programming, Applicants assert that, like foreclosure, such a strategy would be contrary to News Corp.'s economic interest.⁴³⁰ According to Applicants, News Corp. cannot increase the price of RSN programming without risking a loss of subscribers, and vertical integration with DirecTV will not change this.⁴³¹ Claiming that News Corp.'s fees for RSN programming already maximize the profits that it can earn on the programming,⁴³² Applicants argue the transaction actually will reduce News Corp.'s incentive to raise prices, because News Corp. would lose revenue from programming fees when cable operators refuse to pay the higher prices and stop carrying the RSNs, and DirecTV would lose money due to the increased RSN prices.⁴³³ Applicants further contend that opponents' foreclosure analysis fails to take into account the downward pressure on prices associated with the transaction, such as elimination of double marginalization and other efficiencies.⁴³⁴ Finally, Applicants claim that regardless of the transaction, News Corp. could achieve the benefits of foreclosure of a RSN through the use of contracts.⁴³⁵

142. JCC criticize the Applicants' for failing to adequately grapple with the key argument that

⁴²⁷ Applicants' Reply at 29.

⁴²⁸ Applicants' Reply at 29 (citing Judd Zulgad, *FSN, Time Warner Struggled to Agreement*, STAR TRIBUNE at 6C (Mar. 14, 2003)).

⁴²⁹ Applicants' Reply at 30. In response to claims that Applicants would have a greater incentive and ability to withhold programming from smaller cable operators, Applicants state that although subscriber losses to the RSN would be small, so would subscriber gains to DirecTV. Applicants' Reply at 31.

⁴³⁰ Applicants' Reply at 32.

⁴³¹ Applicants' Reply at 32.

⁴³² Applicants' Reply at 33 (citing CRA Analysis at ¶¶ 92-94).

⁴³³ Applicants' Reply at 33 (citing CRA Analysis at ¶¶ 95-100).

⁴³⁴ Applicants' Reply at 34.

⁴³⁵ Applicants' Reply at 24; *see also* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Sept. 8, 2003) ("Applicants' Sept. 8, 2003 Ex Parte"), Exhibit 2, Lexecon, Inc., *Response to William P. Rogerson and Daniel L. Rubinfeld* ("Lexecon Analysis II") at 66. Opponents counter that it would be difficult for independently owned and controlled firms to negotiate, exchange necessary information, and monitor compliance with the complex contracts that would be required to efficiently apportion the benefits of temporary foreclosure. Rogerson Analysis II at 22-23.

the transaction increases the likelihood that News Corp., armed with the increased bargaining power its interest in DirecTV will give it, will withhold – or threaten to withhold – programming from MVPDs in a few select markets for only a short period of time in order to obtain additional pricing power and negotiating leverage.⁴³⁶ JCC use the data and methodology from the CRA Analysis to support their temporary foreclosure theory. Rogerson, on behalf of JCC, notes that programmers, including News Corp., currently use the threat of withdrawing programming as a lever to negotiate higher programming prices from MVPDs. Any change in circumstances, according to Rogerson, that lowers the cost to News Corp. of withdrawing programming will increase the credibility of its threat to withdraw programming and therefore will increase News Corp.'s ability to force MVPDs to accept higher programming prices. News Corp.'s acquisition of control of DirecTV reduces the cost to News Corp. of withdrawing programming from rivals of DirecTV because: (i) when News Corp. withdraws programming from rival MVPDs, some customers will switch to DirecTV and DirecTV will earn profits on the customers who switch; and (ii) these profits offset the cost to News Corp. of withdrawing programming and therefore reduce the net cost of withdrawing programming. As Rogerson notes, “this will make the threat of withdrawing programming more credible and thus allow News Corp. to bargain for higher prices.”⁴³⁷ Moreover, Rogerson concludes, the threat to competition and consumers by temporary withdrawals of “must have” programming will “be particularly serious in less dense regions of the country served by small and medium sized cable operators [because] raising the price of programming from these firms is more likely to drive them entirely out of the market,” and this in turn will increase News Corp.'s incentive to use its bargaining power in this manner, with the potential result of significant price increases.⁴³⁸ ACA argues that these conclusions confirm that smaller and medium sized cable operators outside urban areas of the country are at particular risk from the combination of News Corp.'s programming and DirecTV's distribution assets, and that the Applicants' proposed program access undertakings offer smaller cable operators no protection, because, as Rogerson and the Applicants acknowledge, the proposed conditions expressly allow quantity discounts and therefore place very little constraint on the prices that News Corp. could charge smaller cable systems.⁴³⁹

143. According to Rogerson's calculations, temporary withdrawals of programming by News Corp. are likely to not only partially offset losses during the blackout periods for RSN programming, but are “very likely to be profitable for News Corp. after it acquires control of DirecTV. These temporary withdrawals will directly harm consumers and also provide News Corp. with even more bargaining leverage in its negotiations over programming prices with rival MVPDs.”⁴⁴⁰ Additionally, Rogerson finds, using data contained in the CRA Analysis, that if News Corp. temporarily withholds an RSN from a targeted MVPD, it breaks even economically if less than **[REDACTED]** of that MVPD's subscribers migrate to DirecTV.⁴⁴¹ As a consequence, Rogerson concludes, News Corp. will -- because of the transaction -- be able to bargain for higher programming prices than it would otherwise, and consumers

⁴³⁶ JCC Aug. 4, 2003 Ex Parte at Rogerson Analysis II.

⁴³⁷ JCC Aug. 4, 2003 Ex Parte at 15, Rogerson Analysis II at 43-44.

⁴³⁸ JCC Aug. 4, 2003 Ex Parte at 15, Rogerson Analysis II at 4.

⁴³⁹ ACA Comments at 5-7; ACA Oct. 17, 2003 Ex Parte at 1, 10.

⁴⁴⁰ JCC Aug. 4, 2003 Ex Parte at 15, Rogerson Analysis II at 43-44.

⁴⁴¹ JCC Sept. 23 Ex Parte, Rogerson Analysis III at 11.

will suffer as these increased input costs are passed along to them by their MVPDs.⁴⁴²

144. JCC argue accordingly that News Corp. would not need to achieve “enormous increases in subscribership or pricing” using DirecTV to make temporary withholdings of must-have programming a viable and profitable strategy.⁴⁴³ They argue that: (1) internal News Corp. documents show that News Corp. already engages in temporary programming withdrawals of must-have programming, such as RSNs; (2) acquiring control over DirecTV will reduce the costs of such tactics to News Corp. and therefore create upward pressure on programming prices; and (3) News Corp. recognizes the value of effectuating a service interruption in a particular market in order to “send a message” to distributors in other markets about the costs of resisting its fee and carriage demands.⁴⁴⁴ They claim that the transaction changes the present “balance of terror” between programmers and MVPD distributors.⁴⁴⁵ JCC explain that News Corp. currently does not know whether the loss of subscription and advertising revenue resulting from a temporary withdrawal of RSN or FOX programming will be recouped via higher carriage fees gained from that distributor (and others in adjacent markets) once the impasse is resolved. According to JCC, the acquisition substantially reduces, if not eliminates, the pre-transaction risks to News Corp. of failing to conclude a carriage agreement with a cable operator or other MVPD for “must have” programming.⁴⁴⁶ JCC emphasize that the key competitive concern is that this transaction will enable News Corp. to use temporary foreclosure and/or the threat of such foreclosure as a tactical “weapon” to obtain supra-competitive prices for Fox programming from all retail distributors, and that those prices will ultimately be borne by consumers.⁴⁴⁷

145. Applicants respond that reliance of the JCC upon selective portions of internal News Corp. documents is misplaced, and that News Corp. does not engage in a temporary foreclosure negotiation strategy with respect to its RSNs.⁴⁴⁸ Rather, Applicants claim that News Corp. seeks “maximum distribution of its programming.”⁴⁴⁹ Applicants maintain that in nearly every instance involving renewal of an RSN, the parties have been able to reach an agreement without service interruptions, and that temporary service interruptions have occurred only rarely during negotiations with MVPDs for Fox RSN carriage.⁴⁵⁰ Applicants argue further that JCC fail to take into account the evidence of the actual negative effects of temporary service interruptions to News Corp., where these have

⁴⁴² JCC Sept. 23 Ex Parte; Rogerson Analysis III at 2.

⁴⁴³ Letter from Bruce Sokler, Mintz, Levin, et al. to Marlene Dortch, Secretary, FCC (Nov. 5, 2003) (“JCC Nov. 5, 2003 Ex Parte”).

⁴⁴⁴ *Id.*

⁴⁴⁵ JCC reiterate their claim that News Corp. will use DirecTV as a negotiating weapon. *Id.* See also ACA Comments at 18.

⁴⁴⁶ *Id.* Similarly NRTC notes that News Corp. could threaten cable operators by using DirecTV to acquire market share. NRTC Petition at 14.

⁴⁴⁷ *Id.* at 2; See also Consumers Union Sept. 23, 2003 Ex Parte at 3.

⁴⁴⁸ Letter from William Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene Dortch, Federal Communications Commission (Nov. 13, 2003) (“Applicants’ Nov. 13, 2003 Ex Parte”).

⁴⁴⁹ *Id.* at 2.

⁴⁵⁰ *Id.* at 2.

occurred. Applicants claim that there is no evidence to support theories that the acquisition of a partial interest in DirecTV would materially change the relative bargaining power of News Corp. and MVPDs. In fact, Applicants argue, real-world experience with withdrawals of sports programming from cable operators in other markets (such as the Cablevision/YES dispute) demonstrates that “very little switching” of subscribers to DBS providers carrying the foreclosed programming actually occurs.⁴⁵¹ Finally, Applicants reiterate that temporary withholding of RSNs is unlikely to occur because News Corp. is likely to suffer significantly greater financial losses than the MVPD if the RSN signal is not carried.⁴⁵² According to the Applicants, while News Corp. will lose the subscriber fees and advertising revenues that it would have realized through carriage on the MVPD, the MVPD – able to publicize to its subscribers that the RSN signal will be restored once the carriage dispute is concluded -- suffers nothing “more than customer annoyance.”⁴⁵³

146. EchoStar takes issue with the characterization of the harm inflicted on the MVPD as mere “customer annoyance,” and argues that “the absence of regional sports . . . from an MVPD’s package, even for a short period of time, has a debilitating effect on that distributor’s ability to compete in the region in question . . . [T]he distributor would have lost existing subscribers, potential new subscribers, and would have suffered a serious reputational blow. All of these losses would be irreparable – the subscribers who departed or chose another distributor would almost certainly not come back when the programming returns.”⁴⁵⁴

(iii) Discussion

147. 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. Moreover, we find that in contrast to the situation with respect to access to national and non-sports regional programming, neither our program access rules nor Applicants’ proposed program access commitments are sufficient to protect against these likely transaction-specific harms.

148. At the outset, we agree with commenters that there are no reasonably available substitutes for News Corp.’s RSN programming and that News Corp. thus currently possesses significant market power in the geographic markets in which its RSNs are distributed. We base these conclusions, in part, on the limited number of teams and games of local interest that are available and [REDACTED],⁴⁵⁵ and on our economic analysis, described below, of the effects of temporary withdrawals of such programming

⁴⁵¹ *Id.* at 4.

⁴⁵² Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Dec. 11, 2003) (“Applicants’ Dec. 11 Ex Parte”), Attachment at 1; Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Dec. 12, 2003) (“Applicants’ Dec. 12 Ex Parte”), Attachment at 1.

⁴⁵³ Applicants’ Dec. 11 Ex Parte, Attachment at 1.

⁴⁵⁴ EchoStar Dec. 15 Ex Parte at 2.

⁴⁵⁵ *See* [REDACTED].

from MVPD subscribers. An additional feature of RSN programming that sets it apart from general entertainment programming is the time-sensitivity of the airing of important local professional sports events, such as opening days or playoffs. As we have previously observed,⁴⁵⁶ RSNs are comprised of assets of fixed or finite supply – exclusive rights to local professional sports teams and events – for which there are no acceptable readily available substitutes. These peculiar features of RSN programming give rise to somewhat unique competitive problems in terms of finding relatively close substitute programming in the event access that is foreclosed to rival MVPDs.

149. We also reject News Corp.'s claim that the key competitive harms associated with this transaction could be inflicted by means of contractual arrangements between the companies, and that therefore the claims are not transaction-specific.⁴⁵⁷ To the extent that any behavior other than permanent foreclosure is at issue, it appears highly unlikely that News Corp. and DirecTV, as separate entities, could better manage and coordinate temporary withholdings than they could functioning as a single entity. Rather we agree, as JCC's expert observes, that News Corp. cannot simultaneously claim that the transaction is essential to the accomplishment of all of the beneficial efficiencies identified in their Application, while simultaneously asserting that it is completely unnecessary to the imposition of the harms identified in the record.⁴⁵⁸

150. Both Applicants and commenters have provided economic analyses, which rely in part on empirical data to evaluate whether News Corp., after the transaction, will engage in some form of foreclosure.⁴⁵⁹ Applicants' analyses find that they would not profit from either permanent or temporary foreclosure.⁴⁶⁰ Commenters' analyses, in contrast, find that Applicants will have an increased incentive and ability to temporarily withhold, or credibly threaten to withhold, access to their RSNs.⁴⁶¹

151. In addition to the studies submitted by the parties, Commission staff conducted its own economic analysis. As commenters correctly observe, the increased *ability* of an RSN owner to credibly threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow the RSN owner to extract higher prices, which are ultimately passed on to consumers. The staff's economic analysis is premised on the assumption that, if the transaction significantly enhances News Corp.'s incentive and ability to withhold signals of its RSNs by lowering the costs to News Corp. of employing such bargaining tactics, News Corp. will engage in such behavior, and that this will result in an increase of rival MVPDs' programming costs, and ultimately end-user prices.

⁴⁵⁶ See *Program Access Order*, 17 FCC Rcd at 121489 ¶ 54; FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 124 (citing *2000 Video Competition Report*, 17 FCC Rcd at 1354-1356; *1998 Video Competition Report*, 13 FCC Rcd at 24298-99 and 24380-81).

⁴⁵⁷ Applicants' Reply at 24-26.

⁴⁵⁸ JCC Aug. 4, 2003 Ex Parte at 10-11; Rogerson Analysis II at 22-25.

⁴⁵⁹ See Applicants' Reply, CRA Analysis; JCC Comments, Rogerson Analysis I; JCC Aug. 4 Ex Parte, Rogerson Analysis II; JCC Sept. 23, 2003 Ex Parte, Rogerson Analysis III; Applicants' Sept. 8 Ex Parte, Exhibit 1, Charles River Associates, Inc., *News Corp.'s Partial Acquisition of DirecTV: A Further Economic Analysis* ("CRA Analysis II").

⁴⁶⁰ Applicants' Reply, CRA Analysis at ¶¶ 44-67; Applicants' Sept. 8 Ex Parte, CRA Analysis II at ¶¶ 4-29.

⁴⁶¹ JCC Comments, Rogerson Analysis at 12-24; JCC Aug. 4, Ex Parte at Rogerson Analysis II; JCC Sept. 23 Ex Parte at Rogerson Analysis III.

Key to determining the degree to which the transaction lowers News Corp.'s costs of engaging in temporary foreclosure is the number of subscribers that can be predicted to shift from the affected MVPD to competitor DirecTV to access the foreclosed programming, which in turn will increase the profits of the post-transaction company as a whole, over and above levels achievable under today's conditions.

152. *Permanent Foreclosure.* As discussed in greater detail in Appendix D, the technical appendix, the staff's economic analysis examined the potential profitability of both permanent and temporary foreclosure strategies for each of News Corp.'s RSNs. Based upon the staff's analysis, we agree with Applicants that a strategy of permanent RSN foreclosure, assuming that it were permissible under the rules, would be unprofitable for News Corp. and therefore unlikely to be pursued any more frequently post-transaction than it is today. We therefore do not find that permanent foreclosure of RSN programming is likely to be transaction-specific harm.

153. *Temporary Foreclosure.* We also agree with commenters who argue that a temporary foreclosure strategy is likely to be profitable to News Corp. in many instances. The staff's analysis supports the further conclusion that this increase in the profitability of temporary foreclosure to News Corp. will make the threat of withdrawing programming a more credible tactic. By employing this tactic News Corp. will be able to negotiate higher prices than it could absent its control of DirecTV. On this basis, we find it likely that temporary foreclosure will be employed more frequently following News Corp.'s acquisition of control of DirecTV than it is today, and that this would, in turn, lead to greater programming price increases to MVPDs and higher subscription prices to consumers than we would expect to find absent News Corp.'s control of DirecTV. Increased use of temporary foreclosure strategies would thus harm competition and consumers by raising rivals' costs, by amounts greater than those News Corp. could reasonably expect to gain absent the transaction, thereby causing undue increases in MVPD subscription prices.

154. The Applicants additionally argue that we should consider not only how the transaction may increase RSN programming prices due to temporary foreclosure, but also how the transaction may lead to lower programming prices. Specifically, the Applicants claim that the reduction in "double marginalization" which results from vertical integration "will create a downward incentive for News Corp.'s programming prices. . . ." ⁴⁶²

155. We recognize and agree with the theoretical argument that vertical integration can reduce prices by reducing double marginalization. ⁴⁶³ In this case, however, the Applicants have neither attempted to quantify this benefit nor provided sufficient information for the Commission to quantify the benefit. In particular, the Applicants have not presented sufficient information concerning the marginal costs to News Corp. of producing various types of programming or the relevant demand elasticities for different types of programming that are necessary for the development of an estimate of the magnitude of this benefit.

156. Like the Applicants, the staff's economic analysis of the harms of permanent and temporary withholding of programming, described in the technical appendix, assumes that DirecTV's profit margin does not change following the transaction. ⁴⁶⁴ We find that, to the extent that the elimination

⁴⁶² Applicants' Sept. 22 Ex Parte at 12. See also Applicants' Reply, Lexecon Analysis at 6; Applicants' Reply, CRA Analysis at 10-12 & Appendix B.

⁴⁶³ We define double marginalization at para. 70, supra.

⁴⁶⁴ Appendix D at 36.

of double marginalization and other efficiencies will increase DirecTV's profit margin on each additional customer, the incentives to engage in permanent or temporary foreclosure will be enhanced, not reduced. In the absence of any estimates of the impact of the elimination of double marginalization on the prices of News Corp. programming to other MVPDs and how this interacts with the increased incentives to withhold when DirecTV's profit margin increases due to lower programming costs, we can only conclude that the claimed economic efficiencies are insufficient to mitigate the harms we have identified.

157. The results of the staff's economic analysis suggest that a strategy of temporarily withholding RSN programming from a cable operator, but not EchoStar, would be profitable for News Corp. for a large percentage of the cable systems that carry News Corp. RSNs.⁴⁶⁵ Specifically, if [REDACTED] of cable customers defect to DBS providers following a one month withdrawal of an RSN, News Corp. would find it profitable to withdraw RSN programming temporarily from cable companies serving [REDACTED] of RSN cable subscribers, assuming that News Corp. receives 50% of DirecTV's additional profits.⁴⁶⁶ Under the assumptions that [REDACTED] of cable customers will defect to a DBS provider and that News Corp. receives 100% of DirecTV's additional profits, then News Corp. would find it profitable to temporarily withdraw RSN programming from cable companies serving [REDACTED] of cable RSN subscribers. In addition, based on staff's analysis, we also find it reasonable to assume that News' incentives to temporarily foreclose a RSN from EchoStar are likely to be even stronger than to foreclose from the cable operators. This occurs because, unlike the situation with cable operators where DirecTV always faces competition from EchoStar for the switching customers, when the RSN is removed from EchoStar there will be some areas where the competing cable operator will not carry the RSN and DirecTV will be the only source for the RSN. Furthermore, in those areas where DirecTV would compete with cable providers for customers defecting from EchoStar, DirecTV would likely capture a significantly greater share of the customers. As we have found previously, consumers view EchoStar and DirecTV as closer substitutes for each other than cable is for either product.⁴⁶⁷

158. Examining the effect of the withdrawal of YES programming from Cablevision, the staff economic analysis further finds it likely that a sufficient number of cable subscribers will leave a cable company in response to the temporary withdrawal of RSN programming for such a strategy to be profitable. We note that Applicants pointed to the YES example to argue that an insufficient number of cable subscribers would defect in response to a temporary withdrawal of RSN programming. The staff performed an econometric analysis of DirecTV's subscriber gains during the 2002 season. The results indicate that Cablevision likely lost many more subscribers⁴⁶⁸ than the 30,000 subscribers estimated by

⁴⁶⁵ As discussed in the technical appendix, staff analyzed the incentives to withhold an RSN from a cable operator but not from EchoStar for two reasons. [REDACTED]. In addition, staff did not examine the incentive to temporarily withhold a RSN from EchoStar because, unlike the cable companies carrying a RSN, not all of EchoStar's competitors carry the RSN. Some cable companies would not carry the RSN and subscriber switching would heavily favor DirecTV in those areas if the RSN were withdrawn for EchoStar. In areas where the cable firm does carry the RSN, subscriber switching would not be as favorable for DirecTV, and the record was insufficient to permit staff to distinguish between these two areas to calculate News Corp.'s incentive to temporarily withhold a RSN from EchoStar.

⁴⁶⁶ See Appendix D at ¶ 38.

⁴⁶⁷ *EchoStar-DirecTV HDO*, 17 FCC Rcd 20622-23 ¶¶ 162-164.

⁴⁶⁸ See Appendix D at ¶ 47.

the Applicants' experts.⁴⁶⁹ The staff analysis, in contrast, is based on an econometric analysis of the number of subscribers that DirecTV gained as a result of the temporary withdrawal of YES. The staff analysis estimates that DirecTV gained a number of subscribers equal to [REDACTED] of Cablevision's customer base during the first month that New York Yankees games were unavailable. According to the results presented in table A-5 in the technical appendix, if [REDACTED] of a cable company's subscribers switched to DBS during the temporary withdrawal of an RSN, the staff analysis indicates that, depending on the assumptions, between [REDACTED] and [REDACTED] of News Corp.'s RSN subscribers could be vulnerable to this tactic because News Corp. would find it profitable to attempt temporary foreclosures to increase its RSN fees.

159. The staff analysis thus demonstrates that 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. This raising rivals' cost strategy is likely to generate two types of consumer harm. First, and most importantly, temporary foreclosure or the credible threat of temporary foreclosure as a negotiating strategy is likely to result in rival MVPDs agreeing to higher carriage fees or other concessions in return for carriage of RSNs than they would absent the transaction, and these fee increases will then be passed through to MVPD consumers in the form of rate increases. Because the transaction effectively lowers the costs to News Corp. of temporary withdrawals of its RSN programming, it increases the likelihood and frequency of use of this negotiating strategy. Second, staff's analysis demonstrates that, to the extent that News Corp. actually withholds RSN programming, consumers will lose access to highly desired programming and some consumers will leave their preferred MVPD provider to access the foreclosed programming on a less-desired MVPD platform. Consumers who have moved to an MVPD that requires a minimum service contract period will be harmed because they will be forced to remain with their less preferred provider for the term of their contract, even though the RSN programming may have been restored to their original MVPD. Thus, temporary withdrawals of RSN programming or threats to withdraw RSN programming would provide News Corp. a strong, credible, mechanism to extract higher rates for RSN programming from vulnerable MVPDs, and, as a result of the transaction, News Corp. will find it profitable to engage in temporary foreclosure or will be able to demand higher carriage fees for RSNs based only on the threat of temporary foreclosure in more instances than it would today.

160. We agree with commenter claims that this enhanced incentive and ability to engage in temporary foreclosure will allow News Corp. to extract more compensation for its regional sports networks from competing MVPDs that it could reasonably expect to achieve absent the transaction. The potential public interest harms that would result from such a strategy are substantial. News Corp.'s ability to raise rivals costs in this manner would harm consumers in different ways depending on the type of compensation it obtains. When News Corp. secures carriage of other cable programming networks from MVPDs in exchange for carriage of its RSNs, MVPDs pay for those networks. If News Corp. can secure carriage of more cable networks and charge higher fees for such carriage, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates. If News Corp. uses withholding or threats of withholding in RSN carriage negotiations to obtain carriage of its affiliated cable networks that the MVPD, absent the threat of foreclosure, would not agree to carry, consumers are harmed because MVPDs are forced to make programming decisions based on News Corp.'s demands, rather than selecting the programming of their choice. In the long term, News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer

⁴⁶⁹ Applicants' Sept. 8 Ex Parte, Lexecon Analysis at ¶ 25.

choice.

161. Accordingly, 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, 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.

162. In light of the foregoing analysis, we conclude that neither the Commission's existing rules nor the Applicants' proposed safeguards are sufficient to protect against harms caused by temporary foreclosure. We find, contrary to Applicants' arguments, that the program access rules will not adequately protect against this harm, because they were not intended to regulate or address the level of rates *per se*.⁴⁷⁰ Moreover, we recognize that, even if the program access rules adequately address rate levels (and not just discrimination), News Corp. would still be able to withhold programming pending resolution of a program access complaint.⁴⁷¹ Because we find that the proposed transaction poses likely consumer harms that will not be adequately mitigated by the Commission's existing rules or the Applicants' proposed conditions, we consider whether other conditions can mitigate this harm below.

(iv) Conditions

163. *Positions of the Parties.* As explained above, in addition to the existing program access rules, Applicants have proposed to undertake additional enforceable program access commitments,⁴⁷² which they claim are sufficient to protect the public interest against any potential harms arising from the transaction. For the reasons stated in Section VI.C.3 and 4.a., *supra*, we accept Applicants' proposed additional program access commitments and incorporate them in the terms of our license transfer approval. And, as noted in Section VI.C.4.a, several commenters generally assert that, the transaction will increase News Corp.'s incentives and ability to act anticompetitively and therefore the Application should be designated for hearing, denied, or, if approved, conditioned to prevent such harms. Commenters contend that neither the program access rules nor the Applicants' proposed program access commitments will adequately protect against potential harms arising from the transaction.⁴⁷³ Many of the

⁴⁷⁰ Even for analysis in the context of an alleged unfair practice, the Commission will focus on whether the purpose or effect of the practice was to hinder or harm the complainant relative to its competitors. *Program Access First Report and Order*, 8 FCC Rcd at 3375 n.26.

⁴⁷¹ The Commission attempts to resolve denial of programming case (unreasonable refusals to sell, petitions for exclusivity, and exclusivity complaints) within five months of submission of the complaint. All other program access complaints, including price discrimination cases, should be resolved within nine months of the submission of the complaint. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, 15842 ¶ 41(1998).

⁴⁷² Application at 44.

⁴⁷³ ACA Comments at 16, 20, 23; JCC Comments at 55-63; EchoStar Petition at 58-62; NRTC Petition at 20-22. Letter from Jeffrey A. Chester, Executive Director, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Dec. 3, 2003); Letter from Jeffrey A. Chester, Executive Director, Center for Digital Democracy, (continued....)

proposed arguments and conditions were lodged generally concerning access to all of News Corp.'s video programming products. We address commenters' suggestions here to the extent they have not already been addressed and explain why we reject some proposed remedies and adopt others with respect to access to regional sports cable programming.

164. As we stated above, several commenters and opponents contend that proposed program access commitments will not prevent News Corp. from raising the price, terms or conditions of programming above competitive levels by simply requiring DirecTV to compensate News Corp. for its programming at unreasonably high prices with unreasonably favorable terms of carriage.⁴⁷⁴ These parties maintain that such a "sweetheart deal" would then establish unreasonable terms for agreements with all other MVPDs, without harm to DirecTV or News Corp., because it is effectively compensating itself.⁴⁷⁵ Commenters and opponents are not convinced that the Applicants' Audit Committee will be able to monitor every term of every agreement with an unaffiliated MVPD and do not consider the committee as a sufficient guard against the threat of unreasonable terms.⁴⁷⁶ ACA contends that the proposed commitment does not prevent News Corp. from offering different or more costly terms to small cable operators, because although the commitment requires nondiscrimination, News Corp. is likely to offer the same prices/terms/conditions only to MVPDs with as many subscribers as DirecTV.⁴⁷⁷

165. To remedy the claimed deficiencies in the conditions proposed by Applicants, parties urge the Commission to adopt several revisions and additions. ACA urges the Commission to seek an enforceable commitment from Applicants that News Corp. will not use programming prices, terms and conditions to disadvantage smaller market cable companies.⁴⁷⁸ In addition, ACA argues that News Corp. should be required to offer all News Corp.-controlled satellite programming to the National Cable Television Cooperative ("NCTC") or other recognized programming buying group on the same effective prices, terms and conditions as News Corp. offers such programming to DirecTV.⁴⁷⁹ To effectuate this condition, ACA suggests that News Corp. be required to disclose to the NCTC and the Commission all effective prices, terms, conditions and agreements of any kind related to the sale of News Corp.-controlled programming to DirecTV.⁴⁸⁰ EchoStar urges that we require News Corp. to supply programming to MVPDs on a separate basis (i.e., no bundling), publish a rate card showing its fees for all MVPDs with a discount rate structure approved in advance by the Commission, and provide the

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to Marlene H. Dortch, Secretary, FCC (Dec. 9, 2003); Letter from Jeffrey A. Chester, Executive Director, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Dec. 11, 2003).

⁴⁷⁴ EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5-6.

⁴⁷⁵ EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5.

⁴⁷⁶ JCC Comments at 59-63; Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) ("Consumers Union Sept. 23, 2003 Ex Parte") at 5-6.

⁴⁷⁷ ACA Comments at 19.

⁴⁷⁸ ACA Comments at 20-21; ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

⁴⁷⁹ ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

⁴⁸⁰ ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

Commission with separate accounting records for its programming and distribution businesses, showing that the rates paid by DirecTV are not so high that DirecTV cannot make a reasonable profit.⁴⁸¹

166. Pegasus urges that we add the following requirements designed to supplement those proposed by Applicants: (a) contracts between Fox and DirecTV would have to be approved by a majority of the independent directors of DirecTV and parent Hughes; (b) all contracts between Fox and DirecTV would be filed with the Commission and available to the public; (c) the economic terms of any contract between Fox and DirecTV would have to be set at the average of those charged to Fox's three largest, non-affiliated MVPDs. The CEO and directors of Fox, DirecTV, and Hughes would be required to certify compliance with these conditions annually. Pegasus asserts that these conditions should apply for a period of five years.⁴⁸² EchoStar proposes that we: prohibit satellite exclusives of any kind for News Corp. programming; apply the requirement to programming delivered terrestrially; make the program access condition permanent; apply the access condition to Liberty's programming assets; clarify that the nondiscrimination requirement applies to all non-price terms; require News Corp. to offer all programming separately, at published rates that are pre-approved by the Commission.⁴⁸³

167. Other parties urge the Commission to adopt several revisions and additions specifically applicable to RSN programming. In instances where News Corp. and an MVPD fail to negotiate and enter into a license agreement for carriage of an RSN upon mutually agreeable terms and conditions, JCC urge imposition of a condition that prohibits News Corp. from refusing to make available or conditioning the availability or carriage terms of an RSN it controls to any MVPD on whether that MVPD or any other MVPD agrees to carry any other News Corp. owned, controlled or affiliated video programming service or television broadcast station.⁴⁸⁴ Under the JCC proposal, News Corp. would additionally be permitted to offer a license agreement for a News Corp. RSN with fees, terms and conditions based upon an MVPD's transmission or distribution of such News Corp. RSN on the MVPD's most popular tier of service. However, prior to taking any action to deauthorize or cause removal of an News Corp. RSN from any MVPD's package of video programming services offered to any of its subscribers, News Corp. must also, upon request by any MVPD, make a good faith offer that enables the MVPD to carry and pay license fees for, such News Corp. RSN based upon (a) distribution in an existing or a proposed service tier other than the MVPD's most popular tier of service; and (b) distribution on a stand-alone, a la carte basis.⁴⁸⁵ JCC further propose that enforcement of such requirements would be handled through complaint to the Commission by an MVPD who believes that News Corp. has violated this condition. During the pendency of the complaint, JCC propose that News Corp. be prohibited from deauthorizing or causing the removal of the RSN programming from the aggrieved MVPD's package of video programming services offered to its subscribers. Additionally, JCC propose that the Commission place the burden of proof on

⁴⁸¹ EchoStar Petition at 66. EchoStar notes that News Corp.'s affiliate BSkyB has agreed to such conditions in the United Kingdom. *Id.*

⁴⁸² See Pegasus Sept. 30, 2003 Ex Parte; Pegasus Dec. 10, 2003 Ex Parte.

⁴⁸³ EchoStar Petition at 64-66. JCC and NRTC also support a program access condition that does not sunset with the program access rules. JCC Comments at 65; NRTC Petition at 20-21.

⁴⁸⁴ JCC Reply Comments at 18-19; Letter from Christopher J. Harvie, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Aug. 18, 2003) ("JCC Aug. 18, 2003 Ex Parte") Attachment at 4.

⁴⁸⁵ See JCC Aug. 18, 2003 Ex Parte Attachment at 4.

News Corp. to establish that its good faith offer provides a genuine choice to the MVPD without imposing unreasonable conditions on tier carriage. RCN supports the proposals of the JCC, noting that to the extent that large incumbent MSOs may be harmed by the anticompetitive conduct of post-transaction News Corp., RCN is in even greater jeopardy.⁴⁸⁶

168. We note here that the JCC proposed a somewhat different remedy for potential temporary foreclosure of access to local broadcast television station signals during retransmission consent negotiations which involves sending disputes to commercial arbitration that is discussed in Section VI.C.4.c. Because we are adopting the arbitration remedy for both forms of “must have” programming, we first explain JCC’s rationale in this section. JCC urge the Commission to prevent News Corp. from using DirecTV to strengthen its leverage and pricing power in retransmission consent negotiations by, *inter alia*, establishing a “last offer” arbitration mechanism that is designed to reduce News Corp.’s post transaction incentive to force competing MVPDs to choose between paying higher prices and carrying new Fox channels in order to retain access to existing Fox broadcast content, or ceding that content to their most powerful MVPD competitor – DirecTV.⁴⁸⁷ JCC explain that the arbitration mechanism is intended to serve as a fair and neutral backstop for resolving carriage disputes and will thereby reduce News Corp.’s post-transaction incentive and ability to threaten or inflict carriage disruptions on subscribers of rival MVPDs as a means of extracting supra-competitive prices and unfair concessions in carriage negotiations for local broadcast stations. The end result of having the arbitration “backstop mechanism,” they claim, should be to reduce the otherwise likely increase in service interruptions and retransmission consent disputes arising from the transaction. Both sides, they allege, will have an incentive to negotiate reasonably and conclude a mutually agreeable arrangement, rather than face the prospect of having an arbitrator select one party or the other’s last offer.⁴⁸⁸

169. *Discussion.* We agree with commenters that both the program access rules and the Applicants’ proposed program access commitment are insufficient to protect against harms arising from News Corp.’s enhanced incentive and ability to use its market power in the market for regional sports programming to the detriment of consumers. Accordingly, we will modify and supplement Applicants’ proposed conditions and condition the license transfer to ensure that the transaction minimizes the possibility of harm while preserving the overall benefits to the public.

170. The concerns that many commenters generally raise with respect to News Corp.’s incentive to discriminate or otherwise disadvantage rival MVPDs in the terms and conditions of the carriage of all of its video programming following the transaction include News Corp.’s RSN programming. Commenters have also suggested certain conditions under the assumption that News Corp. has no incentive to behave anti-competitively towards DirecTV and therefore the rates charged to DirecTV can be used as a benchmark for the rates charged to rival MVPDs. However, as explained in preceding Section C.4.a, we found that many of the suggested additional conditions were already covered by Applicants’ offer, were not transaction specific, were calculated to remedy harms that we have determined are unlikely to occur, would not adequately remedy the likely harms of the transaction, or would leave Applicants in a worse position following the transaction than they are today.⁴⁸⁹ As we stated

⁴⁸⁶ RCN Oct. 24, 2003 Ex Parte at 7-8.

⁴⁸⁷ JCC Aug. 18, 2003 Ex Parte Attachment at 6.

⁴⁸⁸ *Id.*

⁴⁸⁹ For example, EchoStar proposes that program access requirements be extended to apply to Liberty Media’s programming assets and to programming that Congress did not choose to subject to the rules and that News Corp. (continued....)

in Section VI C.4.a, an application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. In contrast, in the case of “must have” RSNs, the very existence of the program access non-discrimination rules may create the perverse incentive for News Corp. to charge excessive rates for RSNs to DirecTV, in order for Applicants to disguise News Corp.’s behavior towards rival MVPDs. As we have found, the *de facto* control of DirecTV by News Corp. ensures that DirecTV will accept these rates, and rather than responding by raising its prices, will act in a manner that maximizes the joint profits of the Applicants by holding its rates steady. This will enable DirecTV to take advantage of its rivals’ response to their increased costs with rate increases, and permit DirecTV to gain market share. We believe that the same close coordination between News Corp. and DirecTV necessary to obtain many of the proposed benefits of the transaction ensures that the gains from the strategy of raising rivals’ costs can be obtained and equitably distributed between the shareholders of the two firms.

171. We adopt none of the suggested conditions, however, either in whole or as stand-alone remedies for the particular harms that we have identified regarding access to RSN programming. Many of the proposed conditions attempt to remedy the harms we have identified, but in our opinion would either fail to do so or would place the Applicants at a disadvantage relative to their positions prior to the transaction. For example, the proposed non-discrimination conditions standing alone are flawed because DirecTV has a national footprint which renders all other MVPDs direct rivals of the integrated firm, and therefore there are no programming transactions to use as a benchmark in determining if a particular transaction is discriminatory. JCC’s proposal that News Corp. be required to make a good-faith offer that enables MVPDs to carry its RSNs on an *a la carte* basis or on an existing or proposed programming tier other than the MVPDs’ most popular tier places News Corp. in a worse competitive situation than it was prior to the transaction. In addition, this condition would place News Corp. at a distinct disadvantage relative to other cable programmers when bidding to renew or acquire additional sports rights. Instead, we use selected aspects of remedies proposed by various commenters with respect to both RSN and broadcast programming to fashion a hybrid approach to the temporary foreclosure problem that should ensure that the Applicants are able to realize the economic efficiencies associated with the acquisition, while adequately mitigating the transaction-specific harms likely to arise as a result.

172. *Conditions.* Our analysis demonstrates that the primary public interest harm likely to follow from the unique combination of News Corp.’s RSN programming assets and DirecTV’s nationwide distribution platform is the competitive harm of an across-the-board MVPD price increase resulting from News Corp.’s ability to extract rents or other unfair carriage concessions from MVPDs for carriage of RSN programming through the more frequent use of threats of withholding or actual withholding of RSN programming during a period of temporary foreclosure. A secondary public interest harm is that MVPD subscribers are deprived of programming that is highly desired during such a period.

173. We agree with the JCC that a neutral dispute resolution forum would provide a useful backstop to prevent News Corp. from exercising its increased market power to force rival MVPDs to either accept inordinate affiliate fee increases for access to RSN programming and/or other unwanted programming concessions or potentially to cede critical content to their most powerful DBS competitor, DirecTV. We therefore create a mechanism whereby an aggrieved MVPD may choose to submit a

(Continued from previous page) _____

be limited to offering programming at published rates that are preapproved by the Commission. See EchoStar Petition at 64-66. Pegasus suggests that we impose specialized corporate governance rules and FCC filing requirements on all contracts between Fox and DirecTV for a period of five years. See Pegasus Sept. 30, 2003 Ex Parte.

dispute with News Corp. over the terms and conditions of carriage of RSNs to commercial arbitration to constrain News Corp.'s increased incentive to use temporary foreclosure strategies during carriage negotiations for RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN, and require News Corp. to permit the MVPD to continue to carry the RSN while the dispute is being resolved.

174. By requiring commercial arbitration where negotiations fail to produce a mutually acceptable set of prices, terms and conditions, we reduce the incentives and opportunities for News Corp. to remove programming and thus eliminate the additional credibility of programming withdrawal as a bargaining tool. Our arbitration condition is also intended to push the parties towards agreement prior to a complete breakdown in negotiations. Final offer arbitration has the attractive "ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator."⁴⁹⁰

175. Thus, our remedy is to allow MVPDs to demand commercial arbitration when they are unable to come to a negotiated "fair" price for the programming. The staff analysis has found that the allure of temporary withholding to News Corp. is substantial, even after the ability invariably to obtain supracompetitive affiliate fee increases is eliminated. Accordingly we do not allow News Corp. to deauthorize carriage of the RSN after an MVPD has chosen to avail itself of the arbitration condition. We also specify that expedited arbitration procedures be used and that the final offers submitted to the arbitrator by each side may not include any compensation for RSN carriage in the form of the MVPD's agreement to carry any video programming networks or any other service other than the RSN.

176. In addition, 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. 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.⁴⁹¹ The designated collective bargaining entity will have all the rights and responsibilities granted by our arbitration conditions.

177. The following procedures shall be followed:

Commercial Arbitration Remedy

⁴⁹⁰ Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264.

⁴⁹¹ The Commission has previously defined small cable companies as those with 400,000 or fewer subscribers. We adopt that definition for the purposes of this condition. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 7393, 7394-95 (1995).

- An aggrieved MVPD may submit a dispute with News Corp. over the terms and conditions of carriage RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN.
- Following the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify News Corp. within five business days that it intends to request commercial arbitration to determine the terms of the new affiliation agreement.
- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued carriage of the network under the same terms and conditions of the expired affiliation agreement as long as the MVPD continues to meet the obligations set forth in this condition.
- Carriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage.
- *"Cooling Off Period."* The period following News Corp.'s receipt of timely notice of the MVPD's intent to arbitration and before the MVPD's filing for formal arbitration with the American Arbitration Association ("AAA"), shall constitute a "cooling off" period during which time negotiations are to continue.
- *Formal Filing with the AAA.* The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the RSN contract and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, News Corp. must participate in the arbitration proceeding.
- The AAA will notify News Corp. and the MVPD upon receiving the MVPD's formal filing.
- News Corp. will file a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.
- The MVPD's final offer may not be disclosed until the AAA has received the final offer from News Corp.
- The final offers shall be in the form of a contract for the carriage of the programming for a period of at least three years. The final offers may not include any provision to carry any video programming networks or any other service other than the RSN.

Rules of Arbitration

- The arbitration will be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules, then in effect, of the AAA (the "Rules"), excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in the Order.
- The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- The arbitrator is directed to choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- Under no circumstances will the arbitrator choose a final offer that does not permit News Corp. to recover a reasonable share of the costs of acquiring the programming at issue.
- To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession),⁴⁹² including, but not limited to:

⁴⁹² We clarify that, by "possession," we mean actual possession or control.

- current or previous contracts between MVPDs and RSNs in which News Corp. does not have an interest as well as offers made in such negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
 - evidence of the relative value of such programming compared to the RSN programming at issue (e.g., advertising rates, ratings);
 - contracts between MVPDs and RSNs on whose behalf News Corp. has negotiated made before News Corp. acquired control of DirecTV;
 - offers made in such negotiations;
 - internal studies or discussions of the imputed value of RSN programming in bundled agreements;
 - other evidence (including internal discussions) of the value of RSN programming;
 - changes in the value of non-News Corp. RSN programming agreements;
 - changes in the value or costs of News Corp. RSN programming, or in other prices relevant to the relative value of News Corp. RSN programming (e.g., advertising rates).
- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.
 - If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party.
 - Following resolution of the dispute by the arbitrator, to the extent practicable, the terms of the new affiliation agreement will become retroactive to the expiration date of the previous affiliation agreement. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.
 - Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission and does so in a timely manner.

Review of Award by the Commission

- A party aggrieved by the arbitrator's award may file with the Commission a petition seeking de novo review of the award. The petition must be filed within 30 days of the date the award is published.
- The MVPD may elect to carry the programming at issue pending the FCC decision, subject to the terms and conditions of the arbitrator's award.
- In reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- The Commission may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorney fees) of the arbitration.⁴⁹³

⁴⁹³ The Commission has the authority to award attorney fees and costs. See 47 C.F.R. §1.6009(b)(3).

178. No later than 20 business days prior to the expiration of an affiliation agreement with an MVPD for video programming subject to this condition, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order. News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for affiliation.

179. The markets and technologies used in the provision of MVPD services and video programming continue to evolve over time, rendering accurate predictions of future competitive conditions difficult. Accordingly, the conditions concerning RSN carriage shall cease to be effective six years after the release of this *Order*.⁴⁹⁴ The Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the conditions have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

c. Access to Broadcast Television Station Signals

(i) Background

180. Through its subsidiary Fox Television Stations, Inc. (“FTS”), News Corp. owns and operates 35 television broadcast stations (the “O&Os”) located in 26 DMAs,⁴⁹⁵ most of which are affiliated with either the Fox or UPN networks.⁴⁹⁶ In addition to the O&Os, the Fox Network has affiliation agreements with 171 independently owned, television broadcast stations.⁴⁹⁷ News Corp.’s television broadcast stations are carried on every cable system in their DMAs pursuant to (1) retransmission consent agreements; (2) informal agreements for carriage without compensation pending agreement negotiations; or (3) in a few cases, must-carry.⁴⁹⁸ In addition, DirecTV and EchoStar carry the News Corp. O&Os in every market where the operators offer local-into-local service.⁴⁹⁹ Today, the Fox Network originates some of the most popular programming on broadcast television.⁵⁰⁰ The vast majority

⁴⁹⁴ The six-year period is parallel to that for the analogous condition on retransmission consent.

⁴⁹⁵ Application at 63.

⁴⁹⁶ Twenty-five of these stations are affiliated with the Fox network, nine are affiliated with the United Paramount network, and one station, KDFI, Dallas, Texas, is not affiliated with any network. Application at 63.

⁴⁹⁷ See *FEG 10-K 2003 Annual Report* at 7.

⁴⁹⁸ Applicants’ Reply at 46-47; July 28 Response at 23. Applicants report that KTXH elected must-carry on all cable systems. July 28 Response at 23. WUTB, WDCA, and WPWR elected must-carry with respect to some MVPDs, including DirecTV in one case. *Id.*

⁴⁹⁹ Application at 63.

⁵⁰⁰ The Fox Network delivers 15 hours of prime-time programming per week and one hour of late-night programming on Saturday to its affiliates. *FEG 10-K 2003 Annual Report*. The Fox Network’s has developed a reputation for originating popular shows, and in particular reality shows. For example, the season finales of Fox’s reality shows *Joe Millionaire* and *American Idol* were the two most popular entertainment programs during the last television season, drawing 40 million and 38.1 million viewers respectively. Cablevision Comments at 13. Fox programming is especially appealing to adults aged to 18 to 49, an age group that commenters contend is most often targeted by advertisers. *Id.* at 14. According to one News Corp. investor presentation, prime time ratings for viewing of Fox Network programming by adults aged 18-49 increased by 14% from May 2002 to May 2003, while the ratings of competing broadcast networks declined or remained static. See News Corp., Merrill Lynch Media and Entertainment Conference, Investor Presentation, at <http://www.newscorp.com/investor/download/MerrillLynch2003/sld0023.htm> (visited Dec. 19, 2003).

of News Corp. O&Os choose retransmission consent over must carry.⁵⁰¹ In this manner, the stations bargain with MVPDs for compensation in exchange for the right to retransmit their broadcast signal. Although the bargaining may encompass many issues, it is ultimately about the “price” an MVPD is willing to pay for carriage of the local broadcast station,⁵⁰² and although that price may be in the form of monetary compensation, it is more likely to be structured in the form of an “in kind” payment whereby the MVPD provides channel capacity for a broadcast network’s affiliated cable programming network and/or other carriage-related concessions.⁵⁰³ As we have previously recognized, the process was intended to provide “incentives for both parties to come to mutually beneficial arrangements.”⁵⁰⁴ We have additionally recognized that “retransmission consent negotiations . . . are the market through which the relative benefits and costs to the broadcaster and the MVPD are established.”⁵⁰⁵ Both programmer and MVPD benefit when carriage is arranged: the station benefits from carriage because its programming and advertising will likely reach more households when carried by MVPDs than otherwise, and the MVPDs benefit because the station’s programming adds to the attraction of the MVPD subscription to consumers.⁵⁰⁶ Thus, the local television broadcaster and the MVPD negotiate in the context of a roughly even “balance of terror” in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially damages each side greatly in their core business endeavor.

181. In addition to this marketplace reality, both MVPDs and broadcasters appear convinced that the rules offer the other significant protections. For example, JCC argue that a cable operator’s only potential source of bargaining power in retransmission consent negotiations with a broadcast stations is the ability to decide not to carry the signal of that station, an ability that is restricted by both rule and practical reality, since it is the cable operator that bears the brunt of any public fall-out arising from a failure to reach agreement with a broadcast station, and the broadcast station also has the protection of the must carry provisions.⁵⁰⁷ Broadcasters receive additional protections in retransmission consent negotiations, according to JCC, by means of the Network Non-Duplication rule⁵⁰⁸ and the Syndicated Exclusivity rule,⁵⁰⁹ which they claim make obtaining a substitute for the local broadcast station signal difficult for cable operators because, under Commission rule, stations electing retransmission consent

⁵⁰¹ See Application at 63. This is also true for Fox affiliates. See NAB Comments at 19.

⁵⁰² See, e.g., *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 1164, 1212-14 ¶¶ 91-93 (1993); JCC Comments at 18.

⁵⁰³ See *Good Faith Negotiations Order*, 15 FCC Rcd at 5462 ¶ 38.

⁵⁰⁴ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723 ¶ 115 (1994).

⁵⁰⁵ See Applicants’ Reply at 44; *Good Faith Negotiations Order*, 15 FCC Rcd at 5448 ¶ 8.

⁵⁰⁶ See Applicants’ Reply at 44-45.

⁵⁰⁷ JCC Comments at 19 and n.34 (citing 47 U.S.C. 534(b)(9); 47 C.F.R. § 76.1601, Note 1 (2002) (prohibiting deletion or repositioning of a local commercial television station during the four national four-week ratings periods or audience “sweeps”); *In the Matter of Time Warner Cable; Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order for Violation of Section 76.58 of the Commission’s Rules, or in the Alternative for Immediate Injunctive Relief*, 15 FCC Rcd 7882 (2002)).

⁵⁰⁸ 47 C.F.R. § 76.92.

⁵⁰⁹ 47 C.F.R. § 76.101.

may assert network nonduplication and syndicated exclusivity protection.⁵¹⁰ Applicants, for their part, similarly claim that MVPDs enjoy significant protections in the retransmission consent process under Commission rules. First, they note, a broadcast station may not grant retransmission consent to any MVPD on an exclusive basis.⁵¹¹ Second, a broadcast station has an affirmative obligation to negotiate in good faith with all MVPDs seeking retransmission consent, and MVPDs are under no reciprocal good faith obligation.⁵¹² Third, Applicants claim that although stations may enter into retransmission consent agreements with different MVPDs containing different terms and conditions, including price terms, such differences must be based on “competitive market conditions and in determining the kinds of agreements that are presumptively not consistent with competitive market consideration, the Commission includes those “the effect of which is to hinder significantly or foreclose MVPD competition.”⁵¹³ Finally, Applicants observe that an aggrieved MVPD may bring a complaint against a broadcast station based not only upon actions that the Commission has identified as *per se* evidence of bad faith, but also based on any other factors that support such an inference under a totality of circumstances test.⁵¹⁴ It is against this backdrop that we evaluate the parties’ claims with respect to the effect of this transaction.

(ii) Positions of the Parties

182. Applicants assert that the transaction creates no incentive for News Corp. to withhold the broadcast signals of its O&Os from other MVPDs. Applicants further assert that, although retransmission consent negotiations are sometimes difficult, News Corp. has never failed to reach a mutually acceptable agreement with any MVPD.⁵¹⁵ Because national, regional, and local advertisers seek maximum reach, Applicants claim that it is essential for Fox and other broadcast networks to come as close as possible to 100% audience reach.⁵¹⁶ They further claim that because advertising is the sole revenue source in the broadcast network business, audience reach is even more critical for the success of broadcast stations than it is for cable networks, which are partly supported by subscriber fees.⁵¹⁷ They add that audience reach within each DMA also is critical to securing local and regional advertising. According to the Applicants, the need to secure advertising makes it economically irrational to restrict access to O&O signals in the hopes of gaining DirecTV subscribers.⁵¹⁸

⁵¹⁰ JCC Comments at 20 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723 at ¶ 114 (1994)).

⁵¹¹ Applicants’ Reply at 45; 47 C.F.R. § 76.64(l).

⁵¹² Applicants’ Reply at 45; 47 C.F.R. § 76.65.

⁵¹³ Applicants’ Reply at 45 (citing *Good Faith Negotiations Order*, 15 FCC Rcd at 5470 ¶ 58).

⁵¹⁴ Applicants’ Reply at 45; 47 C.F.R. § 76.65(b).

⁵¹⁵ Application at 63.

⁵¹⁶ Application at 64. Applicants note that, because 15 of the 35 O&Os are UHF stations, which receive less over-the-air coverage, distribution of its signals on all MVPD platforms is particularly important. *Id.* at n.105. Applicants assert that, if News Corp. lost carriage of Fox network programming on even a small number of systems, it would risk being perceived by advertisers as a second-class outlet compared to ABC, CBS or NBC, and would no longer be able to command comparable advertising rates. Applicants’ Reply at 40.

⁵¹⁷ Application at 64.

⁵¹⁸ Application at 64.

183. Applicants further contend that even if News Corp. sought to withhold access to broadcast signals, the Commission's rules requiring good faith negotiation and prohibiting exclusive retransmission consent agreements would prevent News Corp. from using retransmission consent to undermine DirecTV's MVPD rivals.⁵¹⁹ Applicants assert that withholding broadcast signals also would hurt News Corp. by reducing retransmission consent compensation, including compensation for News Corp.'s cable programming services.⁵²⁰

184. Commenters counter that by giving News Corp.'s Fox Network guaranteed access to national distribution via DirecTV, the transaction will increase the incentive and ability of News Corp. to withhold retransmission consent temporarily, to the detriment of competing MVPDs and, ultimately, the public.⁵²¹ MVPD commenters contend the transaction fundamentally shifts the balance of power between MVPDs and Fox broadcast stations in retransmission negotiations because Fox will have the option to walk away from retransmission consent negotiations and broadcast only on DirecTV.⁵²² EchoStar and others claim that the transaction will enable News Corp. to demand higher retransmission consent fees, withhold access to its local television broadcast signals, or demand concessions such as carriage of affiliated cable networks without fear of failing to secure distribution for any of its programming.⁵²³ Commenters allege that this conduct will harm competition and consumers by forcing DirecTV's competitors to raise consumer rates to pay higher retransmission consent fees and/or by forcing competitors to carry less desirable Fox programming.⁵²⁴

185. Several MVPD commenters contend that local television broadcast stations are "must have" programming, which is critical to securing and maintaining subscribers.⁵²⁵ Commenters also express concern that information sharing between Fox programming divisions and DirecTV will increase News Corp.'s bargaining power in retransmission consent negotiations and thus will adversely affect competing MVPDs.⁵²⁶ The JCC and EchoStar also contend that News Corp. negotiates or influences the terms of retransmission consent agreements for not only its O&Os, but also for other stations affiliated

⁵¹⁹ Application at 64-65; Applicants' Reply at 44-47.

⁵²⁰ Applicants' Reply at 41.

⁵²¹ NAB Comments at i-ii; EchoStar Petition at 1-2; Cablevision Comments at 11-18; NRTC Petition at 11-17; JCC Comments at 15-33; CFA Reply Comments at 4, 11-12.

⁵²² EchoStar Petition at 14; Cablevision Comments at 12; JCC Comments at 46.

⁵²³ See, e.g., EchoStar Petition at 12-13; ACA Comments 8-16; Cablevision Comments at 12-16; JCC Comments at 15-33.

⁵²⁴ JCC Comments at 54-55; Cablevision Comments at 15.

⁵²⁵ EchoStar Petition at 22; Cablevision Comments at 13; JCC Comments, Rogerson Analysis at 9-12. Rogerson states that the closest substitute for a local television broadcast station would be an out-of-market station affiliated with the same network, but notes that such substitution is not possible because of the network non-duplication and syndicated exclusivity rules. *Id.*

⁵²⁶ EchoStar Petition at 13-18; ACA Comments at 9. As an example, EchoStar notes that because it must obtain retransmission consent from Fox before entering a new local market, DirecTV will know what markets EchoStar plans to enter in advance, and can act strategically to minimize the benefits to EchoStar of entering a new market. EchoStar Petition at 17-18.

with the Fox network.⁵²⁷

186. JCC note that News Corp. pioneered the use of retransmission consent to spawn new cable programming networks, and that the strategy has allowed News Corp. to expand its cable networks faster than any other cable programmer.⁵²⁸ Commenters assert that small and medium-sized cable operators are the most vulnerable to News Corp.'s enhanced bargaining power.⁵²⁹ ACA contends that, although Applicants assert that they only have incentives to consent to carriage on mutually agreeable terms, News Corp.'s historical conduct towards some small and mid-sized cable operators results in agreements that are anything but "mutual" or "agreeable."⁵³⁰ Instead, ACA claims that negotiations for carriage of Fox O&Os are characterized by "take it or leave it" proposals and threats to deny carriage that will particularly disadvantage DirecTV's smaller competitors in less dense areas of the country once News Corp. acquires control of DirecTV.⁵³¹ ACA reiterates that its concerns arise from the unique combination of assets that the transaction brings together, and argues that the ability of a combined News Corp./DirecTV to disadvantage smaller competitors through retransmission consent is "unprecedented and must be addressed within the context of this proceeding."⁵³²

187. Cablevision disputes Applicants' claim that they lack the incentive and ability to withhold access to their broadcast programming, and contends that similar arguments already have been considered—and rejected—by the Commission.⁵³³ Specifically, Cablevision notes that the Commission has previously held that a vertically integrated programmer has the incentive and ability to favor its affiliated MVPD when that MVPD has the power to reach all potential subscribers, who can switch to that provider to receive the programming if they view it as valuable.⁵³⁴ Cablevision also notes that although cable operators argued, as Applicants do here, that it would not make economic sense to limit distribution of affiliated programming, the Commission found that argument unpersuasive.⁵³⁵ Cablevision also points to the Commission's conclusion that where "must-have" programming is involved, denying program access to a competitor is an investment that brings benefit because subscribers will switch providers in order to receive it.⁵³⁶ Cablevision contends that these conclusions apply with equal force to post-transaction News Corp., which will have the same incentives and abilities to withhold access to its

⁵²⁷ JCC Comments at 21, n. 39, 65; EchoStar Petition at 15-16, 18.

⁵²⁸ JCC Comments at 21, 25-26.

⁵²⁹ ACA Comments at 8-15; ACA Reply Comments at 4; JCC Comments at 30. ACA claims that smaller cable operators will be especially vulnerable to Fox network abuses because the incentive to disadvantage smaller competitors in favor of DirecTV will likely outweigh any temporary marginal advertising revenue decrease. ACA Comments at 13.

⁵³⁰ ACA Comments at 13-15.

⁵³¹ ACA Comments at 13-15; ACA Oct. 17 Ex Parte.

⁵³² ACA Oct. 17 Ex Parte at 4-5.

⁵³³ Cablevision Comments at 28 (citing *Program Access Order*, 17 FCC Rcd at 12125 ¶ 3); see also JCC Aug. 4 Ex Parte at 6-7.

⁵³⁴ Cablevision Comments at 28 (citing *Program Access Order*, 17 FCC Rcd at 12125 ¶ 3).

⁵³⁵ Cablevision Comments at 28.

⁵³⁶ Cablevision Comments at 28.

broadcast programming as would a vertically integrated MSO.⁵³⁷

188. Most MVPD commenters maintain that the Commission's rule that broadcasters negotiate in good faith is an inadequate safeguard, standing alone, in the context of the proposed transaction.⁵³⁸ Commenters note that, at the time the good faith provisions were adopted, cross-ownership of a cable system and a television broadcast station in the same market was prohibited, so the Commission was unlikely to have considered the impact of common ownership of broadcast stations and an MVPD on retransmission consent negotiations.⁵³⁹ JCC assert that the retransmission consent scheme is not reflective of today's media marketplace or other media regulations, and note that, today, most popular stations today choose retransmission consent over must-carry.⁵⁴⁰ Specifically, JCC assert that retransmission consent was "designed for an era when local broadcast station ownership was less concentrated, when duopolies were prohibited, and broadcast licensees were prohibited from owning a cable system in their local markets," citing several regulatory and marketplace changes since 1992.⁵⁴¹ Cablevision contends that the power imbalance between broadcasters and MVPDs with respect to retransmission consent negotiations has been exacerbated by increased concentration in media ownership and resulting increases in the number of stations affiliated with and controlled by the top four broadcast networks.⁵⁴²

189. EchoStar asserts that the Commission's interpretation of the good faith negotiation requirement makes violations difficult to prove, and observes that the Commission has never granted a DBS operator relief under these rules.⁵⁴³ JCC argue that News Corp. can abuse its market power without its actions qualifying as "outrageous" under the Commission's rules.⁵⁴⁴ ACA contends that good faith negotiation complaints are not a viable remedy because: (1) they require extensive resources; and (2) until the complaint is adjudicated, the network signal must be dropped.⁵⁴⁵ Commenters further note that the

⁵³⁷ Cablevision Comments at 28-29. Cablevision contends that News Corp.'s ability to withhold broadcast programming is even greater than that of a vertically integrated MSO, because "local broadcast signals win a substantially greater share of the viewing audience and represent "must have" programming far more than any cable programmer could." *Id.* at 29.

⁵³⁸ EchoStar Petition at 15-16, 19-21; ACA Comments at 11-12; JCC Comments at 31-34; Cablevision Comments at 11, 26.

⁵³⁹ EchoStar Petition at 14. This prohibition was subsequently vacated by the U.S. Court of Appeals for the D.C. Circuit. *See Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *reh'g granted in part*, 293 F.3d 537 (D.C. Cir. 2002).

⁵⁴⁰ JCC Comments at 17-18. CFA agrees and has urged Congress to "revisit the necessity of retransmission consent at is pertains to stations owned and operated by News Corp./Fox" in testimony before the Senate Commerce Committee. CFA Reply at 12.

⁵⁴¹ JCC Comments at 17-18.

⁵⁴² Cablevision at 11; *see also* JCC Comments at 28 n.61 (discussing News Corp.'s ability to use its television duopolies and RSNs to cross-promote the outlets, bundle sales of advertising time, and gain leverage in retransmission consent negotiations).

⁵⁴³ EchoStar Petition at 19. EchoStar contends that the good faith requirement, as interpreted by the Commission, applies to the process of negotiations, not the substantive terms. *Id.*

⁵⁴⁴ JCC Comments at 31 (citing 47 C.F.R. §§ 76.65(c), 76.7).

⁵⁴⁵ ACA Comments at 11-12.

Commission's rules regulating broadcasters' retransmission negotiations are scheduled to sunset at the end of 2005.⁵⁴⁶

190. Cablevision also expresses particular concern about the effect of the transaction on its DBS affiliate, Rainbow DBS.⁵⁴⁷ Cablevision claims that Rainbow DBS has the potential to become a formidable DBS competitor, so DirecTV has a strong incentive to hobble Rainbow DBS' development.⁵⁴⁸ Cablevision contends that vertical integration with a supplier of programming and television broadcast signals will give DirecTV the ability to disadvantage its DBS competition.⁵⁴⁹ Cablevision asserts that the Applicants' argument that News Corp. cannot risk losing viewers is wholly inapplicable to Rainbow DBS because, due to Rainbow's small subscriber base, News Corp. would suffer almost no harm from hindering Rainbow DBS' entry into the market.⁵⁵⁰

191. Applicants respond with the CRA Analysis, which finds that permanent withholding of broadcast signals would not be in News Corp.'s economic interest. Comparing the costs (*i.e.*, lost advertising and other revenues) and benefits (*i.e.*, profits from increased subscribership to DirecTV) of withholding the signals of News Corp.'s television broadcast stations from competing MVPDs,⁵⁵¹ the CRA Analysis finds that DirecTV would have to quadruple its subscribership in News Corp.'s O&O markets in order for signal withholding to be a profitable strategy for post-transaction News Corp.⁵⁵² Applicants contend that such subscribership increases are implausible.⁵⁵³

192. Applicants reject as economically irrational claims that they will be able to raise prices for retransmission consent uniformly following the transaction.⁵⁵⁴ According to Applicants, commenters have failed to recognize that such a strategy would: (1) lower expected profits for the O&Os, which are already profit-maximizing in their bargaining for retransmission consent; (2) lower expected profits for DirecTV by increasing its costs for O&O programming; and (3) eliminate certain efficiencies that Applicants expect to result from the transaction, including elimination of double marginalization.⁵⁵⁵

193. Applicants further assert that permanent and temporary foreclosures are not transaction-

⁵⁴⁶ ACA Comments at 11-12; JCC Comments at 34; JCC Aug. 4 Ex Parte, Rogerson Analysis II at 39.

⁵⁴⁷ Cablevision Comments at 19-20.

⁵⁴⁸ Cablevision Comments at 19.

⁵⁴⁹ Cablevision Comments at 19-20.

⁵⁵⁰ Cablevision Comments at 20.

⁵⁵¹ Applicants' Reply, Exhibit B, CRA Analysis at 43-46. CRA also considers whether the transaction would enhance News Corp.'s incentive and ability to withhold its broadcast station signals only from small cable operators and finds that signal withholding would still be unprofitable. *Id.* at 47-49.

⁵⁵² Applicants' Reply at 41 (citing CRA Analysis at 44, 52).

⁵⁵³ Applicants' Reply at 42.

⁵⁵⁴ Applicants' Reply at 44.

⁵⁵⁵ Applicants' Reply at 44.

specific harms because they could effectively be achieved through the use of contracts.⁵⁵⁶ As evidence of this, News Corp. points to a retransmission dispute in which broadcast television stations owned by Disney were briefly dropped from Time Warner cable systems in May 2000 in a dispute over retransmission consent. In the time leading up to the removal of the signal, Disney agreed with DirecTV to subsidize customers that switched from Time Warner to DirecTV.⁵⁵⁷

194. JCC and Cablevision respond that Applicants' Reply and the CRA Analysis fail to address the likelihood of the potential harm of temporary foreclosure which they had raised.⁵⁵⁸ JCC assert that, while the Applicants have attempted to prove that permanent withholding of Fox programming would be unprofitable, it is temporary and not permanent foreclosure that is the real threat posed by the transaction.⁵⁵⁹ They further contend that control of DirecTV effectively reduces the costs and risks to News Corp. of employing "take it or leave it" bargaining tactics with competing MVPDs seeking to carry "must have" FOX broadcast network programming, thus increasing the likelihood that News Corp. will engage in such behavior.⁵⁶⁰ JCC contend that the increase in bargaining power resulting from the transaction will lead to higher prices for consumers, particularly in less dense regions of the country served by small to medium-sized cable systems.⁵⁶¹ JCC and Cablevision further contend that News Corp. need only withhold – or threaten to withhold – programming from a handful of MVPDs in a few select markets for only a short period of time in order to obtain undue pricing power and negotiating leverage.⁵⁶²

195. Commenters assert that documents filed in the record by Applicants demonstrate that: (1) News Corp. already engages in temporary foreclosure of local broadcast station programming to obtain more favorable rates and terms; (2) acquiring control over DirecTV will reduce the costs of such tactics; and (3) News Corp. recognizes that service interruptions can send a valuable message to other MVPDs about the consequences of resisting its demands.⁵⁶³

⁵⁵⁶ Applicants' Reply at 24.

⁵⁵⁷ Applicants' Sep. 8 Ex Parte at 3; Lexecon Analysis II ¶ 66.

⁵⁵⁸ JCC Aug. 4 Ex Parte; Cablevision Aug. 20 Ex Parte.

⁵⁵⁹ JCC Aug. 4 Ex Parte at 2; *see also* Cablevision Aug. 20 Ex Parte at 1, Rubinfeld Analysis at 2.

⁵⁶⁰ JCC Aug. 4 Ex Parte at 2; Cablevision Ex Parte at 1.

⁵⁶¹ JCC Aug. 4 Ex Parte at 2, Rogerson Analysis II at 2.

⁵⁶² Rogerson states that "In large part, the studies of News Corp.'s economists are focused upon demonstrating that it is not economically rational for News Corp. to withhold programming permanently from rival MVPDs to increase DirecTV's attractiveness and market share. Lexecon and CRA ignore and do not account for the more likely scenario—that News Corp., armed with increased bargaining power, has increased ability to raise prices to all distributors, and therefore to consumers, through the actual or threatened withholding of programming." JCC Aug. 4 Ex Parte, Rogerson Analysis II at 2. *See also* Rubinfeld at 1, 10.

⁵⁶³ JCC Nov. 5 Ex Parte at 2-3; Cablevision Aug. 20 Ex Parte at 2. In support of this, JCC cite documents [REDACTED]. JCC also cites News Corp. documents [REDACTED]. Similarly, Cablevision asserts [REDACTED]. Cablevision Aug. 20 Ex Parte at 2 [REDACTED]. Applicants disagree with JCC's interpretation of their documents. *See* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Nov. 13, 2003) ("Applicants' Nov. 13 Ex Parte").

196. JCC and Cablevision also use the data and methodology from the CRA's permanent foreclosure analysis to support their temporary foreclosure theory.⁵⁶⁴ For example, Rogerson, on behalf of the JCC, finds that, if News Corp. temporarily withholds a broadcast station from a targeted MVPD, it breaks even economically if less than 1% of that MVPD's subscribers migrate to DirecTV.⁵⁶⁵ In a similar vein, Cablevision's Rubinfeld concludes that temporary withholding of broadcast programming will be profitable if DirecTV's market share increases by just less than 1.5%.⁵⁶⁶ JCC further argues that, since the ultimate purpose of temporary withholding of programming is to increase prices across a national base of over ninety million MVPD households, it is clear that News Corp. has every incentive to engage in such conduct.⁵⁶⁷ JCC asserts that in the context of temporary foreclosure, DirecTV's national footprint is especially important, because it insulates Applicants against any potential losses from such foreclosure in every market in the country.⁵⁶⁸ Responding to Applicants' argument that News Corp.'s already maximizes profits on its programming, JCC contends that recent comments made by News Corp. executives belie this analysis, and that it is inconsistent with Applicants' own economic reasoning, including its theory of raising rivals' costs.⁵⁶⁹

197. Commenters further assert that there is no basis for concluding that Applicants' claimed incentives to eliminate double marginalization will offset the competitive harms arising from the transaction.⁵⁷⁰ First, they assert that DirecTV is under no obligation to pass cost savings arising from the elimination of double markup on to consumers.⁵⁷¹ Second, they contend that there is no basis to conclude that Applicants' incentives to eliminate double markup—if any—outweigh the incentives to raise rivals costs.⁵⁷²

198. Cablevision and its expert Rubinfeld identify several additional alleged flaws in the CRA Analysis. First, they claim that the CRA Analysis, in calculating lost advertising revenue, fails to consider that some customers view Fox signals over-the-air. Second, they assert that even a temporary withholding affects the future growth of an MVPD, because subscribers selecting a new MVPD will consider access to programming in making that decision. Third, they contend that the Applicants fail to acknowledge that News Corp. and DirecTV could easily engage in joint profit maximization, without News Corp.'s having a 100% ownership interest in DirecTV. Finally, they claim that withholding programming from cable competitors may confer significant marketing advantages on DirecTV.⁵⁷³

⁵⁶⁴ JCC Aug. 4 Ex Parte at 3 and Rogerson Analysis II; Cablevision Aug. 20 Ex Parte at 1 and Rubinfeld Analysis.

⁵⁶⁵ JCC Aug. 4 Ex Parte, Rogerson Analysis II at 2-3.

⁵⁶⁶ Cablevision Aug. 20 Ex Parte at 2 and Rubinfeld Analysis at 10.

⁵⁶⁷ JCC Aug. 4 Ex Parte, Rogerson Analysis II at 3.

⁵⁶⁸ JCC assert that, for this reason, the Commission should not focus on DirecTV's share of the MVPD market, as the Applicants have done in their Reply. JCC Aug. 4 Ex Parte at 4-6.

⁵⁶⁹ JCC Aug. 4 Ex Parte at 8 and Rogerson Analysis II at 40-42.

⁵⁷⁰ JCC Aug. 4 Ex Parte at 9-10.

⁵⁷¹ JCC Aug. 4 Ex Parte at 9.

⁵⁷² *Id.* at 9-10 and Rogerson Analysis II at 29-33; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 21-22.

⁵⁷³ Cablevision Aug. 20 Ex Parte at 2 and Rubinfeld Analysis at 5-9, 11-14, 19-20.

199. Responding to Applicants' argument that temporary foreclosure of broadcast programming cannot be considered a transaction-specific harm because the parties could also accomplish it through contracts, opponents of the transaction contend that it would be difficult for News Corp. and DirecTV to negotiate and monitor compliance with the contracts that would divide the benefits of temporary foreclosure.⁵⁷⁴ They further argue that, if the efficiencies of the transaction cannot be gained through arms-length contracting, it is unlikely that the benefits of foreclosure can be achieved through arms-length contracting.⁵⁷⁵

200. Applicants submit a further economic analysis, responding to the analyses of Rogerson and Rubinfeld, which finds that an interest in DirecTV will not make a temporary foreclosure strategy profitable for News Corp. Applicants contend that the Rogerson and Rubinfeld analyses: (1) overestimate the numbers of consumers that would switch to DirecTV due to temporary withholding; (2) overestimate gains to DirecTV based on unrealistic assumptions about the length of time that new subscribers would remain with DirecTV; and (3) underestimate or disregard potential countermeasures available to MVPDs and the potential degradation in the value of programming withheld. Applicants assert that by accounting for these factors, their analysis correctly finds that temporary foreclosure would not be profitable.⁵⁷⁶

(iii) Discussion

201. We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations.⁵⁷⁷ Local broadcast station programming is highly valued by consumers, and entry into the broadcast station market is difficult. Moreover, we conclude that, absent conditions, News Corp.'s acquisition of DirecTV will enhance this market power, which could result in several public interest harms. To prevent such harms, we will impose conditions that are discussed below.

202. At the outset, we agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings. Congress has repeatedly recognized the importance of carriage of local television broadcast signals to MVPDs—most recently when it enacted the SHVIA, which permitted DBS operators to carry local television broadcast signals so that they could better compete with cable operators.⁵⁷⁸ As we recently found in our annual video competition report, DBS penetration has increased more rapidly in markets where local-into-local service is available.⁵⁷⁹ We

⁵⁷⁴ JCC Aug. 4 Ex Parte, Rogerson Analysis II at 22-23; Cablevision Aug. 20 Ex Parte at 24.

⁵⁷⁵ JCC Aug. 4 Ex Parte, Rogerson Analysis II at 23; Cablevision Aug. 20 Ex Parte at 24.

⁵⁷⁶ Applicants' Sept. 8 Ex Parte at 2.

⁵⁷⁷ Our conclusions apply to any O&O station as well as any local broadcast station affiliate on whose behalf News Corp. negotiates retransmission consent agreements.

⁵⁷⁸ See H.R. Rep. No. 106-79 at 11-15 (1999); Satellite Home Viewer Improvement Act, Pub.L. No. 106-113, 113 Stat.1501, at App. I at 1501A-523 & 544.

⁵⁷⁹ DBS operators report that the ability to carry local television broadcast signals has made their service more attractive to consumers. See *2002 Video Competition Report*, 17 FCC Rcd 26901, 26931-32 ¶ 61 (2002); see also U.S. Government Accounting Office (GAO) Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate, *Telecommunications Issues in Providing Cable and Satellite Television Services*, GAO-03-130, October 2002 at i, 9-12.

also agree with commenters who contend that News Corp. possesses market power in the broadcast station segment of the video programming market. We base this finding, in part, on the fact that the signals of local television broadcast stations are without close substitutes. Moreover, because of the extremely limited availability of new television broadcast licenses, entry into this segment of the video programming market is highly restricted.

203. We further find that News Corp.'s existing control of MVPDs' access to a large number of local broadcast stations airing highly popular Fox network programming, when combined with ownership of a nationwide DBS platform, will likely increase News Corp.'s incentive and ability engage in temporary foreclosure strategies aimed at increasing its programming fees thereby having the effect of raising rival MVPDs' costs by lowering the costs to News Corp. of engaging in such behavior. Both Applicants and commenters have provided economic analyses that rely, in part, on empirical data to evaluate whether News Corp., after the transaction, will engage in some form of foreclosure.⁵⁸⁰ Applicants' analyses find that they would not profit from either permanent or temporary foreclosure.⁵⁸¹ Commenters' analyses, in contrast, find that Applicants will have an increased incentive and ability to temporarily withhold access to their broadcast signals.⁵⁸²

204. In addition to the studies submitted by the parties, Commission staff conducted its own analysis, which is described in greater detail in Appendix D. As commenters have correctly observed, the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers.⁵⁸³ Staff's analysis is, as was true for RSN carriage, premised on the assumption that, if the transaction increases News Corp.'s incentive and ability to withhold the signals of its O&Os by lowering the costs to News Corp. of employing such bargaining tactics, News Corp. will engage in such behavior and that this will result in an increase of rival MVPDs' costs, and ultimately end-user prices. Key to determining the degree to which the transaction lowers News Corp.'s costs of engaging in temporary foreclosure is the number of subscribers that can be predicted to shift from the affected MVPD to competitor DirecTV to access the foreclosed programming, which in turn will increase the profits of the post-transaction company as a whole. Staff analyzed the likelihood of two types of potential post-transaction foreclosure of access to News Corp.'s broadcast signals: (1) permanent foreclosure, where the signal is permanently removed from rival MVPDs; and (2) temporary foreclosure, where the signal is removed for a brief period. Staff performed this analysis for all markets in which Fox owns the broadcasts station or has an affiliation agreement with the station.⁵⁸⁴

⁵⁸⁰ See Applicants' Reply, CRA Analysis; JCC Comments, Rogerson Analysis; JCC Aug. 4, 2003 Ex Parte, Rogerson Analysis II; JCC Aug. 4, 2003 Ex Parte, *Economic Analysis of the Competitive Effects of the Takeover of DirecTV by News Corp.*, William P. Rogerson ("Rogerson Analysis III"); Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis; Cablevision Sept. 25 Ex Parte, Rubinfeld Analysis II.

⁵⁸¹ Applicants' Reply, CRA Analysis.

⁵⁸² JCC Reply, Rogerson Analysis; JCC Aug. 4 Ex Parte, Rogerson Analysis II; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis.

⁵⁸³ JCC Aug. 4, 2003 Ex Parte.

⁵⁸⁴ The details of the staff's analysis of foreclosure strategies with respect to local broadcast signals are described in the technical appendix, Appendix D at 1-13. As explained in greater detail in the next section, we conclude that News Corp. has the ability to influence the terms of their affiliates' retransmission consent agreements. To the (continued....)

205. *Permanent Foreclosure:* As discussed in greater detail in Appendix D, staff's analysis examined the potential profitability of both permanent and temporary foreclosure strategies each of News Corp.'s O&O broadcast stations. Based upon staff's analysis, we find that, for News Corp. to profit from a permanent foreclosure strategy, DirecTV would have to capture between [REDACTED] and [REDACTED] of rival MVPD's subscribers, depending on whether News Corp. captures 50% or 100% of the additional profits, and the size of the market.⁵⁸⁵ We agree with Applicants that it is unlikely that DirecTV would experience subscriber gains of these magnitudes as a result of a broadcast programming foreclosure strategy. Consequently, we do not believe that use of a permanent foreclosure strategy in retransmission consent negotiations is a likely harm arising from this transaction.

206. *Temporary Foreclosure:* The case of temporary foreclosure is slightly more complicated than that for permanent foreclosure. In particular, the analysis of temporary foreclosure required staff to consider additional variables, including the likelihood that some customers would later return to their initial MVPD service,⁵⁸⁶ the timing of the foreclosure, and the timing of subscriber gain and loss.⁵⁸⁷ We again agree with commenters who argue that a temporary foreclosure strategy is likely to be profitable for News Corp. in many instances, and therefore likely to be pursued more frequently post-transaction than it is today. The staff analysis found that, for News Corp. to profit from a temporary foreclosure strategy in which a Fox broadcast signal is withheld for one month, DirecTV would have to capture between [REDACTED] and [REDACTED] of rival MVPD's subscribers, depending on the size of the market and whether News Corp. could capture 50% or 100% of the additional profits.⁵⁸⁸ We find that the subscriber shifts required for temporary foreclosure to be profitable are likely to be realized.

207. We base this finding on the effects of the temporary withdrawal of the ABC broadcast station from Time Warner subscribers in the Houston DMA. As commenters have noted, this example illustrates the likely responses of consumers to the anticipation and eventual loss of a popular broadcast station from their chosen MVPD.⁵⁸⁹ The Applicants argue that this incident is not relevant since the withdrawal of the broadcast station was instigated by the MVPD rather than the broadcaster, as would occur under the harms alleged in this proceeding.⁵⁹⁰ Our use of this incident is not intended to analyze the motives behind the withdrawal, however. Rather, we use the incident to measure the likely responses of consumers to the loss of broadcast programming.

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extent that News Corp. is involved in negotiating the terms of retransmission consent for its affiliates, the potential harms relating to foreclosure of broadcast programming extend to a much broader geographic area.

⁵⁸⁵ See Appendix D, Technical Appendix.

⁵⁸⁶ Our analysis assumes that no customers will leave DirecTV for the first 12 months following their switch, [REDACTED] will leave once their equipment contracts expire, and in all following months, [REDACTED] of the remaining customers will revert to their original MVPD. See Appendix D, Technical Appendix.

⁵⁸⁷ We adopt a discounted cash flow approach to allow us to compare the benefits and costs of that occur over time. The discounted cash flow analysis is the technique used by both commenters and Applicants and is the standard method for comparing flows of costs and benefits that vary temporally. See Applicants' Sept. 8 Ex Parte; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis.

⁵⁸⁸ See Appendix D, Technical Appendix.

⁵⁸⁹ JCC Sept. 23 Ex Parte at 18; Cablevision August 19 Ex Parte at 3-5.

⁵⁹⁰ Applicants' Sept. 8 Ex Parte at 25-27.

208. Both Cablevision and the Applicants have provided data on the subscriber shift that occurred during the ABC – Time Warner dispute. Cablevision reports that 20,000 vouchers were issued for free installation of DirecTV to Time Warner customers in Houston, or about 3% of Time Warner’s subscribers in Houston.⁵⁹¹ Cablevision does not have any information on the number of rebates that were actually redeemed for DirecTV service.⁵⁹² However, the Applicants provided an accounting of the number of rebate coupons redeemed in the Houston area of approximately [REDACTED].⁵⁹³ The number of rebate coupons available was limited, however, and there may have been many other Time Warner customers that switched to DirecTV without receiving a rebate.⁵⁹⁴ We conclude, therefore, that this estimate represents merely a lower bound on the number of Time Warner customers that switched to DirecTV. Cablevision, using data on the number of DirecTV subscribers in the Houston DMA during the time of the dispute, estimates that DirecTV [REDACTED] customers due to the withdrawal of the ABC signal from the Time Warner cable systems in Houston.⁵⁹⁵ The staff’s econometric analysis of DirecTV’s gains in subscribers indicates that DirecTV gained [REDACTED] customers, or [REDACTED] of Time Warner’s customers in Houston, as a result of the dispute.⁵⁹⁶ We find this response to be representative of the shifts of customers that could occur during a long-simmering dispute over retransmission consent. According to our analysis, a shift of this magnitude would put [REDACTED] at risk of the harms alleged to result from this transaction.

209. Based on this analysis, we conclude that the transaction will increase News Corp.’s post-transaction incentive and ability to temporarily withhold access to the signals of its television broadcast stations as a negotiating tactic by lowering the risks and costs to News Corp. of engaging in such foreclosure. We agree with commenter claims that this enhanced incentive and ability to engage in temporary foreclosure will allow News Corp. to extract more compensation for its broadcast station signals from competing MVPDs than it could reasonably expect to achieve absent the transaction. The potential public interest harms that would result from such a strategy are substantial. News Corp.’s ability to raise rivals’ costs in this manner would harm consumers in different ways depending on the type of compensation it obtains. When News Corp. secures carriage of other cable programming networks from MVPDs in exchange for its broadcast signal, MVPDs pay for those networks. If News Corp. can secure carriage of more cable networks and charge higher fees for such carriage, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates. If News Corp. uses withholding or threats of withholding in retransmission consent negotiations to obtain

⁵⁹¹ Cablevision Aug. 19 Ex Parte at 4.

⁵⁹² Furthermore, we note that Time Warner offered to accept the rebate coupons and issue credits for digital cable and Internet service. See Mike McDaniel, *TV Spat Turns into Game of Give and Let-Give, Cable Firms to Honor Ch. 13 Satellite Vouchers*, HOUSTON CHRONICLE, Mar. 8, 2000.

⁵⁹³ Applicants’ Response to Second Information and Document Request at 3; Applicants’ Response to Third Information and Document Request at 3-4.

⁵⁹⁴ Mike McDaniel, *TV Spat Turns into Game of Give and Let-Give, Cable Firms to Honor Ch. 13 Satellite Vouchers*, HOUSTON CHRONICLE, Mar. 8, 2000.

⁵⁹⁵ Letter from Tara Corvo, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Nov. 20, 2003) (“Cablevision Nov. 20 Ex Parte”), Daniel L. Rubinfeld and Duncan Cameron, *Estimating the Effect on MVPD Subscribership of the May 2000 Withholding of ABC Network Retransmissions from Time Warner Houston Cable Subscribers* at 11.

⁵⁹⁶ See Appendix D, Technical Appendix at para. 23.

carriage of its affiliated cable networks that the MVPD, absent the threat of foreclosure, would not agree to carry, consumers are harmed because MVPDs are forced to make programming decisions based on News Corp.'s demands, rather than selecting the programming of their choice. In the long term, News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice.

210. Moreover, during periods of temporary foreclosure, News Corp.'s television broadcast signal is not available to the subscribers of competing MVPDs. We have previously found that local broadcast station signals play a very important role in terms of viewpoint diversity and localism, two of our most important Communications Act goals and policies.⁵⁹⁷ Loss of access to local broadcast stations signals harms consumers who cannot access desired Fox programming, local news and public affairs programming, and other programming available on the affected stations, even if the loss is temporary.

211. We disagree with Applicants' contention that, even if the transaction affected their incentive to engage in such a strategy, our rules would prevent them from executing such a strategy successfully.⁵⁹⁸ Although the Act and our rules are important safeguards by requiring good faith negotiation with MVPDs and prohibiting exclusive retransmission consent agreements, these statutory and rule provisions do not prevent broadcasters from withholding their signals while retransmission consent negotiations are in progress, nor do they require that access be provided on non-discriminatory terms and conditions.⁵⁹⁹ And, the rules will not prevent News Corp. from uniformly raising broadcast programming carriage costs to all MVPDs, including DirecTV. Because we find that the proposed transaction poses likely consumer harms that will not be adequately mitigated by the Commission's existing rules, and the Applicants have offered no additional access commitments, we consider below whether other conditions can mitigate this harm.

(iv) Conditions

212. *Positions of the Parties.* Consumers Union and JCC urge the Commission to expand the proposed program access commitments proposed by Applicants to include the television broadcast programming of Fox O&Os and any other Fox affiliates for which News Corp. conducts retransmission consent negotiations.⁶⁰⁰ Consumers Union explains that extension of News Corp.'s non-discrimination condition to local broadcast station programming can be useful in preventing egregious competitive abuses such as selling Fox programming to DirecTV's competitors at prices that are substantially and unjustifiably higher than the price paid by DirecTV.⁶⁰¹ Non-discrimination requirements alone, however, will not stop News Corp. from charging DirecTV an artificially high price for Fox programming and then

⁵⁹⁷ See, e.g., 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620, 13623-24 ¶¶ 7-8, 13627 ¶ 17, 13643-44, ¶¶ 73-76 ("2002 Biennial Review Order"), recon. pending; Rules and Regulations Relating to Multiple Ownership, 18 F.C.C. 288 (1953).

⁵⁹⁸ Applicants' Reply at 44-46.

⁵⁹⁹ We also disagree with the contention that the alleged harm of the transaction could occur through contracting. [REDACTED]

⁶⁰⁰ JCC Comments at 64-65; Consumers Union Sept. 23 Ex Parte at 5.

⁶⁰¹ Consumers Union Sept. 23 Ex Parte at 5.

requiring any MVPDs seeking to carry the programming to either pay a rate based upon that same high rate or allow DirecTV to become the major distributor of that programming in the MVPD's market, according to Consumers Union. Therefore, Consumers Union recommends that the Commission impose a restriction similar to what the FTC applied in the Time Warner/Turner merger. In that instance, Consumers Union avers, the FTC established a cable programming price index mechanism to evaluate whether the merging companies were raising programming prices at a more accelerated pace than their historic pattern.⁶⁰²

213. ACA suggests another variant on the benchmarking proposal articulated by Consumers Union. Under ACA's proposal, News Corp. also could not impose terms or conditions on other cable operators that are "more costly or burdensome" than the terms and conditions of current retransmission consent agreements.⁶⁰³ Disputes could be brought to the Commission, and News Corp. would be required to grant the aggrieved cable operator retransmission consent pending resolution of the dispute.⁶⁰⁴ ACA's plan would require News Corp. to negotiate retransmission consent with smaller cable operators on a group basis, consistent with News Corp.'s current practices for satellite programming. ACA explains that its proposals would maintain News Corp.'s and smaller cable operators' ability to negotiate a wide variety of mutually beneficial carriage arrangements that may include some compensation for News Corp., or conversely, for the cable operator, while preventing News Corp. from raising the "price" of retransmission consent to DirecTV's competitors as a consequence of gaining control of DirecTV. Permitting smaller cable operators to pool their resources and address retransmission consent on a group basis, as they have done for years on the satellite programming side, will also temper the increase in negotiating leverage News Corp. gains from the transaction.⁶⁰⁵ ACA also proposes that News Corp. be required to grant retransmission consent to small cable operators (i.e., those serving 5,000 subscribers or less) for no additional consideration beyond continued carriage and channel placement.⁶⁰⁶ ACA states that this condition would merely adopt what the Applicants say is News Corp.'s current practice – that News Corp. has granted retransmission consent to approximately 320 small cable companies "without seeking compensation of any kind, with cash or carriage."⁶⁰⁷ Finally, ACA requests that the Applicants be required to offer distribution rights to qualifying cable operators for the local-into-local broadcast signals carried by DirecTV.⁶⁰⁸ Cablevision urges the Commission to impose a similar requirement allowing Rainbow DBS to redistribute local signals carried by DirecTV.⁶⁰⁹ But, in the main, Cablevision

⁶⁰² Consumers Union Sept. 23 Ex Parte at 5-6 (citing Agreement Containing Consent Order, In the Matter of Time Warner Inc., Turner Broadcasting System Inc., Tele-Communications, Inc., and Liberty Media Corporation, File No. 961-004, Before the Federal Trade Commission (Sept. 12, 1996) at <http://www.ftc.gov/os/1996/09/timewar.pdf>).

⁶⁰³ ACA Oct. 17 Ex Parte at Exhibit A, Page 1.

⁶⁰⁴ *Id.*

⁶⁰⁵ ACA Oct. 17 Ex Parte at 6.

⁶⁰⁶ ACA Oct. 17 Ex Parte at Exhibit A, Page 1.

⁶⁰⁷ ACA Oct. 17 Ex Parte at 6.

⁶⁰⁸ ACA Oct. 17 Ex Parte at Exhibit A, Page 2.

⁶⁰⁹ Cablevision Comments at 32. Cablevision also urges the Commission to prohibit Applicants from excluding Rainbow DBS from any agreement to share backhaul it makes with EchoStar "in the course of this merger." (continued....)

is doubtful that behavioral remedies alone will adequately mitigate the increase in News Corp.'s market power arising from the transaction, and maintains that a structural approach is better. Cablevision therefore contends that, if the Application is granted, News Corp. should be required to waive the retransmission consent rights of all of its O&Os and to elect must-carry on all Cablevision systems.⁶¹⁰

214. JCC also urges us to prohibit News Corp. from entering into any exclusive retransmission consent contracts or other exclusive distribution agreements for its O&Os and any other broadcast stations on which it negotiates agreements, make its broadcast stations available to all MVPDs on a non-discriminatory basis, and to require News Corp. to enter into arbitration proceedings to negotiate carriage of its broadcast stations in certain circumstances.⁶¹¹ As described in Section VI.C.4.b *supra*, JCC propose that we institute a commercial arbitration remedy for aggrieved MVPDs to use when retransmission consent negotiations reach an impasse.⁶¹² The arbitration mechanism, according to JCC, is designed constrain the undue pricing power and bargaining leverage News Corp. gains by its ability to profit from subscriber shifts to DirecTV during periods of temporary foreclosure, and thereby mitigate News Corp.'s ability to utilize DirecTV as a "tactical weapon" during retransmission consent negotiations with unaffiliated MVPDs.⁶¹³ JCC also recommends that we prohibit News Corp. from removing its broadcast station signal from the aggrieved MVPD's system during the pendency of an arbitration proceeding. RCN supports this aspect of JCC's proposal.⁶¹⁴ JCC also urge us to mandate that News Corp. grant MVPDs nondiscriminatory access to any nationwide high-definition ("HDTV") feed of Fox network programming that News Corp. may implement in the future.⁶¹⁵ EchoStar urges us to: (i) apply the good faith negotiation rules proposed by DirecTV in the good faith negotiation proceeding to News Corp.,⁶¹⁶ and (ii) require that retransmission consent fees for Fox O&Os do not exceed the lower of: the highest fees agreed to with any other network station in the same market *or* the fees agreed to for Fox affiliates in other markets.⁶¹⁷

215. *Discussion.* Several conditions proposed by commenters are intended to remedy situations that are unrelated to the transaction. As we stated earlier, we decline to impose non-transaction specific conditions. The goal of our transfer application review process is to allow parties to realize the economic efficiencies associated with a transaction while ensuring that any harms resulting from the license transfer are mitigated and some portion of the benefits of the transfer are passed on to the public. (Continued from previous page) _____

Cablevision has not demonstrated that any such agreement has been reached, or that negotiations concerning backhaul are in progress.

⁶¹⁰ Cablevision Comments at 27.

⁶¹¹ JCC Aug. 18 Ex Parte., Attachment at 7-8

⁶¹² JCC Aug. 18 Ex Parte, Attachment at 7-8.

⁶¹³ JCC Aug. 18 Ex Parte at 2.

⁶¹⁴ RCN Oct. 24 Ex Parte, Attachment at 7.

⁶¹⁵ JCC Comments at 65-66.

⁶¹⁶ *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, DirecTV Comments (filed Jan. 12, 2000). *See also Good Faith Negotiation Order.*

⁶¹⁷ EchoStar Petition at 67; *see also* JCC Reply Comments at 15-16.

For example, the ACA and Cablevision request that DirecTV be required to make its local-into-local broadcast station signals available to cable operators when the cable operator cannot receive a good quality broadcast signal off-air.⁶¹⁸ We do not have any evidence that the transaction will reduce the quality of broadcast signals available to cable operators and we therefore decline the condition as being unrelated to the transaction.

216. We also reject the proposed conditions that are calculated to remedy harms that we have determined are unlikely to occur. EchoStar worries that the sharing of information about requests for retransmission request between News Corp.'s owned and operated television stations and DirecTV will allow DirecTV to engage in strategic actions that will reduce EchoStar's incentives to introduce local-into-local service in additional markets.⁶¹⁹ We find this harm unlikely to occur. Evidence in the record indicates that [REDACTED].⁶²⁰

217. Many of the proposed conditions attempt to remedy the harms we have identified, but in our opinion either fail to remedy the harms or place the Applicants at a disadvantage relative to their positions prior to the transaction. For example, Cablevisions' proposal to require the waiver of retransmission consent for News Corp.'s owned and operated stations only in areas served by Cablevision fails to fully address the harms. Our analysis demonstrates that consumers in nearly all areas of the country are likely to be harmed by the transaction. In addition, applying Cablevision's condition to all of News Corp.'s owned and operated stations would put News Corp. at a distinct disadvantage in obtaining carriage of its cable networks relative to other broadcast station owners with affiliated cable programming networks such as Viacom and Disney.

218. *Conditions.* We impose several conditions on News Corp that combine the most attractive aspects of several proposals in the record. At the outset, in terms of stations covered by our remedy, we realize that today News Corp. does not negotiate retransmission consent agreements on behalf of independently owned network affiliates.⁶²¹ However, our analysis indicates that the harms we believe will occur in markets served by News Corp.'s owned and operated stations could also occur in markets served by broadcast stations affiliated with the Fox network. Since these stations do not possess an ownership interest in DirecTV, we are not concerned about a substantial change in leverage in retransmission consent negotiations except in situations where News Corp. is able to intervene in the negotiations. Accordingly, we extend our conditions to apply whenever News Corp. negotiates retransmission consent agreements on behalf of independently owned Fox network affiliates.

219. We will extend the commitments News Corp. has proposed regarding non-discriminatory access to cable programming networks to encompass access to any broadcast station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent. This will, as Consumers Union has noted, prevent News Corp. from engaging in competitive abuses such as selling Fox broadcast programming to DirecTV's competitors at prices that are substantially and unjustifiably higher than the price paid by DirecTV. Congress prohibited non-discrimination for satellite programming to ensure this programming was available to competing MVPDs. We believe that a similar prohibition toward News

⁶¹⁸ ACA Oct. 17 Ex Parte at 11-12.

⁶¹⁹ EchoStar Petition at 17-18.

⁶²⁰ [REDACTED].

⁶²¹ Applicants' Response to Third Information and Document Request at 1-3.

Corp.'s broadcast stations will counter its market power and make certain that this critical programming is available to MVPDs. In addition, the good faith and exclusivity requirements of SHVIA, which, by their terms, are effective only until January 1, 2006, are extended to apply to News Corp. for as long as our program access rules are in effect. This should help to temper increases in News Corp.'s market power arising from the transaction and protect the public interest in continued access to local broadcast stations carried by their MVPD as part of their package of video programming services.

220. Our primary condition to alleviate the public interest harms in the market for broadcast station retransmission consent is to allow MVPDs with 5,000 or more subscribers to elect to submit a dispute with News Corp. over the terms and conditions of carriage of programming subject to retransmission consent to commercial arbitration. We choose this remedy to provide a fair and neutral mechanism by which disputants can quickly resolve retransmission consent disputes. The arbitration mechanism is intended to limit News Corp.'s post-transaction incentive and ability to threaten or impose broadcast service interruptions on subscribers of competing MVPDs to extract greater price increases than it obtain under today's conditions.

221. Upon receiving notice of the intention to submit the dispute to arbitration, pursuant to the procedures described in the following paragraph, News Corp. must immediately allow continued retransmission of the broadcast station signal under the same terms and conditions of the expired contract, unless the dispute is a first time request for local broadcast station signal carriage by an MVPD. The staff analysis clearly demonstrates that, even in the absence of the supracompetitive rates, News Corp.'s threats of temporary foreclosure can generate significant gains in nearly all markets. Consumer reactions in this area are such that the additional profits DirecTV would earn from subscribers switching MVPDs will likely compensate News Corp. relatively rapidly for the lost revenue from reduced distribution of the broadcast signal.

222. We establish the following procedures for arbitration of retransmission consent disputes:

Commercial Arbitration Remedy

- The commercial arbitration condition commences following the expiration of any existing retransmission consent agreement.
- Following such expiration, or 90 days after a first time request for retransmission consent, an MVPD may notify News Corp. within five business days that it intends to request arbitration over the terms and conditions of retransmission consent.
- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued retransmission of the broadcast signal under the same terms and conditions of the expired retransmission consent agreement as long as the MVPD continues to meet the obligations set forth in this condition.
- Retransmission of the broadcast signal during the period of arbitration is not required in the case of first time requests for carriage.
- *"Cooling Off Period."* Following the MVPD's notice of intent to submit the dispute to arbitration, but prior to filing for formal arbitration with the American Arbitration Association ("AAA"), the MVPD and News Corp. will enter a "cooling off" period during which negotiations will continue.
- *Formal Filing with the AAA.* The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the retransmission consent agreement and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, News Corp. must participate in the arbitration proceeding.

- The AAA will notify News Corp. and the MVPD upon receiving the MVPD’s formal filing.
- News Corp. will file a “final offer” with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.
- The MVPD’s final offer may not be disclosed until the AAA has received the final offer from News Corp.
- The final offers shall be in the form of a contract for the retransmission of the broadcast signal for a period of three years. The final offers may not include any provision to carry any video programming networks or any other service other than the broadcast signal.

Rules of Arbitration

- The arbitration will be decided by a single arbitrator under the expedited procedures of the Rules, excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in the Order.
- The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- The arbitrator is directed to choose the “final offer” of the party which most closely approximates the fair market value of the programming carriage rights at issue.
- To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession),⁶²² including, but not limited to:
 - current contracts between MVPDs and Fox-affiliated stations on whose behalf News Corp. does not negotiate;
 - current contracts between MVPDs and non-Fox network stations;
 - offers made in the preceding negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
 - evidence of the relative value of Fox programming compared to other network programming (e.g., advertising rates, ratings);
 - contracts between MVPDs and stations on whose behalf News Corp. has negotiated made before News Corp. acquired control of DirecTV as well as offers made in such negotiations;⁶²³
 - internal studies of the imputed value of retransmission consent agreements in bundled agreements;⁶²⁴
 - changes in the value of non-Fox retransmission consent agreements;
 - changes in the value or costs of Fox programming or broadcast stations, or in other prices relevant to the relative value of Fox broadcast programming (e.g., advertising rates).

⁶²² We clarify that, by “possession,” we mean actual possession or control.

⁶²³ [REDACTED].

⁶²⁴ [REDACTED].

- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.
- If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other parties costs and expenses (including attorney fees) against the offending party.
- Following the decision of the arbitrator, and to the extent practicable, the terms of the new retransmission consent agreement, including payment terms, if any, will become retroactive to the expiration date of the previous retransmission consent agreement. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.
- Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission, and does so in a timely manner.

Review of Award by the Commission

- A party aggrieved by the arbitrator's award may file with the Commission a petition seeking *de novo* review of the award. The petition must be filed within 30 days of the date the award is published.
- The MVPD may elect to continue to retransmit the broadcast signal pending the FCC decision, subject to the terms and conditions of the arbitrator's award.
- In reviewing the award, the Commission will examine the same evidence that was presented to the Arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- The Commission may award the winning party costs and expenses (including reasonable attorney fees), to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorney fees) of the arbitration.⁶²⁵

223. An MVPD meeting the Commission's definition of "small cable company" may appoint a bargaining agent to bargain collectively on its behalf in negotiating with News Corp. for carriage of the programming subject to this condition and News Corp. may not refuse to negotiate with such an entity.⁶²⁶ The designated collective bargaining entity will have all the rights and responsibilities granted by these conditions.

224. The costs of arbitration may overwhelm MVPDs with fewer than 5000 subscribers, thereby providing them with little relief from the harms associated with this transaction. Accordingly, as suggested by ACA, when dealing with MVPDs with fewer than 5,000 total subscribers, we require News Corp. to either elect "must-carry" status or negotiate retransmission consent for its owned and operated stations without any requirements for cash compensation or carriage of programming other than the broadcast signal. While we are unwilling to apply such a condition to all MVPDs since it would seriously

⁶²⁵ The Commission has the authority to award attorney fees and costs. *See* 47 C.F.R. § 1.6009(b)(3).

⁶²⁶ The Commission has previously defined small cable companies as those with 400,000 or fewer subscribers. We adopt that definition for the purposes of this condition. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 7393 (1995).

disadvantage News Corp. relative to other producers of video programming that also own broadcast stations, we find the adverse consequences on News Corp. to be minimal. In the latest retransmission consent cycle, News Corp. granted retransmission consent to approximately 71% of the cable operators serving markets in which it owns and operates broadcast stations without seeking compensation of any kind.⁶²⁷

225. No later than 20 business days prior to the expiration of a must-carry election or retransmission consent agreement with an MVPD, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order. News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for retransmission consent.

226. As we observed above, the markets and technologies used in the provision of MVPD services and video programming continue to evolve over time, rendering accurate predictions of future competitive conditions difficult. Accordingly, the conditions concerning carriage of programming subject to retransmission consent shall cease to be effective six years after the release of this *Order*.⁶²⁸ The Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the conditions have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

d. Access to Programming-Related Technologies

(i) Electronic Program Guides/Interactive Program Guides

227. *Background.* In this section we examine the proposed transaction's potential impact on the use of electronic program guides ("EPGs") and interactive program guides ("IPGs"). An EPG is a software-based service or device offered by cable operators and other MVPDs to consumers to navigate, organize, and differentiate video program offerings.⁶²⁹ An IPG is an EPG that allows for consumer interactivity. For example, a consumer with an IPG is able to sort and select programming, schedule reminders for upcoming programming, obtain additional information or descriptions about the programming or advertised products, as well as purchase pay-per-view and video-on-demand programming using their remote control.⁶³⁰

228. News Corp. holds a 42.9% interest in Gemstar – TV Guide International, Inc. ("Gemstar"), the leading provider of EPGs and IPGs.⁶³¹ Gemstar currently offers three guide products to MVPDs: TV Guide Channel (an EPG), EPG, Jr. (a text-only guide), and TV Guide Interactive (an IPG).⁶³² News Corp. also states that its subsidiary, NDS, has entered into a patent agreement with

⁶²⁷ Applicants' Reply at 46.

⁶²⁸ The six-year period is intended to cover the next two retransmission consent negotiation cycles.

⁶²⁹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901 (2002).

⁶³⁰ The majority of the comments focused on EPGs.

⁶³¹ Application at 65.

⁶³² Gemstar July 31 Response at 7.

Gemstar and begun to offer an IPG in the United States, although the IPG is not yet operational.⁶³³ The NDS IPG is offered only in conjunction with NDS conditional access technology and not on a stand-alone basis.⁶³⁴

229. *Positions of the Parties.* Several parties contend that the proposed transaction will increase News Corp.'s incentive to tie Gemstar's EPG to retransmission consent negotiations with unaffiliated MVPDs and that News Corp.'s enhanced bargaining power could force these other MVPDs to use the Gemstar EPG to the exclusion of alternative, preferred products.⁶³⁵ Cablevision contends that News Corp. could use its increased leverage in retransmission consent negotiations with Cablevision and Rainbow DBS to force them to carry the Gemstar EPG.⁶³⁶ Cablevision also contends that News Corp., through DirecTV, is guaranteed access to an MVPD platform even if cable operators do not agree to use the Gemstar EPG as a condition for access to the Fox O&O broadcast stations.⁶³⁷ JCC argue that News Corp., in a carriage dispute, could use the EPG "to exploit subscriber dislocation and resentment associated with dropped channels, through heightened promotion of DirecTV or by placing text messages and click-through DirecTV marketing materials on the EPG channel slot normally associated with the dropped service."⁶³⁸ JCC note the DOJ's position that EPGs/IPGs are a relevant antitrust product market and contend that EPGs are a necessary component of cable operator product offerings.⁶³⁹ They claim that cable operators that have committed to upgrade their systems would not regard incompatible EPGs as viable substitutes and are thus "locked in" to agreements with Gemstar.⁶⁴⁰ JCC and ACA claim that News Corp. could use its control of Gemstar to disadvantage DirecTV's rivals by raising the costs of the Gemstar EPG or otherwise discriminating against cable operators, including small cable operators, in the content, unique features, or license terms and conditions offered to these competitors.⁶⁴¹ The JCC argue that the proposed transaction "threatens to give new impetus to anti-competitive leveraging of Gemstar/TV Guide's dominance in the EPG marketplace."⁶⁴²

230. News Corp. contends that any competitive concerns regarding its 42.9% control of Gemstar are unwarranted because DirecTV has only a small share of the MVPD market and that, "in

⁶³³ News Corp. July 28 Response at 27-29. According to News Corp., "[t]o date, NDS has entered into agreements to provide its IPG product to only two MVPDs: (1) a single RCN system in the Chicago area; and (2) the DBS system planned by a Cablevision subsidiary, R/L DBS." *Id.* at 27.

⁶³⁴ *Id.* at 27. News Corp. also states that NDS has "received no revenue in exchange for distribution of its IPG product" and that the IPG will not carry advertising. *Id.* at 28.

⁶³⁵ Cablevision Comments at 20-22; CDD Petition at 3-4; EchoStar Petition at 24-25; JCC Comments at 48-49; NAB Comments at 20; NRTC Petition at 14-15; ACA Reply at 9; JCC Reply at 8-9.

⁶³⁶ Cablevision Comments at 21.

⁶³⁷ Cablevision Comments at 3.

⁶³⁸ JCC Comments at 48.

⁶³⁹ *Id.* at 49 n.120 (citing *U.S. v. Gemstar and TV Guide*, CV No. 1:03CV00198, (D.D.C., filed Feb. 6, 2003)).

⁶⁴⁰ *Id.* at 49.

⁶⁴¹ JCC Comments at 49; ACA Reply at 9.

⁶⁴² JCC Aug. 4 Ex Parte at 14-15.

practice, Gemstar has not been the default EPG for the DTH systems in which News Corp. holds an interest – for example, BSkyB uses a different EPG product.”⁶⁴³ News Corp.’s argument is premised on the Commission’s decision regarding the lack of potential harm from an EPG/MVPD affiliation in the *AT&T-MediaOne* transaction, where AT&T’s acquisition of Media One was found to pose no threat to competition in the EPG marketplace.⁶⁴⁴ In *AT&T-MediaOne*, the Commission identified three potential harms from an EPG/MVPD affiliation: (1) the MVPD could steer subscribers toward affiliated content providers; (2) the MVPD could harm unaffiliated EPG providers by selecting affiliated EPGs for its system; and (3) the MVPD could lock EPG providers into exclusive contracts that would prevent them from dealing with other MVPDs.⁶⁴⁵ The Commission found that the requirement that AT&T reduce its attributable cable system ownership interests was sufficient to circumscribe AT&T’s alleged ability to harm unaffiliated content providers, unaffiliated EPGs, and other MVPDs because AT&T, post-divestiture, would serve a smaller share of the MVPD market.⁶⁴⁶ Although AT&T held a comparable interest to News Corp. in TV Guide (a corporate predecessor of Gemstar), News Corp. argues that there is no basis for concern here because DirecTV has a much smaller share of the MVPD market than that allowed in the *AT&T-MediaOne* transaction.⁶⁴⁷

231. NRTC, however, contends that the potential for vertical foreclosure and discrimination in favor of News Corp.’s EPG is greater here than in the case of *AT&T-MediaOne* because cable was subject to a 30% ownership (coverage) cap while full-CONUS DBS operators such as DirecTV have 100% nationwide coverage and no market share cap.⁶⁴⁸ In addition, CDD argues that given Gemstar’s penetration to approximately 100 million people in the United States, the importance in controlling the EPG cannot be understated and it urges the Commission to examine all the proprietary technologies and intellectual property relationships involving Gemstar to determine the impact that this News Corp.-controlled entity will have on a wide number of markets, including consumer electronics, VCR-plus, and set-top boxes.⁶⁴⁹ According to Cablevision and EchoStar, Gemstar has aggressively asserted its patent rights in litigation against competing EPG providers and users of EPGs, taking a broad view that its patents encompass the use of EPGs, including the interactive grid guide.⁶⁵⁰ EchoStar argues that Gemstar, should it prevail on its patent claims, would exert monopoly power over all EPG providers, including EchoStar.⁶⁵¹ EchoStar also argues that News Corp., with an assured distribution outlet in

⁶⁴³ Application at 66-67.

⁶⁴⁴ *Id.* at 65-67 (citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Grop, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9856-58 (2000) (“*AT&T-MediaOne*”)).

⁶⁴⁵ *AT&T-MediaOne*, 15 FCC Rcd at 9857 ¶ 89.

⁶⁴⁶ *AT&T-MediaOne*, 15 FCC Rcd at 9857-58 ¶ 90.

⁶⁴⁷ Application at 66. *See also* Applicants’ Nov. 14 Ex Parte at 2.

⁶⁴⁸ NRTC Petition at 14-15.

⁶⁴⁹ CDD Petition at 3-4.

⁶⁵⁰ Cablevision Comments at 21; EchoStar Petition at 24.

⁶⁵¹ EchoStar Petition at 25. On June 19, 2003, the U.S. District Court in Atlanta granted EchoStar’s motion for summary judgment against Gemstar concerning issues involving a patent for electronic program guide technology. EchoStar filed suit against Gemstar in December 2000, accusing the company of violating federal and state (continued....)

DirecTV, would be unfettered to extract unreasonable fees or other terms and conditions relating to its programming assets by leveraging its market power in the EPG realm.⁶⁵² EchoStar and the JCC request that the Commission clarify that program access rules would extend to EPGs and “[p]rohibit the tying of any non-programming intellectual property rights to the carriage of programming.”⁶⁵³

232. CDD also states that Fox stations have been given a preferred position on the IPG in their designated market areas and that Gemstar has the right to transmit IPG data in the vertical blanking interval of each Fox O&O broadcast station.⁶⁵⁴ CDD also contends that Gemstar’s licensing arrangements with MSOs under which it shares a portion of the interactive platform advertising revenue that it generates through the MSO raises questions about the integration of News Corp. business operations with the cable industry, its primary competitor.⁶⁵⁵

233. In response, News Corp. points out that the Commission concluded in *AT&T-MediaOne* that concerns relating to the EPG marketplace are more appropriately addressed in a general, industry wide, rulemaking and thus the Commission has made clear that an individual transfer application would not be the proper forum in which to address EPG-specific issues.⁶⁵⁶ News Corp. claims that the Commission’s decision in *AT&T-MediaOne* established the general proposition that an MVPD with less than 30% of MVPD subscribers would not have the ability to use a commonly-owned EPG to disadvantage other MVPDs, other programmers, or other EPG providers and thus the transaction will have no such adverse consequences.⁶⁵⁷ News Corp. finds that virtually all of the concerns raised by the parties are irrelevant to this proceeding because they are wholly speculative and in no way arise from the instant transaction.⁶⁵⁸ News Corp. argues that its interest in the EPG technology platform already exists, and is not altered in any way by the proposed transaction, and it states that it could attempt to use retransmission consent rights today to promote the use of the Gemstar EPG over cable and satellite MVPDs, if such a strategy made economic sense.⁶⁵⁹

234. *Discussion.* We find that many of the harms alleged are unrelated to this transaction. The alleged harms arising from joint control of video programming assets and program guides can occur regardless of this transaction. Under our general rulemaking authority, we have committed to “monitor developments with respect to the availability of electronic programming guides to determine whether any

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antitrust laws. Gemstar counterclaimed, accusing EchoStar of infringing on two patents. Gemstar is expected to reinstate its patent claims and seek a new court decision sometime in 2004. See SkyReport, Jun. 20, 2003, *DISH Wins Patent Case Vs. Gemstar*, at <http://www.skyreport.com/viewskyreport.cfm?ReleaseID=1148>.

⁶⁵² EchoStar Petition at 25.

⁶⁵³ EchoStar Petition at 61, 65-66; JCC Reply at 8-9.

⁶⁵⁴ CDD Petition at 4.

⁶⁵⁵ *Id.*

⁶⁵⁶ *Id.* at 50-51.

⁶⁵⁷ *Id.* at 52.

⁶⁵⁸ *Id.* at 51.

⁶⁵⁹ *Id.*

action is appropriate in the future.”⁶⁶⁰ To the extent that evidence accrues that demonstrates the necessity of Commission action regarding the availability of EPGs, we will consider it at that time.⁶⁶¹

235. An alleged harm that is specific to this transaction involves News Corp.’s purported ability to disadvantage its MVPD rivals through either permanent or temporary foreclosure of electronic and interactive program guides during contract negotiations and using threats of these actions to extract additional concessions. We analyze, in turn, the likelihood of News Corp. engaging in such a strategy for each of the three program guide products sold by its subsidiary, Gemstar-TV Guide: the TV Guide Channel, EPG Jr., and TV Guide Interactive.

236. The program guide feature of the TV Guide Channel consists of a scrolling list of programming organized by the channels carried by the cable system. The TV Guide Channel is available to approximately 50 million MVPD subscribers. We find that while this product possesses a large market share, News Corp. will be unable to use its acquisition of control of DirecTV to extend its dominance in the EPG market because of the relative ease by which competing video programming producers could enter the market or MVPDs could choose to self-supply. In addition, the substitutes available to both consumers and MVPDs should limit the shift of subscribers from rival MVPDs to DirecTV should News Corp. attempt to engage in foreclosure. We do not find high barriers to entry to this market given the common technology used to implement an on-screen display of programming information as well as the existence of an independent supplier of consolidated program listings data.⁶⁶² This should eliminate any increased incentives arising from the transaction for News Corp. to engage in permanent foreclosure. In the event of attempted temporary foreclosure, the substitutes available to consumers, which include newspapers, magazines, and the Internet, are more than adequate to carry them through any temporary withdrawal of the EPG and therefore limit the numbers that might switch to DirecTV.

237. With respect to the EPG Jr. product, a text-only program guide, we find that News Corp. does not possess the necessary market power to engage in the harms alleged by the opponents to this transaction. [REDACTED].⁶⁶³

238. The TV Guide Interactive product is an on-screen listing of television program information with interactive functions that enable viewers to navigate, sort, select and schedule television programming for viewing using a remote control.⁶⁶⁴ Post-transaction, News Corp. will acquire an interest

⁶⁶⁰ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14820 ¶ 116 (1998). We are also exploring EPG-related issues in other pending rulemaking proceedings. See *Compatibility Between Cable Systems and Consumer Electronics Equipment*, 15 FCC Rcd 17568 (2000); *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321 (2001); *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598 (2001).

⁶⁶¹ We have also sought comment on the development and deployment of EPGs and the technologies used to provide them to consumers. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 18 FCC Rcd 16042, 16049 (2003).

⁶⁶² Tribune Media Services provides listings of program information to competing EPG/IPGs, as well as newspapers, magazines, and other media. In addition, we note that since the original information on programming is supplied by programmers themselves, an MVPD could collect this data on its own.

⁶⁶³ [REDACTED].

⁶⁶⁴ See Gemstar-TV Guide, TV Guide Interactive, at <http://www.gemstartvguide.com/whatwedo/ipgproducts.asp> (visited Nov. 6, 2003).

in the DirecTV-produced IPG. Under some situations, this might raise concerns that the acquisition will enhance News Corp.-controlled Gemstar's ability to affect the price of IPGs. However, DirecTV is not currently selling its IPG to other MVPDs.⁶⁶⁵ Although the transaction will result in an increase in concentration in the IPG market, because DirecTV, like the other large MSOs, does not resell its IPG product, it is doubtful that this structural change will cause a change in the behavior of market participants. We therefore do not find that control of DirecTV's IPG product would enhance News Corp.'s ability to restrict the supply of IPGs and thereby influence price.

239. Our concern regarding potential vertical harms attributable to the share of the IPG market controlled by News Corp. is mitigated by several factors. First, we note that [REDACTED].⁶⁶⁶ [REDACTED]. We also note that the current competitors in the market, as well as the most likely entrants, are firms that manufacture set-top boxes.⁶⁶⁷ These are firms with existing relationships with MVPDs and provide one of the necessary inputs -- set-top boxes -- that are required in order for the subscriber to use an IPG. Attempts by News Corp. to raise prices for TV Guide Interactive are likely to be countered by MVPDs switching to alternative suppliers with whom they have existing relationships. [REDACTED].⁶⁶⁸ Thus, we do not find that the proposed transaction will likely produce consumer or competitive harms related to access to interactive program guides.

240. Our conditions for RSN and retransmission consent negotiations should alleviate the concerns raised by the commenters regarding News Corp.'s ability to use a tying strategy to leverage RSNs or retransmission consent rights to increase the use or price of the Gemstar EPG.⁶⁶⁹ As we indicated above, given the nature of the IPG market, at present any such benefit from tying must come from News Corp.'s market power as a source of other "essential programming." Because the conditions we impose are intended to neutralize any additional market power created by the proposed transaction in these areas, News Corp. should not be able to successfully tie the purchase of the Gemstar products to its RSN or local broadcast programming in order to garner more market power in the EPG/IPG markets than Gemstar currently holds, as a result of the proposed transaction.

241. Some parties have alleged that News Corp., through patent litigation initiated by Gemstar-TV Guide, has the opportunity to monopolize the IPG market. This in and of itself is not a merger specific issue. Moreover we observe that such claims are already an area of substantial litigation. [REDACTED]⁶⁷⁰ -- we find that this issue does not warrant specific attention in this license transfer review proceeding. The Commission will, however, continue to monitor the situation.

(ii) Interactive Television

242. *Background.* The Commission has yet to define interactive television ("ITV") or classify

⁶⁶⁵ In addition, [REDACTED].

⁶⁶⁶ [REDACTED].

⁶⁶⁷ Pioneer and Scientific Atlanta accounted for nearly 43% of digital set-top boxes shipped in 2001 according to *Kagan Media Trends 2003*.

⁶⁶⁸ [REDACTED].

⁶⁶⁹ See Section VI.C.4.b and c, *supra*, and Section IX, *infra*.

⁶⁷⁰ [REDACTED]

ITV for regulatory purposes under the Communications Act, but has broadly characterized ITV as a service or suite of services that support subscriber-initiated choices or actions that are related to one or more video programming streams.⁶⁷¹ Services providing such capabilities may include video-on-demand, personal video recorder, gaming, e-mail, TV-based e-commerce (“t-commerce”), interactive advertising, interactive program guides, Internet access, and program-related enhanced content.⁶⁷² Although not requiring a return path, service offerings such as electronic program guides, might also fit within the ITV category. A number of companies are involved in developing the technical standards, equipment and software necessary to provide ITV services.⁶⁷³ In connection with its review of the American Online (“AOL”) – Time Warner merger, the Commission issued a Notice of Inquiry to consider whether industry-wide rules were needed to address any impediments to the development of ITV services and markets, particularly with respect to cable-delivered ITV services.⁶⁷⁴ In *AOL-Time Warner*, the Commission concluded that the newly formed company had the incentive and potential ability to use its combined control of cable system facilities, video programming, and the AOLTV interactive service, to discriminate against unaffiliated video programming networks in the provision of ITV services.⁶⁷⁵ The Commission held, however, that the terms of the Federal Trade Commission’s AOL-Time Warner Consent Agreement regarding ITV would substantially address concerns about the availability of alternatives for the distribution of unaffiliated video programming networks’ ITV services.⁶⁷⁶ Although the Commission concluded that no further merger-related restrictions pertaining to ITV were warranted, it

⁶⁷¹ See *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321, 1323 (2001) (“*ITV NOI*”). In the *ITV NOI*, the Commission noted that ITV was rapidly developing, thus making it difficult to define with specificity the precise universe of services that might be encompassed within the term. For purposes of discussion, the *ITV NOI* instead attempted to identify the major technical resources or “building blocks” necessary for the provision of what it understood to be likely ITV services. *Id.*, 16 FCC Rcd at 1329. The identified components were: (1) a video transmission capacity associated with interactive content (e.g., the digital video stream), (2) a two-way connection (e.g., via the Internet), and (3) specialized customer premises equipment (e.g., the interactive television set-top box). *Id.*, 16 FCC Rcd at 1324-25.

⁶⁷² See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901, 26971 (2002) (“*2002 Video Competition Report*”).

⁶⁷³ Major ITV middleware and content providers include Liberty’s OpenTV, ACTV, and Wink; Liberate, Worldgate; and GoldPocket Interactive. See *2002 Video Competition Report*, 17 FCC Rcd at 26972. News Corp.-controlled NDS recently announced its acquisition of Thomson’s *MEDIAHIGHWAY*, another ITV middleware provider. See *NDS Acquires Thomson’s MEDIAHIGHWAY and Enters into Strategic Alliance with Thomson on Provision of Middleware* (press release), Sept. 13, 2003. NDS has also entered into an agreement with itaas, Inc. to provide “support services to NDS for the development of interactive applications for Scientific-Atlanta’s Explorer set-top boxes.” See *NDS Selects itaas Program to Support Development of Advanced Interactive TV Applications*, (press release), July 28, 2003.

⁶⁷⁴ See *ITV NOI*.

⁶⁷⁵ See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization by Time Warner, Inc. and America Online, Inc. to AOL Time Warner, Inc.*, 16 FCC Rcd 6547 (2001) (“*AOL-Time Warner*”).

⁶⁷⁶ *Id.* at 6646. The FTC ordered AOL-Time Warner not to discriminate in the transmission and carriage of interactive content and forbade AOL-Time Warner from blocking or otherwise interfering with interactive content transmitted by an unaffiliated ISP. The FTC Consent Agreement also prohibited AOL-Time Warner from blocking subscribers’ access to any interactive content that is carried on the AOL-Time Warner facilities and thus enabled subscribers to access such content as part of an ITV service provided by an unaffiliated entity. *Id.*

did find that open questions regarding distribution of ITV services warranted further examination in the aforementioned proceeding of general-applicability. The *ITV NOI* remains pending.

243. *Positions of the Parties.* NAB and CDD argue that the proposed transaction would result in a single entity with control over both content and distribution and therefore allow News Corp. to act as a “gatekeeper” with the ability and the incentive to discriminate against unaffiliated providers of content and services, including providers of ITV and other emerging communications services.⁶⁷⁷ NAB contends that discrimination could take “many forms” such as the denial of access to the DBS platform or in “such technology related areas as interactivity, channel assignment and positioning, use of navigation devices and electronic program guides, data transfer speed, and downstream and return path traffic.”⁶⁷⁸ CDD argues that the relationship between News Corp. and Liberty Media, which controls Open TV and Wink, and has a stake in ACTV and significant cable programming interests, will impact the emerging ITV marketplace by disadvantaging competing program suppliers and technology companies.⁶⁷⁹

244. In response, the Applicants argue that they do not have sufficient market power in any relevant product or geographic market to profitably engage in anti-competitive foreclosure.⁶⁸⁰ They further contend that the harms proffered by the parties are speculative and are not transaction-specific and therefore do not provide a basis either for denying their Application or for imposing regulatory conditions.⁶⁸¹ The Applicants also state that News Corp. has no ownership interest in and no agreements pending to acquire an interest in Liberty Media.⁶⁸² The Applicants further state that “DirecTV will not enter into exclusive arrangements for satellite cable programming with ‘affiliated program rights holders’ including Liberty, and will not ‘unduly or improperly influence the decision’ of such rights holders to sell satellite cable programming to other MVPDs, or the prices, terms and conditions of such sale.”⁶⁸³

245. *Discussion.* In other proceedings, the Commission has found that the interactive television market in the U.S. is nascent and “to date commercial two-way interactive service deployments have been very limited.”⁶⁸⁴ In our *2002 Video Competition Report*, we reported that “[c]able MSOs and

⁶⁷⁷ NAB Comments at 20; CDD Nov. 3 Ex Parte at 1-2.

⁶⁷⁸ *Id.*

⁶⁷⁹ See CDD Petition at 4; CDD Nov. 3 Ex Parte at 1-2; CDD Nov. 17 Ex Parte at 3-4. CDD refers to Liberty’s present and potential future investment in News Corp. (citing SEC 10Q filing, 5/14/03). OpenTV provides interactive television technology and content for the cable, satellite and terrestrial broadband industries. See OpenTV Homepage at <http://www.opentv.com> (visited Sept. 11, 2003). Wink is a free interactive television service, distributed through partnership agreements with cable and satellite operators, broadcasters, advertisers, and equipment manufacturers, that provides viewers with the ability to access enhanced programs or advertisements via the remote control while continuing to watch television. See Wink Homepage at <http://www.wink.com> (visited Sept. 11, 2003). On July 1, 2003, ACTV was acquired by OpenTV. See *OpenTV Completes the Acquisition of ACTV* (press release), Jul. 1, 2003.

⁶⁸⁰ Applicants’ Reply at 12-23.

⁶⁸¹ *Id.* at 50-51.

⁶⁸² News Corp. July 28 Response at 25.

⁶⁸³ Applicants’ Nov. 14 Ex Parte at 4 (citing Application at 61-63).

⁶⁸⁴ *2002 Video Competition Report*, 17 FCC Rcd at 26972 ¶ 170.

DBS operators continue to develop these services as measures to increase subscribership, develop new streams of revenue, and reduce churn.”⁶⁸⁵ The Report also indicated that the multiple but incompatible platforms in use today have slowed the development of ITV content and applications.⁶⁸⁶ Accordingly, we agree with the Applicants that DirecTV’s share of the MVPD market is too small to enable the merged entity to exercise market power in any ITV market. Until this market develops further, the vertical harms alleged by NAB and CDD are speculative at best.⁶⁸⁷ We therefore find that this transaction would not create any public interest harm in this particular line of business. We will, however, continue to monitor the development of interactive television technologies and services.⁶⁸⁸

246. With respect to CDD’s allegation regarding Liberty, we are not convinced that Liberty’s unreciprocated financial interest in News Corp. will induce DirecTV to ignore its customers and the profits they generate, and instead provide programming that its customers may not want. Our analyses of the vertical issues in this transaction hinge on the assumption that News Corp. and DirecTV will act to maximize their profits. CDD’s allegation assumes that DirecTV will act in a contrary manner, which we find implausible. Liberty Media and News Corp. do not share any members of their Boards of Directors.⁶⁸⁹ While it is true that Liberty owns a substantial share of News Corp. stock, this stock carries only limited voting rights that do not include a vote on the nominees for the Board of Directors. A formal mechanism does not exist, beyond arm’s length market transactions, by which Liberty Media can influence the programming choices of DirecTV.

(iii) Conditional Access Technology and Set-top Boxes.

247. *Positions of the Parties.* Cablevision, CDD, and EchoStar argue that News Corp.’s control of DirecTV and NDS would give it the incentive and ability to discriminate against MVPD competitors in its provisioning of conditional access technology and interactive applications.⁶⁹⁰ Sun Microsystems alleges no particular transaction-specific harm but requests that the Commission require or “at a minimum encourage” DirecTV to migrate to Multimedia Home Platform (“MHP”) based set-top box standards, which will allow for interoperability with CableLabs’ Open Cable Application Platform

⁶⁸⁵ 2002 Video Competition Report, 17 FCC Rcd at 26972.

⁶⁸⁶ *Id.*

⁶⁸⁷ We note that NAB raised similar concerns regarding a cable operator’s ability to dominate the ITV market in the *ITV NOI* proceeding. As we reported in the 2002 Video Competition Report, we have seen no evidence of such domination in the current marketplace.

⁶⁸⁸ The Commission recently issued the 2003 Video Competition Notice in which we sought comment on the development and deployment of ITV services and the technologies used to provide them. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 18 FCC Rcd 16042, 16049 (2003) (“2003 Video Competition Notice”).

⁶⁸⁹ Application, Attachments - Volume I at C-3 and Liberty Media Corp., *Notice of Annual Meeting of Shareholders*, at http://www.libertymedia.com/investor_relations/pdfs/annualmeeting_2003.pdf (visited Oct. 2, 2003).

⁶⁹⁰ Cablevision Comments at 22; CDD Petition at 4; EchoStar Petition at 38, 60; CDD Nov. 3 Ex Parte at 1-2; CDD Nov. 17 Ex Parte at 2.

(“OCAP”) and ATSC’s Digital Application Software Environment (“DASE”).⁶⁹¹ CDD contends that the Application should be denied or at least conditioned on Applicants providing non-discriminatory access to all related distribution technologies and devices, including conditional access and interactive marketing software/processing.⁶⁹²

248. The Applicants respond that the harms alleged by the respective commenters are speculative and, therefore, do not provide a basis for either denying their Application or for imposing regulatory conditions.⁶⁹³ They also argue that Sun’s requested condition falls outside the scope of this proceeding because it “would conflict with the Commission’s well-established policy against picking winners and losers among competing technologies and its preference to let the market decide such issues.”⁶⁹⁴

249. *Discussion.* As the Applicants note, our preference is to allow the market to determine which technologies succeed and which fail. We see no reason on the record before us to presume that the set-top box market will fail to deploy the technologies that best serve consumers, and therefore decline to impose the condition proposed by Sun Microsystems.

250. With respect to conditional access systems, we find that NDS does not possess sufficient market power in the United States to profitably discriminate against competing MVPDs. Set-top box manufacturers Scientific-Atlanta and Motorola are the dominant providers of conditional access systems to domestic MVPDs.⁶⁹⁵ Accordingly, any attempt by NDS to disadvantage DirecTV’s rivals would almost certainly be unavailing. We do not impose license conditions to mitigate hypothetical harms.

e. Access to Fixed Satellite Services

251. *Background.* A portion of the Application before us involves the transfer of control of the licenses of PanAmSat from Hughes to News Corp.⁶⁹⁶ PanAmSat is a significant provider of fixed

⁶⁹¹ Sun July 30 Ex Parte at 1-2. MHP is an open standard created in Europe establishing a common framework for content, application, and service delivery over different transmission systems. It is based on DVB-J, which relies on Sun Microsystem’s Java Virtual Machine specification. See *DVB-MHP - What is MHP?* at http://www.mhp.org/what_is_mhp/index.html (visited Nov. 18, 2003).

⁶⁹² See Letter from Jeffrey Chester, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Nov. 7, 2003) at 3 (“CDD Nov. 7 Ex Parte”).

⁶⁹³ Applicants’ Reply at 50-51; Applicants’ Nov. 14 Ex Parte at 2-3.

⁶⁹⁴ News Corp. Aug. 28 Ex Parte at 5 (citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24014 (1998); *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11376 (2002)).

⁶⁹⁵ *Kagan Media Trends 2003* at 110 and NE Asia Online, *Sony Pushes New Conditional Access Technology*, May 2003 at http://neasia.nikkeibp.com/nea/200305/cojp_244652.html (visited Oct. 2, 2003).

⁶⁹⁶ See Application, Volume I, A for a list of all satellite space station authorizations controlled by Hughes; see also Application, Volume I, B for a chart depicting a simplified ownership structure of GM/Hughes’ pre-transaction FCC licenses; see also Application, Volume I, D for a chart depicting a simplified ownership structure of Hughes’ post-transaction FCC licenses.

satellite services (“FSS”)⁶⁹⁷ in the United States and currently is 81% owned by Hughes.⁶⁹⁸ Most distribution of video programming to MVPD service providers (and to over-the-air television broadcasters) is carried over FSS. Upon closing of the proposed transaction, News Corp. would be, in addition to its broadcast television and cable network holdings, both an MVPD and an FSS provider.

252. MVPDs typically retransmit programming received from distant points, rather than originate programming at the locale where transmission takes place. To obtain these signals, MVPDs rely primarily on FSS provided over a number of geo-stationary orbit (“GSO”) satellites.⁶⁹⁹ For national distribution of video programming within the United States, a full CONUS satellite “footprint” is needed.⁷⁰⁰ A significant portion of the capacity on FSS satellites in the United States is dedicated to video distribution.⁷⁰¹

253. There are three major FSS operators licensed by the United States: SES AMERICOM, PanAmSat, and Loral Space.⁷⁰² Other providers include New Skies, Anik, and various Latin American satellites partly available for North American use. PanAmSat owns and operates a fleet of 22 satellites that operate in FSS bands, and with that capacity carries video programming for broadcasters and other programmers, as well as Internet backbone support, communications network support and pipelines for telecommunications providers.⁷⁰³ SES AMERICOM and its subsidiaries provide similar services through a fleet of 18 satellites.⁷⁰⁴

254. Applicants state that News Corp., as one of the world’s largest users of satellite video services, will be able to offer valuable customer insight to PanAmSat.⁷⁰⁵ And, because PanAmSat derives more than 65% of its revenues from carrying video services, Applicants claim that News Corp’s insight “should prove an invaluable tool in devising strategies for developing new markets and new services around the world.”⁷⁰⁶ Applicants argue, therefore, that the proposed transaction will create synergies

⁶⁹⁷ FSS is defined as satellite service between fixed, as opposed to mobile, points, and excludes broadcast satellite service such as DBS.

⁶⁹⁸ See Application, Volume I, B.

⁶⁹⁹ Non-geostationary FSS also exist, but because of cost and other considerations, video distribution is carried primarily by GSO satellites operating in the C- and Ku-bands. In the rest of this Order, when we refer to FSS satellites, we mean GSO FSS satellites exclusively.

⁷⁰⁰ The footprint of a satellite at a CONUS location will include the 48 contiguous states.

⁷⁰¹ See ING Barings’ *Satellite Communications Industry*, March 2000 at 149.

⁷⁰² See SPACE NEWS, Jun. 23, 2003, at 18.

⁷⁰³ Application at 6.

⁷⁰⁴ See Comments of SES AMERICOM, Inc., In the Matter of Loral Satellite, Inc. (Debtor in Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), Assignors, and Intelsat North America LLC, Assignee, Applications for Consent to Assignments of Space Station Authorizations, September 15, 2003, at 2.

⁷⁰⁵ See Application at 44.

⁷⁰⁶ *Id.*

throughout Hughes.⁷⁰⁷ Further, Applicants argue that PanAmSat's new ownership structure will neither increase FSS concentration, nor raise any prospect of competitive harm in the MVPD marketplace.⁷⁰⁸

255. NRTC, however, argues that once News Corp. acquires an interest in PanAmSat, it could manipulate the prices paid by broadcasters, cable programmers, and others who rely on PanAmSat for video distribution backhaul, thereby raising costs for competitors and ultimately, their customers.⁷⁰⁹ Applicants responded by stating that PanAmSat's current market position is essentially the same as it was in October 2002 when the Commission released its *EchoStar-DirecTV HDO* and found that PanAmSat's market position was such that "any anti-competitive schemes were 'unlikely to occur and even more unlikely to succeed.'"⁷¹⁰

256. *Discussion.* Although Hughes controls a significant share of the FSS capacity through its ownership of the PanAmSat satellites, News Corp. does not operate any FSS satellites. Thus, upon consummation of the proposed transaction, News Corp. would control the identical percentage to that controlled currently by Hughes. It is therefore evident that the proposed transaction does not increase concentration in the FSS capacity. In addition, as we have previously noted,⁷¹¹ PanAmSat is already under common control with a DBS provider – DirecTV – and the proposed transaction would not change that situation. No opponent or commenter has made a credible showing as to why News Corp.'s ownership of PanAmSat, as compared to Hughes,' would adversely impact competition in the provision of FSS, in the video programming markets, or any other relevant satellite service or market.

257. As we have discussed, there are situations in which it would be profitable for an integrated firm to pursue a vertical foreclosure strategy against downstream rivals that use the firm's goods or services.⁷¹² Thus, it is possible that News Corp, once it has acquired PanAmSat, might have an incentive to use its market power in the provision of FSS capacity (assuming, arguendo, that it would have such power) to competitively harm video programming rivals who use FSS. For instance, News Corp. could degrade the quality of the FSS service provided to rivals, restrict supply, or raise the price of FSS, all in attempt to gain additional share (and earn additional profits) in the video programming market.

258. We find that such attempts are unlikely to occur and even more unlikely to succeed. First, with PanAmSat's share of the FSS capacity, it remains doubtful that News Corp. would have sufficient market power to carry out such a scheme. Second, there appears to be sufficient excess capacity in the FSS market so that if News Corp./PanAmSat attempted to raise the rates it charges to its video programming rivals, or degrade the service it provides to them, it likely would lose these customers to other FSS providers. Thus, unilateral restriction of FSS supply would likely be very costly to News Corp. and would likely achieve very little in the marketplace. Market power in an upstream market is a necessary condition for competitive harms to occur in a vertical merger. We find no change in the

⁷⁰⁷ *Id.*

⁷⁰⁸ *Id.* at 67.

⁷⁰⁹ NRTC Petition at 14.

⁷¹⁰ See Applicants' Reply at 53 (citing *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20659).

⁷¹¹ See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20660.

⁷¹² See Section VI.C.1, *supra*.

competitive landscape that would cause us to alter our prior conclusion that PanAmSat possesses limited market power in the provision of FSS capacity. We therefore conclude that News Corp.'s acquisition of PanAmSat will be unlikely to cause competitive harm in the provision of FSS or in the video programming markets.

VII. OTHER POTENTIAL PUBLIC INTEREST HARMS

A. Impact of the Transaction on Diversity

1. Background

259. As stated above, the Commission's public interest review includes an evaluation of the proposed transaction's affect on the quality and diversity of communications services to consumers.⁷¹³ Commenters have raised issues concerning the proposed transaction's impact on program and viewpoint diversity. Commenters contend that the transaction will adversely affect both program diversity and viewpoint diversity, either as a direct result of the combination of an MVPD, programmer, and broadcaster, or as a result of competitive harms posed by the transaction. Applicants counter that the transaction presents no potential harms to viewpoint diversity⁷¹⁴ and will increase programming geared to linguistic, ethnic, and cultural minorities.⁷¹⁵ Commenters disagree, claiming that the Applicants have not shown that any transaction-specific benefits relating to diversity will result from the proposed transaction.⁷¹⁶ Below, we analyze the diversity issues raised by commenters. We conclude that potential harms to viewpoint and program diversity will be addressed by the conditions we are imposing on our approval of the Application.

2. Program Diversity

260. *Positions of the Parties.* One of the Commission's goals is to promote program diversity, which refers to the availability of a variety of programming formats such as comedy, drama, and newsmagazines, as well as specific content categories such as health, business, food and content targeted to ethnic or racial groups.⁷¹⁷ EchoStar asserts that the transaction will have anticompetitive effects on the market for video programming which also will harm diversity. EchoStar states that the transaction would foreclose what is currently the largest unaffiliated distribution network, and that vertical integration would reduce or eliminate DirecTV's incentives to offer programming that competes with News Corp. offerings.⁷¹⁸ EchoStar contends that harm to competition in the video programming market could result in fewer viable independent programmers, and therefore less diversity.⁷¹⁹ Cablevision asserts that by

⁷¹³ See Section III, *supra*; see also *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20759-85 ¶¶ 37-52 (analyzing the impact of the proposed transaction on viewpoint and program diversity).

⁷¹⁴ Applicants' Reply at 65-67.

⁷¹⁵ Application at 39-43; Applicants' Sept. 11 Ex Parte at 3-4.

⁷¹⁶ ACA Comments at 28; JCC Comments at 72.

⁷¹⁷ *2002 Biennial Review Order*, 18 FCC Rcd at 13631-32 ¶ 36.

⁷¹⁸ EchoStar Petition at 39-40; see also NRTC Petition at 14; CFA Reply Comments at 9-12.

⁷¹⁹ EchoStar Petition at 39-40; see also CFA Reply Comments at 9-12 (asserting that "the diversity of program sources has eroded to the point of extinction")

combining content, broadcasting, and an MVPD platform, the transaction will give News Corp. substantial leverage and market power that will result in fewer programming choices for cable subscribers and reduced local broadcast programming.⁷²⁰ Cablevision repeats its claim that vertical integration with an MVPD would allow News Corp. to make a credible threat that it will withhold broadcast retransmission consent rights, giving News Corp. leverage to demand carriage of its affiliated cable programming.⁷²¹ Cablevision contends that this pressure to carry News Corp. programming would harm program diversity by thwarting cable operators' ability to select the programming that their subscribers consider most desirable, including new or independent programming services.⁷²² Cablevision asserts that News Corp. would be using the very rights conferred upon broadcasters to promote diversity and localism to contravene those policy goals.⁷²³ Commenters also assert that, after the transaction, News Corp. would have the incentive and ability to deny access to its affiliated cable network programming to competing MVPDs, which would weaken or eliminate these competitors, thereby harming diversity in the distribution of video programming.⁷²⁴

261. *Discussion.* Although the Applicants assert that the proposed transaction would not harm program diversity, but would increase program diversity⁷²⁵ we find that, absent our conditions, the transaction would be likely to reduce program diversity. As we conclude above in our discussion of the video programming market, the transaction will enhance News Corp.'s incentive and ability to engage in temporary foreclosure of access to its RSN and broadcast television station programming in order to raise rival MVPDs' costs for News Corp. programming and/or secure other carriage concessions. Such a strategy of foreclosure would reduce program diversity on a short term basis because consumers lack access to the foreclosed programming. In the long run, the increased costs paid by MVPDs to News Corp. also can reduce program diversity. For example, to obtain RSN or local broadcast station programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay supracompetitive rates for News Corp. programming. Absent these increased costs, the MVPD might have elected to carry a new niche network that would have expanded the types of programming available to its subscribers. We find, however, that by constraining News Corp.'s ability to threaten to foreclose programming and thereby raise prices, and by requiring Applicants to submit bids to the arbitrator for RSN and broadcast station programming on an unbundled basis, the conditions we impose herein will protect against the potential harms to program diversity posed by this transaction.

3. Viewpoint Diversity

262. Another of the Commission's goals in the area of media policy is protection of viewpoint diversity. Accordingly, the Commission has restricted ownership of media outlets in certain ways. The Commission's rationale has been that ownership diversity leads to viewpoint diversity, a rationale that has

⁷²⁰ Cablevision Comments at 23-24.

⁷²¹ Cablevision Comments at 14-15; *see also* NRTC Petition at 13.

⁷²² Cablevision Comments at 14-15.

⁷²³ Cablevision Comments at 24.

⁷²⁴ Cablevision Comments at 28-29; ACA Comments at 3, 7, 16; NRTC Petition at 14; JCC Comments at 54.

⁷²⁵ Applicants contend that one of the public interest benefits of the transaction will be DirecTV's carriage of more programming targeted at culturally, ethnically, and linguistically diverse audiences. Application at 42. Applicants' contentions relating to this benefit are discussed at Section VIII.B.8.

been sustained in court.⁷²⁶ Our rules do not, however, prohibit cross ownership of DBS and broadcast outlets, nor have they ever prohibited such ownership structures.

263. *Positions of the Parties.* CDD and others contend that the transaction will result in a loss of both local and national perspectives.⁷²⁷ They assert that if the transaction is approved, News Corp. will have the incentive and ability to competitively disadvantage unaffiliated content providers and to launch new programming networks on its own distribution system, allowing it to dominate what programming is available to consumers.⁷²⁸ CFA contends that the transaction will result in a degree of concentration and lack of diversity of media voices that is in direct contravention of the public interest.⁷²⁹

264. NRTC is concerned that the transaction may adversely affect viewpoint diversity by eliminating a “voice” in all markets where DirecTV offers DBS service and Fox provides over-the-air broadcast service.⁷³⁰ NRTC states that this potential for harm to viewpoint diversity is greater in smaller markets, which have fewer distinct voices.⁷³¹ NRTC asserts that the Commission cannot evaluate the effects of the proposed transaction on viewpoint diversity without first determining how many homes have access to cable, because without this information, it cannot determine how many media outlets will be available post-transaction in various markets.⁷³²

265. NAB contends that, absent conditions, the proposed transaction will harm local television broadcast stations, endangering the stations’ ability to advance the core public interest goals of diversity and localism.⁷³³ NAB asserts that the post-transaction News Corp. will have the incentive and ability to use a national network feed to distribute the programming it currently offers via local television broadcast stations.⁷³⁴ According to NAB, the ability to “bypass” television broadcast station affiliates would give post-transaction News Corp. enhanced bargaining power in its relationships with its affiliates.⁷³⁵ NAB contends that the transaction also gives DirecTV the incentive and ability to discriminate against local television broadcast stations not affiliated with the Fox Network, which may take the form of refusal to carry unaffiliated stations, discriminatory channel positioning, or technological discrimination.⁷³⁶ NAB

⁷²⁶ See, e.g., *F.C.C. v. N.C.C.B.*, 436 U.S. 775 (1978).

⁷²⁷ CDD Petition at 2. CFA Reply Comments at 4-5; NRTC Petition at 9-15.

⁷²⁸ CDD Petition at 3; CFA Reply Comments at 4-5.

⁷²⁹ CFA Reply Comments at 1.

⁷³⁰ NRTC Petition at 10-11. According to NRTC, the Commission determined that DBS should be considered a voice for purposes of analyzing viewpoint diversity in the *EchoStar-DirecTV HDO*. *Id.* (citing *EchoStar-DirecTV HDO*, 18 FCC Rcd at 20583-85 ¶¶ 49-52).

⁷³¹ NRTC Petition at 11.

⁷³² NRTC Petition at 13.

⁷³³ NAB Ex Parte at 2; NAB Comments at 11, 21-24.

⁷³⁴ NAB Comments at 15-19.

⁷³⁵ NAB Comments at 19; see also NRTC Petition at 16.

⁷³⁶ NAB Comments at 20-21.

also is concerned that the sharing of information between Fox Network and DirecTV on the terms of retransmission consent and affiliation agreements could give both entities negotiating leverage over local broadcasters with respect to such agreements.⁷³⁷ NAB urges us to condition the Application on a prohibition on bypass of local Fox affiliates, a prohibition on discrimination by DirecTV against unaffiliated local television stations, and a ban on information exchange between News Corp. and DirecTV concerning affiliation agreements and retransmission consent agreements.⁷³⁸ NAB also asserts that the Applicants should be required to expand local-into-local service into all markets by 2006 in order to ensure that the proposed transaction does not slow the rollout of local-into-local service.⁷³⁹

266. APTS/PBS urge us to impose conditions on approval of the transaction to promote diversity, including forbidding DirecTV from segregating local broadcast stations on wing satellites,⁷⁴⁰ and requiring DirecTV to carry the free, over-the-air non-duplicative digital signals of public television stations where local television stations are being carried pursuant to SHVIA.⁷⁴¹ Maranatha also urges us to condition grant of the Application on a requirement that DirecTV continue to offer local broadcast television signals on a single satellite dish on grounds that the transaction may result in DirecTV using a second dish to favor News Corp. O&Os and discriminate against other broadcasters.⁷⁴²

267. Applicants assert that News Corp. would have no incentive to engage in an affiliate bypass strategy, and that such a strategy, even if practical, would be counter to News Corp.'s own interests.⁷⁴³ Applicants assert that NRTC is seeking a DBS cross-ownership ban and that NRTC's arguments are without merit.⁷⁴⁴ In support of this, Applicants note that the Commission has considered and rejected cable-DBS cross ownership restrictions, although such cross ownership presents more obvious competitive issues than does broadcast-DBS cross ownership.⁷⁴⁵ They further assert that prohibiting broadcast-DBS cross ownership would be contrary to recent trends in media ownership regulation and the vacation/repeal of the cable-broadcast cross-ownership rule.⁷⁴⁶ In light of these actions, as well as DBS' smaller share of the MVPD market, Applicants contend that there is no basis for

⁷³⁷ NAB Comments at 26-27.

⁷³⁸ NAB Comments at 25-27.

⁷³⁹ NAB Comments at 27.

⁷⁴⁰ APTS/PBS Comments at 6.

⁷⁴¹ APTS/PBS Comments at 9-10.

⁷⁴² Maranatha Comments at 1-2; Reply at 4.

⁷⁴³ Applicants' Reply at 62-64.

⁷⁴⁴ Applicants' Reply at 65-66.

⁷⁴⁵ Applicants' Reply at 65 (citing *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11394-95 (2002)).

⁷⁴⁶ Applicants' Reply at 65-66 (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox Television*"), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002) (vacating cable-broadcast cross-ownership rule); *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 3002 (2003) (repealing cable-broadcast cross-ownership rule)).

limiting broadcast-DBS cross ownership.⁷⁴⁷ Applicants state that the transaction will have no effect on viewpoint diversity in small markets because Fox does not own any stations in such markets, so there will be no change in the number of voices in these markets.⁷⁴⁸ They further state that in large markets where Fox does own broadcast stations, a wealth of other media outlets will ensure viewpoint diversity, so the transaction will have little or no effect.⁷⁴⁹

268. *Discussion.* We do not agree with NAB's assessment of the likelihood that post-transaction News Corp. will harm local stations by engaging in an affiliate bypass strategy and therefore adversely affect localism and diversity. As we explain elsewhere in this *Order*, we find that the transaction only creates a *de minimis* increase in the likelihood that News Corp. will engage in a bypass strategy and we conclude that therefore, there is no need to impose safeguards against such a strategy.⁷⁵⁰ With respect to NAB's claim that the transaction will give DirecTV the incentive and ability to discriminate against unaffiliated broadcasters, we explain above that this is an unlikely result of the proposed transaction. Because we find that the transaction will not enhance DirecTV's incentive or ability to discriminate against unaffiliated broadcasters,⁷⁵¹ we conclude that the combination does not pose a risk of harm to localism or diversity on that basis. As we explain elsewhere in this *Order*, the mandatory carriage provisions of the SHVIA and our rules implementing the statute will ensure that broadcasters will have access to the DirecTV platform in all markets where DirecTV offers local-into-local service. Finally, we disagree with NAB that information sharing between DirecTV and Fox will adversely affect broadcasters negotiating agreements with either entity, and we will not impose a condition limiting the Applicants' communications concerning such agreements. As we explain in our discussion of limitations on information sharing in section VI.C.4, *supra*, we find that the confidentiality provisions of the retransmission consent and program carriage agreements make such information sharing unlikely. In addition, NAB also has not specified what harms could result from such information sharing even if it could be accomplished.

269. We do not agree with NRTC that News Corp.'s ownership of local television broadcast stations and an MVPD outlet in certain markets will harm viewpoint diversity. NRTC has not demonstrated how common ownership of DirecTV and local broadcast television stations would result in a loss of diversity of viewpoint that would be harmful to the public interest, particularly given the prevalence of the multiple sources of news and informational programming from broadcast, MVPD and print sources, and the fact that DBS is not currently a source of local news or other local content.

270. We also disagree with commenters who contend that the transaction will reduce viewpoint diversity by giving News Corp. the incentive and ability to discriminate against unaffiliated program producers (*i.e.*, those who sell programs to networks). We find that our program carriage rules,

⁷⁴⁷ Applicants' Reply at 65-66.

⁷⁴⁸ Applicants' Reply at 66.

⁷⁴⁹ Applicants' Reply at 65-66.

⁷⁵⁰ Indeed, it is not clear that a bypass strategy, if successful, would not actually promote viewpoint diversity because, while Fox programming would remain available in the market on DirecTV, the television broadcast stations formerly affiliated with Fox would remain in existence, and the licensees of these stations would remain obligated to offer programming relevant to the needs and interests of their communities—presumably adding a voice to the market. *See* Section VI.C.3, *supra*.

⁷⁵¹ *See id.*

combined with Applicants' proposed commitment not to discriminate against unaffiliated programmers, are sufficient to protect against any potential harms.⁷⁵²

271. In contrast, we agree with Commenters who contend that the transaction can enhance News Corp.'s incentive and ability to persuade competitors to carry its affiliated programming. Specifically, as we held above, the transaction may enhance News Corp.'s incentive and ability to extract higher compensation from competing MVPDs in exchange for carriage of its most popular programming—RSN and broadcast programming. Such compensation may include monetary compensation, but also carriage of News Corp. affiliated networks. To obtain RSN or broadcast programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay supracompetitive rates for News Corp. programming. Absent these demands and higher costs, the MVPD might have elected to carry an independent rival network that would have expanded the sources of programming available to its subscribers. However, we find that this potential harm is remedied by the conditions we have imposed with respect to competing MVPD access to such programming.⁷⁵³

272. We decline to adopt APTS/PBS's proposal that we require DirecTV to carry the digital signals of public television stations. The public television station digital signal carriage condition does not address a potential harm specific to the proposed transaction. Given that this proposal does not relate to a transaction-specific issue, it is not appropriately considered in this proceeding. The Commission will not consider industry-wide concerns or establish rules or policies of general applicability in this license transfer proceeding.⁷⁵⁴ The record contains no evidence that the transaction will give News Corp. an increased incentive or ability to discriminate against public television stations, or any other evidence of a potential harm which would warrant the imposition of requirements different from those to which other MVPDs are subject with regard to digital carriage of public television stations.

273. With regard to APTS/PBS's proposed condition to restrict DirecTV from segregating local broadcast stations to wing satellites, we recognize that the proposed transaction may give DirecTV greater incentive to favor News Corp.'s Fox broadcast network programming and therefore to move other broadcasters onto other satellites. There is not a majority to decide whether this increased incentive results in a merger-specific harm. Nor is there a majority willing to resolve APTS/PBS's request that the Commission clarify its requirements under SHVIA and specifically, that, in providing local-into-local service pursuant to SHVIA, DirecTV could not place some local broadcast stations on wing satellites. The rationale for their decisions is contained in each of the Commissioners' separate statements.

B. Effect on Network-Affiliate Relationships (“Bypass” Issue)

274. *Positions of the Parties.* NAB contends that as a result of the proposed transaction, News Corp. will have a strong incentive and ability to “bypass” local Fox broadcasting affiliates and instead

⁷⁵² See Section VI.C.4 and IX, *supra*.

⁷⁵³ See *id.*

⁷⁵⁴ Questions concerning the carriage of the digital signals of television broadcast stations are the subject of a pending rulemaking proceeding. *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd 15092 (1998).

distribute Fox programming via a national feed.⁷⁵⁵ NAB asserts that News Corp. would realize immediate benefits from such an action, including immediate cost savings from reduced or eliminated retransmission consent payments and increased advertising revenue⁷⁵⁶ that would otherwise have gone to local Fox affiliates.⁷⁵⁷ NAB argues that this change will give DirecTV substantially increased leverage over local affiliates, endangering their ability to serve local interests or provide diversity.⁷⁵⁸ According to NAB, a bypass strategy would result in short-term harm to Fox affiliates in the form of lost retransmission consent fees, but also long-term harm to the network-affiliate relationship so critical to the American system of broadcasting.⁷⁵⁹ To remedy this potential harm, NAB urges us to prohibit DirecTV from transmitting a Fox network feed in any market currently served by a non-Fox-owned local affiliate.⁷⁶⁰ Applicants respond that a bypass strategy scenario makes no sense. Applicants contend they gain more from a broadcast affiliation system which reaches nearly 100% of the country than could be gained through a bypass model based on DirecTV's 13% market share.⁷⁶¹

275. *Discussion.* Contrary to the contentions of NAB, we find that the transaction creates only a *de minimis* increase in the Applicants' ability and incentive to engage in a bypass strategy. Accordingly, we will not condition our approval of the transaction on the bypass prohibition proposed by NAB. NAB's bypass argument is a variation of the argument made by MVPDs that the transaction will give News Corp. the incentive and ability to engage in permanent foreclosure of access to its broadcast signals by competing MVPDs, which we analyzed above. The only difference between the bypass and permanent foreclosure strategies is that a bypass strategy would impose even greater revenue losses on News Corp. If it bypasses local affiliates, News Corp. will lose not only the advertising revenue associated with those rival MVPD subscribers that do not receive over-the-air broadcast signals but also the advertising revenue associated with all non-DirecTV subscribers. We do not find that it would be profitable for News Corp. to engage in permanent foreclosure in the previous situation, and we find it even less likely in NAB's proposed scenario. [REDACTED].⁷⁶² [REDACTED]. In any event, because the proposed transaction would have a *de minimis* impact on News Corp.'s incentive to engage in this behavior, we do not view it as a likely outcome of the transaction.

C. Collusion with Cable MSOs

⁷⁵⁵ NAB Comments at 11, 15; NAB Comments, Exhibit 1, Decl. of J. Gregory Sidak (Jun. 16, 2003) ("Sidak Decl.").

⁷⁵⁶ NAB Comments at 11; Sidak Decl. at ¶¶ 14-19.

⁷⁵⁷ NAB Comments, Sidak Decl. at ¶¶ 20-23.

⁷⁵⁸ NAB Comments at 21-24. Sidak argues that the harm to Fox affiliates will have a ripple effect across the broadcast landscape to other affiliates. For example, Fox affiliates might be then willing to accept inferior terms from other broadcast network, diminishing the bargaining power of other local broadcasters in the same local area in their affiliation negotiations with their respective networks. NAB Comments at 22, Sidak Decl. ¶ 28.

⁷⁵⁹ NAB Comments at 21-24.

⁷⁶⁰ NAB Comments at 25-28.

⁷⁶¹ Applicants' Reply at 63.

⁷⁶² [REDACTED].

276. *Positions of the Parties.* EchoStar argues that the proposed transaction will give News Corp. new incentives to coordinate with other vertically integrated distributors (the large cable MSOs) to the detriment of independent distributors and consumers.⁷⁶³ EchoStar argues that the proposed transaction will give News Corp. an opportunity to engage in collusive practices, as it will make complementary the interests of News Corp. and the large vertically integrated cable operators and will allow mutually beneficial, but anticompetitive, deals between those companies. Further, it claims that such collusion presents only upside and no cost if News Corp. and a vertically integrated cable MSO enter into an agreement to raise the prices of the News Corp. programming carried by the cable MSO's systems and the cable MSO's programming carried by DirecTV, because the higher programming fees would cancel each other out for the two companies, while independent distributors and consumers would bear the burden of this anticompetitive behavior in the form of higher programming prices and subscription fees.⁷⁶⁴ EchoStar argues that the criteria used by the DOJ and the FTC to determine the likelihood of lessened competition through coordinated interaction as a consequence of a horizontal merger are present in this transaction.⁷⁶⁵ EchoStar argues that the relevant MVPD markets are concentrated and exhibit comparatively substantial barriers to entry.⁷⁶⁶ In the average geographic region, EchoStar contends, the incumbent cable provider holds roughly 80% of the MVPD market, and DirecTV holds about 10%, resulting in a highly concentrated market (an HHI over 6000). Accordingly, EchoStar claims that collusion or coordination is likely.

277. EchoStar also argues that News Corp. has a history of collusive behavior with the largest cable MSOs.⁷⁶⁷ Furthermore, EchoStar avers that the involvement of the same firms and same individuals substantially raises the risk of repeated collusion. EchoStar asserts that in 1996 and 1997, News Corp.'s announcement that it intended to enter the DBS business in the United States (by means of a merger with EchoStar) caused Primestar Partners (a cable MSO-DBS joint venture) to react and convince News Corp. to pull out of the deal with EchoStar in favor of a transaction with Primestar. According to EchoStar, the DOJ found that when it was clear that News Corp. would not compete with cable operators, the cable companies dropped their resistance to carrying certain Fox programming networks. As a result, DOJ brought suit against Primestar and News Corp. alleging collusion. The Primestar/News Corp. transaction was abandoned in the face of this litigation.⁷⁶⁸

278. EchoStar further argues that easy detection of deviation from the collusive arrangement makes it easier to maintain collusive arrangements. According to EchoStar, there would be no need to detect deviations because of the win-win arrangement whereby the two vertically integrated distributors would agree to raise all of their programming prices. In addition, EchoStar argues that the higher prices could be embedded in superficially legitimate program carriage agreements, so there would be no need to police deviations from some illicit backroom deal.⁷⁶⁹ Regarding punishment for deviation, EchoStar

⁷⁶³ EchoStar Petition at 32.

⁷⁶⁴ *Id.* at 33.

⁷⁶⁵ *Id.* at 33 citing DOJ/FTC Guidelines § 2.1.

⁷⁶⁶ EchoStar Petition at 33-34.

⁷⁶⁷ *Id.* at 34-36.

⁷⁶⁸ EchoStar Petition at 32 (citing *See United States v. Primestar, Inc. et al.*, No. 1:98CV01193 (D.D.C.) (filed May 12, 1998) ("DOJ Primestar Complaint"), available at <http://www.usdoj.gov/atr/cases/f1700/1757.pdf>).

⁷⁶⁹ EchoStar Petition at 36.

states that deviations from collusion can be policed automatically by the kind of mutually beneficial agreement that the proposed deal would make possible -- for example, if one partner wanted to charge an independent distributor lower programming rates, it might no longer be able to finance the higher programming rates charged by the other partner. In addition, EchoStar argues that our program access rules would work perversely to ensure uniformly high programming prices and effectively police deviations.⁷⁷⁰

279. EchoStar argues that even without explicit collusion, News Corp. and cable MSOs have incentives to avoid hard competition with one another, especially on price, because, as carriers of each others' programming, the interested companies would share in each others' revenues, and so would avoid vigorous price competition at the MVPD level, which would effectively decrease the size of the total programming revenue pie.⁷⁷¹ In addition, EchoStar believes that News Corp./Hughes faces tough decisions about how aggressively to court cable consumers, and a revenue stream from cable programming alters that calculus by allowing News Corp. to earn some revenue from consumers remaining with cable. Thus, according to EchoStar, given the significant costs of luring customers from cable to satellite, it is predictable that programming revenue would make rational less aggressive competitive efforts than would otherwise be expected. EchoStar also notes that because News Corp. owns the Fox broadcast network, and to the extent that high cable and DBS prices push consumers to avoid pay programming altogether, News Corp. could recover some of its losses by increasing Fox network advertising revenues.⁷⁷²

280. EchoStar provides three scenarios to illustrate how collusion between News Corp. and the cable industry would undermine competition, raise rates and reduce choice for consumers. Under the "Programming Quid Pro Quo" scenario, in exchange for carrying a cable company's affiliated programming network at an inflated rate, News Corp. could demand that the cable company reciprocate with an inflated rate for a Fox network, to the detriment of non-vertically integrated MVPDs and consumers. Due to the non-discrimination program access provisions, both programmers would charge the same inflated rate to all MVPDs. Non-integrated MVPDs would have no programming assets with which to barter in this fashion, and therefore would simply have to absorb the higher rate without any corresponding benefit.⁷⁷³ In its second scenario, EchoStar argues that rival MVPDs and consumers may be harmed by News Corp. and the cable industry extending their mutually beneficial arrangements to the set-top box market, with agreements to share standards, software, patents, and other assets to the exclusion of other MVPDs.⁷⁷⁴ Finally, EchoStar argues that News Corp. will likely partner with cable operators for an alternative means of providing broadband services, rather than using DSL or facilities-based satellite broadband.⁷⁷⁵

281. Applicants deny the existence and the likelihood of a "cable cabal" made up of vertically

⁷⁷⁰ *Id.* at 36.

⁷⁷¹ *Id.* at 36.

⁷⁷² *Id.* at 37.

⁷⁷³ *Id.* at 38.

⁷⁷⁴ *Id.* at 38-39.

⁷⁷⁵ *Id.* at 39.

integrated cable operators that would coordinate their behavior with DirecTV to compete less vigorously with one another. The Applicants argue that antitrust theory supports the notion that collusion of this sort is very difficult to establish and maintain, citing, for example, problems with the prevention of individual cartel members cheating on the cartel.⁷⁷⁶ Applicants argue that EchoStar fails to establish how this problem will be avoided and disputes EchoStar's claim that News Corp.'s incentives in the proposed transaction are the same as those in the PrimeStar transaction. The Applicants contend that the PrimeStar transaction involved News Corp. investing in an organization made up of cable operators, while the present transaction involves News Corp. investing in a DBS operator that has dedicated itself to competing with cable operators.⁷⁷⁷ Finally, Applicants argue that consistent comments from cable operators opposing this proposed transaction and reflecting a recognition of a strengthened DBS competitor further negate EchoStar's theory that the transaction will result in collusion and the reduction of price competition between cable and DBS operators.⁷⁷⁸

282. *Discussion.* We find EchoStar's theories of cable collusion unpersuasive. The record in this proceeding indicates that the MVPD market has been and will remain fiercely competitive between cable operators and DBS providers. EchoStar's claims regarding potential collusion between cable MSOs and the Applicants post-transaction are highly speculative.

283. Moreover, several fundamental bases supporting EchoStar's collusion theory are flawed. At the outset, EchoStar's arguments concerning market concentration are misdirected. EchoStar estimates market concentration in the MVPD market based on the national market shares of the three major MVPD platforms (i.e., the cable MSOs and the two incumbent full-CONUS DBS providers) and assumes that vertically integrated cable MSOs will collude with the Applicants to raise programming prices. In assessing the likelihood of collusion on the prices of video programming, however, it is the characteristics of the programming market and not the MVPD market that are relevant. Even a cursory examination of the programming market reveals, however, that there are numerous owners of cable networks and that many of the programming owners are not vertically integrated with MVPDs.⁷⁷⁹ This suggests that, if the News Corp. and vertically integrated cable MSOs collude to raise the price of their programming, this attempted price increase alone would prove unprofitable.

284. We also disagree with several of EchoStar's factual claims regarding the history of collusion in the MVPD industry. EchoStar does not accurately describe the first PrimeStar lawsuit brought by DOJ and 45 states.⁷⁸⁰ News Corp., in fact, was not involved with that lawsuit, which involved integrated cable programmers that created a joint venture, PrimeStar, used to coordinate their activities. In the transaction before us, there is no joint venture to tie together the disparate economic interests of the parties. We note that in the case of PrimeStar, the firms had to form a company to create a mechanism by which they could commit to sell to only one DBS competitor, which was jointly owned. That mechanism included a joint economic interest and an enforcement provision to avoid the cheating problem. The

⁷⁷⁶ Applicants' Reply at 73-74.

⁷⁷⁷ *Id.* at 74.

⁷⁷⁸ *Id.*

⁷⁷⁹ *2002 Video Competition Report*, 17 FCC Rcd at 26980-88, Tables C-1 and C-2.

⁷⁸⁰ See *United States v. Primestar Partners, L.P.*, 1994 WL 196800 (S.D.N.Y.); *State of New York v. Primestar Partners, L.P.*, 1993 WL 720677 (S.D.N.Y.).

proposed transaction creates no such mechanism.

285. With respect to the second PrimeStar lawsuit, DOJ filed suit to block a horizontal merger in which MVPDs in the same relevant market as DBS, and also owning a DBS firm, PrimeStar, agreed to acquire a potential DBS competitor that owned rights to DBS orbital slots and in which News Corp. owned an interest.⁷⁸¹ As in the previous case, the solution to reduce competition was to tie together the economic interests of the firms through a formal joint venture. While neither case involved explicit collusion, both did involve creating formal organizations to force the firms to cooperate to achieve specific goals. The proposed transaction would create no such formal linkage of DBS and cable operators. The record is devoid of evidence of a history in the MVPD industry of the sort of loosely organized collusive relationships involving News Corp. and vertically integrated cable operators alleged by EchoStar.

286. EchoStar is also incorrect in its claim that there is no need to detect and punish deviation from a collusive arrangement. There are strong incentives in the video programming industry to deviate from collusive agreements because the marginal cost of acquiring additional viewers is near zero. Because the costs of programming production remain the same regardless of the number of viewers, each additional viewer and resulting dollar is almost entirely profit for a video programmer, thereby creating strong incentives to lower price and increase the reach of the programming, particularly in the face of a competitor that has naively agreed to maintain high prices. In addition to the existence of strong incentives to cheat on collusive agreements, it is difficult to detect cheating in collusive agreements in video programming markets. [REDACTED].⁷⁸² [REDACTED].

287. EchoStar's contention that following the transaction, the Applicants will have a reduced incentive to compete with vertically integrated cable operators on the basis of the revenue stream they obtain from providing video programming runs counter to the allegations of many commenters and our analysis of the potential vertical harms likely to result from this transaction. As we discussed above with respect to temporary foreclosure of RSN and local broadcast television signals, the profit margin DirecTV earns from each additional subscriber is substantial. This creates a strong incentive to drive customers to DirecTV, even when it requires sacrificing profits from video programming sales. In the case of regional sports networks and retransmission consent we found that in addition to having an incentive, the Applicants possess the ability to behave in this manner.

288. We examine EchoStar's three collusion scenarios in turn. EchoStar's proposed scenario regarding collusion between vertically integrated cable operators and the Applicants in the video programming market is at best a highly unlikely scenario unsupported by any facts in the record. EchoStar's hypothesis that it "and other non-vertically integrated MVPDs would have no programming assets with which to barter in this fashion, and therefore would simply have to absorb the higher rate without any corresponding benefit," ascribes a degree of market power and lack of substitutes to a broad range of video programming products which in general does not exist.⁷⁸³ EchoStar's scenario of collusion in the set-top box market is curious. EchoStar claims that integrated MVPDs will "share standards, software, patents, and other assets,"⁷⁸⁴ yet provides no evidence that any other integrated MVPD owns

⁷⁸¹ See DOJ Primestar Complaint.

⁷⁸² [REDACTED].

⁷⁸³ 2002 Video Competition Report, 17 FCC Rcd at 26980-88, Tables C-1 and C-2.

⁷⁸⁴ EchoStar Petition at 38.

any assets used in set-top boxes.⁷⁸⁵ Finally, EchoStar's allegation that following the transaction DirecTV will abandon all forms of broadband access in favor of partnerships with providers of cable broadband services is wholly unsupported and defies the evidence contained in several recently announced partnerships with major providers of DSL broadband access.⁷⁸⁶

D. Exclusive Arrangements with Unaffiliated Programmers

289. *Positions of the Parties.* Some commenters are concerned that the combination will allow DirecTV to secure exclusive contracts for desirable programming that is *not* affiliated with News Corp. to the detriment of competing MVPDs and consumers.⁷⁸⁷ These commenters seek to end DirecTV's ability to enter into exclusive contracts with unaffiliated programmers, such as the NFL.⁷⁸⁸ EchoStar contends that News Corp.'s ability to offer worldwide distribution to content providers will result in exclusive arrangements for DirecTV.⁷⁸⁹ According to EchoStar, News Corp.'s dominant presence in Great Britain, Asia, and Latin America will enable it to out-bid EchoStar for sporting events such as World Cup Soccer or the Olympic Games.⁷⁹⁰ EchoStar contends that News Corp.'s ability to outbid EchoStar would not be the result from normal, market-based competition, but from the leveraging of market power abroad to create market power in the United States.⁷⁹¹

290. ACA is concerned that News Corp. will have strong incentives to expand DirecTV's practice of entering into exclusive arrangements for popular content, such DirecTV's current NFL Sunday Ticket offering. ACA contends that such arrangements could be used to target small cable competitors that are ill-equipped to secure such deals.⁷⁹² Accordingly, ACA urges the Commission to require Applicants to make such "all" News Corp. and DirecTV programming, including unaffiliated programming carried by DirecTV, available to small cable operators under reasonable prices, terms, and conditions.⁷⁹³ CFA agrees, asserting that the Applicants' program access commitments must be expanded

⁷⁸⁵ The leading set-top box manufacturers are Motorola, Scientific-Atlanta, Pioneer, Sony, and Pace. *Kagan Media Trends 2003* at 110-113.

⁷⁸⁶ Vince Vittore, *Bellsouth Samples Satellite with DirecTV Resale Setup*, TELEPHONY, Sept. 8, 2003 (reporting on BellSouth's agreement to resell DirecTV service); Kris Hudson, *Qwest Might Tell You How to Pay Less*, DENVER POST, Nov. 3, 2003 (reporting that "Qwest now offers DirecTV's satellite service in Arizona and Washington state."); SATELLITE WEEK, November 24, 2003 (reporting that "a DirecTV spokesman confirmed reports that a strategic marketing agreement with Verizon was in the works but declined to give details. Reports have said Verizon would offer DirecTV service as part of its product mix. 'Both companies expect to bring their products to market after the first of the year. We'll announce details at that time,' the DirecTV spokesman said.").

⁷⁸⁷ EchoStar Petition at 25-26, 64; ACA Comments at 21-23; ACA Reply Comments at 7-8, CFA Reply, Attachment at 3.

⁷⁸⁸ EchoStar Petition at 64.

⁷⁸⁹ EchoStar Petition at 25-26.

⁷⁹⁰ EchoStar Petition at 25-26.

⁷⁹¹ EchoStar Petition at 25-26.

⁷⁹² ACA Comments at 21-23; ACA Reply Comments at 7-8.

⁷⁹³ ACA Comments at 23.

to prevent News Corp. from entering into exclusive arrangements with third parties.⁷⁹⁴

291. *Discussion.* The record does not demonstrate that the transaction is likely to increase DirecTV's incentive and ability to secure exclusive programming contracts with unaffiliated programmers, as its share of the MVPD market is not being increased by the transaction. In several prior mergers involving MVPDs, the Commission has rejected arguments that the post-merger entity should be required to abide by an exclusivity restriction with respect to programming of unaffiliated programming vendors.⁷⁹⁵ Similarly, the Commission considered whether to expand the exclusivity provision to non-vertically integrated programmers in the last program access proceeding and found that such an expansion would directly contradict Congress' intent in limiting the program access provisions to a specific group of market participants.⁷⁹⁶ Commenters have failed to offer a cogent rationale for doing so in the context of this proceeding.⁷⁹⁷

292. We disagree with the contention that the transaction will increase News Corp.'s ability to outbid EchoStar by leveraging its market power abroad in the worldwide distribution of sporting events to create market power in the United States. In making this claim, EchoStar apparently confuses News Corp.'s ownership of satellite assets covering broad geographic areas with the ability to deliver large audiences worldwide. In fact, only eight percent of television households throughout the world subscribe to DBS services.⁷⁹⁸ The vast majority of the world's television households (61%) receive video programming only via free over-the-air television.⁷⁹⁹ It is the ability to deliver large audiences via free over-the-air television, not large geographic areas, that increases a distributor's ability to secure rights to sports programming of worldwide interest, and News Corp. is competing for such rights with many international broadcasters who can deliver larger audiences.⁸⁰⁰ In addition, the sporting events EchoStar is concerned about are governed by organizations such as Federation Internationale de Football Association ("FIFA")⁸⁰¹ or the International Olympic Committee ("IOC"), which seek to maximize distribution of the events, not restrict supply and raise prices. IOC, for example, only grants distribution rights to broadcasters who can guarantee the broadest coverage throughout their respective countries free

⁷⁹⁴ CFA Reply, Attachment at 3.

⁷⁹⁵ See, e.g., *Comcast-AT&T Order*, 17 FCC Rcd at 23290; *AT&T MediaOne Order*, 15 FCC Rcd at 9854-55.

⁷⁹⁶ *Program Access Order*, 17 FCC Rcd at 12158.

⁷⁹⁷ As stated previously, we have accepted without change Applicants' additional program access commitments, described in Section VI.C.4.a, *supra*, which specify that DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (e.g., NFL Sunday Ticket).

⁷⁹⁸ According to the ITU, 8% of television households in the world subscribe to satellite delivered programming services, while 29% subscribe to programming services delivered via cable. The remaining households, over 600 million, receive their programming from over-the-air broadcasts. See International Telecommunication Union, *World Telecommunication Indicators*, Mar. 2001 at 71. We do not know News Corp.'s share of the worldwide DBS market, but the entire market represents only small percentage of the world's television viewers.

⁷⁹⁹ *Id.*

⁸⁰⁰ EchoStar's concern that News Corp. would "outbid" other MVPDs also is misplaced—the possession of market power by a buyer of programming confers the benefit of paying *lower* prices, not higher prices.

⁸⁰¹ FIFA owns the television and radio rights to World Cup soccer matches.

of charge.⁸⁰² Therefore, while News Corp. has the ability to distribute the Olympics through its free over-the-air television O&Os and affiliates, its ownership of or acquisition of satellite distribution platforms—which are not free to the public—is unlikely to expand or enhance News Corp.’s ability to secure rights to the Olympics. To the extent that other U.S. programming distributors are willing and able to offer wider, free distribution of these few events, they are likely to remain on at least an equal footing with News Corp. in the bidding for distribution rights.

293. In conclusion, we find objections concerning exclusive programming arrangements with third parties unrelated to the present transaction. There is no evidence in the record to support a finding that the proposed transaction will increase the incentive or ability of DirecTV to enter into exclusive arrangements with programmers, and commenters have not convinced us of the benefits to the public of limiting the ability of unaffiliated programmers to enter into exclusive contracts with DirecTV.

E. Applicants’ Conduct in Foreign Jurisdictions

294. *Positions of the Parties.* Several parties contend that News Corp.’s alleged anticompetitive track record and market power with respect to its MVPD satellite provider BSkyB in the United Kingdom (UK) should be factored into the Commission’s determination of the potential harms of this proposed transaction.⁸⁰³ EchoStar and JCC argue that News Corp.’s operation of BSkyB offers a “preview of what can be expected in the U.S.”⁸⁰⁴ JCC claim that BSkyB’s UK track record underscores the risks that this transaction will expand opportunities for News Corp. to artificially inflate programming costs and impose unfair tying and bundling requirements for content it controls in order to harm rival content suppliers and distributors.⁸⁰⁵ EchoStar recommends that the Commission should not accept News Corp.’s claim that it lacks market power in the United States programming markets and accordingly should conduct its own investigation in light of the anticompetitive incentives recognized by the UK regulatory authority, the conduct of News Corp.’s vertically integrated UK subsidiary, and the UK regulatory authority’s finding that News Corp. is dominant in UK programming markets.⁸⁰⁶

295. Applicants respond that the “preview” should be encouraging for domestic consumers because BSkyB offers a fully digital, interactive service with a host of features not yet available in the United States.⁸⁰⁷ Moreover, Applicants claim that the allegations of BSkyB’s malfeasance in the UK are

⁸⁰² “The IOC has often declined higher offers for broadcast on a pay-per-view basis or because a broadcaster could reach only a limited part of the population, as this is against Olympic Broadcast Policy. This fundamental IOC Policy, set forth in the Olympic Charter, ensures the maximum presentation of the Olympic Games by broadcasters around the world to everyone who has access to television. Rights are only sold to broadcasters who can guarantee the broadest coverage throughout their respective countries free of charge.” *International Olympic Committee - Organisation - Facts And Figures* at http://www.olympic.org/uk/organisation/facts/broadcasting/index_uk.asp (visited Oct. 9 2003).

⁸⁰³ See JCC Comments at 49-54; EchoStar Petition at 26-30; see also CDD Petition at 6 (calling the Commission’s attention to the MVPD market in Italy).

⁸⁰⁴ EchoStar Petition at 26; JCC Comments at 49-50.

⁸⁰⁵ JCC Comments at 54.

⁸⁰⁶ EchoStar Petition at 30.

⁸⁰⁷ Applicants’ Reply at 70.

irrelevant to the Commission's review of the proposed transaction based on the Applicants' reliance on a 1999 Commission decision regarding an MCI-EchoStar-News Corp. license transfer application.⁸⁰⁸ Finally, Applicants urge the Commission to reject EchoStar's request to subject News Corp. to certain conditions imposed on BSkyB in 1996 by UK regulatory authorities regarding prior approval of rate cards, channel unbundling, the submission of various accounts, and its control of proprietary encryption technology.⁸⁰⁹ Applicants contend that there is no support offered by EchoStar for this type of unprecedented MVPD regulation, even on cable operators with far greater market share than DirecTV, and note that EchoStar did not recommend such conditions for itself in 1999 when News Corp. purchased a 32% share of EchoStar.⁸¹⁰

296. *Discussion.* In *MCIT/EchoStar*, the Commission was unpersuaded by arguments calling for the imposition of program access conditions on EchoStar in its acquisition of MCI and News Corp. satellite licenses.⁸¹¹ One of the primary bases for these proposed conditions was the conduct of News Corp.'s BSkyB satellite service in the UK and the resulting program access conditions imposed on BSkyB by the UK regulatory authority.⁸¹² The Commission did not, however, analyze BSkyB's conduct in the UK when it decided not to impose program access conditions. Instead, the Commission declined to impose the conditions because of an inadequate record to support a finding that EchoStar had market power and because of the ability of MVPDs to use the Commission's program access rules for redress if a News Corp. programming arrangement resulted in price discrimination or unfair practices.⁸¹³ Thus, the Commission precedent discussed by Applicants is of limited assistance.

297. While the Commission generally does not consider harms resulting from a transaction occurring outside the United States in its public interest analysis of a transaction unless the transaction directly impacts a relevant domestic market, nothing in relevant statutory or case law would prevent the Commission from considering the conduct of the Applicants in foreign jurisdictions to determine the likelihood of similar future conduct in the United States.⁸¹⁴ Evidence regarding foreign conduct could provide useful guidance as to how Applicants might act in the United States if they had similar media assets and economic incentives. Based on our understanding of the UK BSkyB experience, however, we do not believe the proposed transaction would result in sufficiently parallel market conditions to warrant great reliance upon BSkyB's UK experience.

298. The UK's Office of Fair Trading (OFT) conducted two formal investigations of BSkyB's wholesale business practices. In its 1996 decision, OFT examined several complaints lodged against BSkyB, including its wholesale pricing for programming, programming packaging, programming rights,

⁸⁰⁸ *Id.* (citing *Application of MCI Telecommunications Corporation*, 16 FCC Rcd 21608, 21621 (1999) (*MCIT/EchoStar*)).

⁸⁰⁹ *Id.* at 70-71.

⁸¹⁰ *Id.* at 71.

⁸¹¹ *MCIT/EchoStar*, 16 FCC Rcd at 21621 ¶ 25.

⁸¹² *MCIT/EchoStar*, 16 FCC Rcd at 21620 ¶ 23.

⁸¹³ *MCIT/EchoStar*, 16 FCC Rcd at 21621-22 ¶¶ 25-27.

⁸¹⁴ *See, e.g., General Electric Capital Corp. and SES Global, S.A.*, 16 FCC Rcd 17575, 17594 (2001).

and conditional access services.⁸¹⁵ OFT's investigation determined that several of BSkyB's business practices warranted scrutiny, which led to BSkyB agreeing to submit separate accounting information for its wholesale and retail operations.⁸¹⁶ BSkyB also committed to modify certain of its programming carriage requirements in response to concerns raised by OFT.⁸¹⁷ OFT determined that the undertakings to which BSkyB agreed were sufficient to avoid a formal referral to the UK's Monopolies and Mergers Commission.⁸¹⁸

299. In its 2002 review of BSkyB, OFT again reviewed numerous aspects of BSkyB's business practices in response to various complaints from BSkyB's wholesale customers and retail competitors.⁸¹⁹ OFT focused on three main areas: whether BSkyB had imposed a margin squeeze on its retail competitors; whether discounts in BSkyB's mixed program bundling scheme prevented rival premium channel providers from entering the market; and whether BSkyB's rate card discounts were anti-competitive.⁸²⁰ In framing its investigation, OFT determined that BSkyB held a dominant position in the market for the wholesale supply of certain premium sports channels and certain premium films channels.⁸²¹ Under UK law, however, dominance in and of itself is not a violation of the UK Competition Act of 1998. Rather, abuse of a dominant position must be shown. OFT determined that BSkyB had not abused its dominant position in either sports or film programming, nor in the manner in which it made that programming available to its competitors. OFT determined that there was insufficient cause to find that BSkyB had exercised a margin squeeze on its competitors.⁸²² It further determined BSkyB's mixed bundling wholesale price strategy was not an abuse of its dominant position.⁸²³ Finally, OFT determined that BSkyB's rate card discounts were not an abuse of its dominant position and had not forestalled entry into the wholesale market for premium channels.⁸²⁴ Thus, in its most recent investigation of BSkyB's

⁸¹⁵ Office of Fair Trading, *The Director General's Review of BSkyB's Position in the Wholesale Pay TV Market (1996 Review)*, Dec. 1996.

⁸¹⁶ *Id.* at 9 and Appendix A, at 117.

⁸¹⁷ *Id.* at 10-18, 115-116.

⁸¹⁸ *Id.* at 17.

⁸¹⁹ Office of Fair Trading, *BSkyB Investigation: Alleged Infringement of the Chapter II Prohibition ("2002 Review")*, Dec. 17, 2002.

⁸²⁰ *Id.* at 4.

⁸²¹ *Id.* at 14-43; 44-63. With respect to sports channels, OFT focused only on channels showing content available strictly via pay TV, specifically the UK Football Association Premier League football matches and those films that had exceeded \$50 million in ticket sales in the U.S. BSkyB had secured exclusive license to the broadcast rights of 66 Premier League live matches, or 100% of the market. Under European Commission precedent, market shares significantly exceeding 70% are by themselves an indication of dominance. With respect to films, BSkyB has exclusive contracts with seven major Hollywood studios, which together supplied more than 70% of the films sold in the European Economic Area. These rights were distributed across only two BSkyB channels: Sky MovieMax and Sky Premier.

⁸²² *Id.* at 135.

⁸²³ *Id.* at 151.

⁸²⁴ *Id.* at 165.

business practices, which built upon its previous investigation, the principle UK regulator determined that BSkyB's behavior did not violate UK competition law. We assume that OFT continues to examine BSkyB's behavior as it continues to maintain its position of dominance.⁸²⁵

300. There is no evidence in the record indicating that BSkyB's current wholesale provision of programming is in violation of UK competition law, and although the company was found in an earlier investigation to be engaging in marginally anticompetitive activities, those same concerns appear to have dissipated during the more recent review. We do not believe it would be fair to focus on a set of behaviors, which BSkyB agreed to modify via specific undertakings and have since been modified or superceded by properly competitive behavior in the UK pay TV market, as evidenced by the lack of UK regulatory censure or referral for anticompetitive remedies. Furthermore, although it is instructive to examine the behavior of News Corp.'s various subsidiaries, we find that each of those subsidiaries functions in essentially a unique commercial environment and is subject to specific national regulatory regimes. To arbitrarily apply a set of conditions, as espoused by EchoStar, without taking into consideration the specific conditions and competitive dynamic of the relevant market, in this case the MVPD market in the United States, would be arbitrary and inappropriate.

F. Competitive Harms in Latin America and Impact on U.S. Consumers and Programmers

301. *Positions of the Parties.* EchoStar argues that the Commission should consider the impact the proposed transaction will have on MVPD markets in Latin America, as well as the resulting indirect impact on U.S. consumers and independent programmers.⁸²⁶ EchoStar claims that the only two Direct-to-Home satellite providers in Latin America are affiliates of Hughes and News Corp., Galaxy Latin America and Sky Latin America, and cable is not a significant competitor to those two MVPDs. EchoStar argues that the proposed transaction will result in a near monopoly for MVPD services in Latin America, which will indirectly impact U.S. consumers by increasing the leverage of News Corp. as a "monopsonist" in Latin America to extract concessions from programmers in other countries, including the U.S.⁸²⁷ EchoStar contends that the Commission has adequate authority to take this alleged harm under consideration based on the Commission's inquiry in 1997 involving Hughes acquisition of PanAmSat. EchoStar claims that in 1997 the Commission dismissed a concern regarding Sky Latin America, who had leased capacity from PanAmSat, because, in part, the programming ventures at issue would remain under separate ownership. Under the proposed transaction, EchoStar argues that the separate ownership relied upon in 1997 would be eliminated.⁸²⁸ Tectelcom Tecnica em Telecomunicacoes Ltda. ("Tecsats"), a Brazilian company, also raises concerns about the competitive

⁸²⁵ We note that it was announced on December 17, 2003 that the European Union and UK Soccer League had agreed to air some games on free television, thus forcing BSkyB to sell some rights of live soccer games to free-to-air broadcasters. Reportedly, the settlement means that BSkyB must lift its control over exclusive rights to as many as eight live games a season as early as next year. See WALL ST. J., December 17, 2003 at D4; Associated Press, *EU Settles Antitrust Dispute Over Soccer Game Broadcasts*, Dec. 16, 2003.

⁸²⁶ EchoStar Petition at 58.

⁸²⁷ EchoStar Petition at 58.

⁸²⁸ EchoStar Petition at 58 (citing *Hughes Communications, Inc.*, 12 FCC Rcd 7534, 7542 (1997).)

impact of the transaction in Brazil where News Corp. provides satellite subscription service in competition with DirecTV.⁸²⁹

302. Applicants urge the Commission to reject EchoStar's call to consider the impact of the proposed transaction on Latin America. First, Applicants note the Commission's prior holding that the effects of a transaction arising outside of the United States are not relevant to the Commission's public interest analysis of the transaction.⁸³⁰ Second, Applicants argue that the 1997 merger of Hughes and PanAmSat is not analogous to the proposed transaction.⁸³¹ The Applicants contend that the impact on the Latin America video market was raised by a party, Comsat, not the Commission, and was more relevant to that transaction because the relevant market for that transaction was the international telecommunications service market. The Applicants conclude that the proposed transaction does not address that market and raises no similar issues.⁸³²

303. *Discussion.* We find that commenters have failed to provide persuasive evidence as to why the Latin America MVPD market is relevant to our consideration of the harms resulting from the proposed transaction. As the Applicants indicate, the Commission generally does not consider harms resulting from a transaction occurring outside the United States in our public interest analysis of a transaction, unless the transaction directly impacts a relevant United States market.⁸³³ We also agree with the Applicants that the 1997 Hughes-PanAmSat transaction targeted a different market from the markets at issue here.

G. DirecTV and Fox Network Service in Alaska and Hawaii

304. *Positions of Parties.* Microcom argues that the Commission should deny the proposed transaction unless the Commission conditions its approval with measures designed to address the alleged failure of Hughes and News Corp. to provide satellite service to Alaska consumers.⁸³⁴ Microcom contends that DirecTV has failed to provide Alaska and Hawaii with comparable service to that provided in other states even though existing regulation requires them to do so.⁸³⁵ Microcom also contends that News Corp. is the only major broadcaster that has effectively denied many Alaska commercial establishments Fox network programming by refusing to allow DBS satellite reception of distant Fox affiliate stations by commercial establishments outside the grade B contour of the local Fox affiliates and

⁸²⁹ Letter from John F. McNaughton and Peter D.P. Vint, Marcondes Advogados Associados, Counsel to Tecsat, to Marlene H. Dortch, Secretary, FCC, Dec. 12, 2003.

⁸³⁰ Applicants' Reply at 75 (citing *General Electric Capital Corp. and SES Global, S.A.*, 16 FCC Rcd 17575, 17594 (2001) ("We need not analyze the impact of the proposed transaction on competition in the provision of satellite services to foreign countries that do not involve service to or from the United States.")).

⁸³¹ *Id.* at 75-76.

⁸³² *Id.*

⁸³³ *See supra* note 105.

⁸³⁴ Microcom Comments at 1.

⁸³⁵ *Id.* at 1-2.

requiring that these establishments install a C-band satellite system to receive the programming from a satellite many cannot see, *i.e.*, that is below or close to the horizon.⁸³⁶

305. The Applicants argue that Microcom's allegations are meritless and do not represent cognizable reasons for the Commission to deny approval of the proposed transaction or to condition it as Microcom suggests. The Applicants claim that DirecTV has always provided Alaska with the same programming it offers to continental U.S. subscribers although with larger satellite dish antennas for reception.⁸³⁷ The Applicants also dispute the allegation that commercial establishments in Alaska are denied DBS reception of distant affiliate signals, noting that copyright law permits satellite carriers to retransmit distant signals for private home viewing only and not into commercial establishments.⁸³⁸

306. *Discussion.* The Commission's rules require that DBS licensees provide service where technically feasible to Alaska and Hawaii, and DBS licensees must offer packages of services in Alaska and Hawaii that are reasonably comparable to what they offer in the contiguous 48 states.⁸³⁹ The issues raised by Microcom regarding DBS service to Alaska and Hawaii are not specific to this transaction and are more appropriately being addressed in another Commission proceeding focused specifically on those issues.⁸⁴⁰ Further, issues raised regarding News Corp.'s provision of distant affiliate signals involve interpretation of copyright law and are not properly addressed in this proceeding.⁸⁴¹

⁸³⁶ *Id.* at 2. To address these alleged public interest harms facing Alaska consumers, Microcom requests that the Commission impose the following conditions on its approval of the proposed transaction: (1) within one year of completion of the transfer, DirecTV must start offering small dish service to Alaska and Hawaii that provides all programming from its core slot at 101° (small dish coverage is defined as anything under on meter in the Anchorage, Fairbanks, and Juneau DMAs and the Honolulu DMA); (2) PanAmSat will make a good faith effort to ensure that all future satellites provide coverage equal to the CONUS over all of Alaska where the elevation angle is 5° or greater consistent with international agreements (including the Aleutian islands); (3) failing condition 1 above, News Corp. should be required to subsidize DirecTV equipment prices and installations to keep the overall cost for consumer services consistent with the CONUS pricing or their nearest competitor in Alaska (alternatively, they should make available for sale on Dish Network's Alaska and Hawaii 110° spot beams their exclusive sports programming packages); (4) immediately make all DirecTV and Fox Networks promotions applicable to all 50 states without exception; and (5) Fox Networks immediately allow reception of distant Fox affiliates in commercial establishment outside the grade B contour of a local Fox affiliate, and Fox Networks should immediately make available other Fox sports and entertainment programming from DBS satellites to commercial operators when there is no other alternative to receive that programming. *Id.* at 2-3.

⁸³⁷ Applicants' Reply at 71-72 n.200.

⁸³⁸ *Id.*

⁸³⁹ See 47 C.F.R. §25.148(c); *Policies and Rules for Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11364 ¶ 65 (2002).

⁸⁴⁰ See *Petitions Regarding DirecTV's DBS Service to the States of Alaska and Hawaii*, MB 03-82, Public Notice, DA 03-862 (rel. Mar. 25, 2003).

⁸⁴¹ See 17 U.S.C. § 119.

H. Exclusion of Non-Network Affiliated Broadcasters from the Benefits of Local-Into-Local Carriage

307. *Positions of the Parties.* Johnson Broadcasting contends that DirecTV has denied it local-into-local carriage, as a licensee of TV station KLDT, Lake Dallas, Texas, in violation of the SHVIA.⁸⁴² Since SHVIA's implementation, Johnson Broadcasting claims DirecTV has attempted to undermine the Act's policy objectives by excluding non-network affiliated broadcasters from the benefits of local-into-local carriage.⁸⁴³ Johnson Broadcasting states that DirecTV alleged that Johnson Broadcasting filed its request for carriage one day late and therefore denied Johnson's request. Johnson Broadcasting argues that the deadline fell on a Sunday and therefore filed the next day, Monday, in accordance with Commission filing rules. As a result, Johnson Broadcasting filed a complaint with the Commission's Cable Services Bureau, which was subsequently denied.⁸⁴⁴ Johnson Broadcasting now has an Application for Review regarding its complaint pending before the Commission. Johnson Broadcasting contends that it will not be eligible for carriage on DirecTV's system until January 1, 2006, as a result of DirecTV's denial of local-into-local carriage.⁸⁴⁵ Johnson Broadcasting seeks the imposition of several conditions. First, before acting on the proposed transaction, the Commission should first ensure that all broadcasters be guaranteed the right to mandatory carriage in any market where DirecTV provides local-into-local service. Second, the Commission should grant Johnson Broadcasting's Application for Review and order DirecTV to commence carriage of KLDT in the Dallas DMA.⁸⁴⁶

308. The Applicants argue that this license transfer proceeding is not the proper forum to litigate Johnson Broadcasting's complaint and note that the Media Bureau and a federal district court have already dismissed this same mandatory carriage complaint against DirecTV.⁸⁴⁷

309. *Discussion.* We agree that this license transfer review proceeding is not the proper forum to address Johnson's Broadcasting's complaint, and Johnson Broadcasting has provided no evidence indicating that DirecTV is in violation of SHVIA on an industry-wide basis. Accordingly, we reject the conditions proposed by Johnson Broadcasting.

I. Lack of Final Media Ownership Rules

310. *Positions of the Parties.* The National Hispanic Media Coalition (NHMC) argues that the Commission should deny the proposed transaction application and find that a substantial and material question exists as to whether the proposed transaction is in the public interest because the Commission

⁸⁴² Johnson Broadcasting Comments at 1.

⁸⁴³ *Id.* at 2.

⁸⁴⁴ See *Johnson Broadcasting, Inc. v. DirecTV, Inc.*, 16 FCC Rcd 21329 (2001); *Johnson Broadcasting of Dallas, Inc. v. DirecTV, Inc.*, 17 FCC Rcd 886 (2002)

⁸⁴⁵ Johnson Broadcasting Comments at 2.

⁸⁴⁶ *Id.* at 3.

⁸⁴⁷ Applicants' Reply at 73 (citing *Johnson Broadcasting, Inc. v. DirecTV, Inc.*, 16 FCC Rcd 21329 (2001); *Johnson Broadcasting of Dallas, Inc. v. DirecTV, Inc.*, 17 FCC Rcd 886 (2002); *Johnson Broadcasting, Inc. and Johnson Broadcasting of Dallas, Inc. v. DirecTV, Inc.*, Civil Action No. H-02-0136, Opinion (S.D. Tex., Houston Div.) (Jul. 15, 2002) (granting motion to dismiss of DirecTV).

has not provided the public with final media ownership rules allegedly needed to determine the relevant factual showings and/or legal standards for reviewing the proposed transaction. Initially, NHMC argued that the Commission had not released final rules at the time initial comments were due on the proposed transaction application.⁸⁴⁸ Subsequently, NHMC contended in its reply comments that the Commission had only recently released an erratum to the *Media Ownership Order* and had not published final rules in the Federal Register as of the deadline for reply comments.⁸⁴⁹ As a result, NHMC argues that, if the Commission were to issue a decision on the proposed transaction during this time of legal limbo where the Commission lacks final multiple ownership and cross-interest rules, the decision would violate the fair notice and opportunity for comment provisions of the Administrative Procedure Act.⁸⁵⁰ If the Commission does not deny the proposed transaction application for these reasons, NHMC argues that the Commission must release a new public notice allowing interested parties to file comment on the proposed transaction within 30 days upon release of final media ownership rules.⁸⁵¹

311. The Applicants argue that NHMC's request is groundless and largely moot and therefore should be rejected.⁸⁵² The Applicants note that the new media ownership rules were released with the Commission's *Media Ownership Order* on July 2, 2003.⁸⁵³ Further, the Applicants contend that the new media ownership rules are irrelevant to their license transfer Application because the Application does not involve any broadcast licenses of the type that are at issue in the *Media Ownership Order* and thereby subject to the broadcast license transfer processing freeze.⁸⁵⁴

312. *Discussion.* Since the filing of NHMC's reply comments, the Commission has released its final media ownership rules.⁸⁵⁵ Those rules, however, were stayed by the United States Court of Appeals for the Third Circuit.⁸⁵⁶ As a result, the previous media ownership rules have been reinstated. Thus, all commenters have had, and continue to have, available what are now the current media ownership rules at the deadlines for initial and reply comments on the proposed transaction. Moreover, because this is a permit-but-disclose proceeding, interested parties, including NHMC, were able to file comments addressing the impact of the current media ownership rules on the proposed transaction in the form of oral or written ex parte presentations throughout this up proceeding. Finally, these rules are part of the Commission's continuing biennial review process and therefore will be subject to change at least every two years. For these reasons, we do not find NHMC's arguments compelling and will not release a subsequent public notice seeking comment as requested.

⁸⁴⁸ NHMC Petition at 2-4.

⁸⁴⁹ NHMC Reply at 2.

⁸⁵⁰ NHMC Petition at 5.

⁸⁵¹ NHMC Reply at 3.

⁸⁵² Applicants' Aug. 28 *Ex Parte*.

⁸⁵³ *See 2002 Biennial Review Order*.

⁸⁵⁴ Applicants' Aug. 28 *Ex Parte*.

⁸⁵⁵ *See 2002 Biennial Review Order*.

⁸⁵⁶ *See Prometheus Radio Project v. FCC*, No. 03-3388, rel. Sept. 3, 2003 (3rd Cir. 2003).

J. Protection of General Motors Class GMH Stockholders

313. *Positions of the Parties.* Wyser-Pratte Management Co. (Wyser-Pratte) petitioned the Commission to deny the proposed transaction or condition its approval of the proposed transaction on the equitable treatment of holders of General Motors Class H Common Stock (“GMH stock”)⁸⁵⁷ so that GMH stockholders are treated as favorably in the proposed transaction as GM, the holder of all of Hughes common stock.⁸⁵⁸ Wyser-Pratte alleges that the proposed transaction discriminates against GMH stockholders through a \$275 million distribution from Hughes to GM as a part of the transaction for claimed “value enhancements” for GMH stockholders arising from the conversion of GMH from a tracking stock to an asset-based stock.⁸⁵⁹ Wyser-Pratte claims the proposed transaction will result in proceeds of sale of Hughes to News Corp. at \$15 per share to GM and \$14 per share to GMH shareholders.⁸⁶⁰ Wyser-Pratte argues based on Commission precedent that the Commission is obligated to protect the rights of GMH shareholders in the Commission’s review of the proposed transaction.⁸⁶¹

314. *Discussion.* We disagree with Wyser-Pratte that its claim falls within the scope of our review of the proposed transaction. While it is true that the Commission does consider the rights and interests of the relevant companies (shareholders) and consumers (ratepayers) in its review of license transfers, we agree with the Applicants that it is beyond the scope of our review to consider allegations of unfair premiums paid to specific classes of shareholders in a given transaction.⁸⁶² The Commission is not the proper forum for what is, in effect, a shareholder derivative suit seeking a share of an alleged control premium. Such claims are properly within the jurisdiction of the appropriate state court.⁸⁶³ Accordingly, we dismiss Wyser-Pratte’s petition as beyond the scope of our review of the proposed transaction.

VIII. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

315. We now consider the efficiencies and other public interest benefits that Applicants claim will result from the proposed merger. As discussed below, we find that the proposed transaction is likely to yield several cognizable benefits. First, we find that News Corp., in its management of BSkyB, Sky Italia, and its other DTH operations, has demonstrated a willingness to take risks in introducing and promoting new and innovative services. Based on this management history, and in particular, its record of innovation in many media businesses, including its introduction of interactive services in the United Kingdom, we find credible the Applicants’ claim that News Corp. will accelerate the introduction of new services, and, in particular, interactive television services by DirecTV, and that the public will benefit from the entry of this innovative and aggressive competitor in the MVPD market. Second, we conclude

⁸⁵⁷ GMH is a tracking stock of GM designed to provide its holders with financial returns based on the financial performance of Hughes, a wholly owned subsidiary of GM. See Wyser-Pratte Management Co. Petition at 7.

⁸⁵⁸ Wyser-Pratte Management Co. Petition at 1.

⁸⁵⁹ Wyser-Pratte Management Co. Petition at 11.

⁸⁶⁰ Wyser-Pratte Management Co. Petition at 2-3

⁸⁶¹ *Id.* at 15 (citing *Illinois Public Telecommunications Assoc. v. FCC*, 117 F.3d 555, 569 (D.C. Cir. 1997)).

⁸⁶² See Applicants’ Aug. 28 *Ex Parte*.

⁸⁶³ See *id.* (citing *A.L.Z. Broadcasting, Inc.*, 15 FCC Rcd 23200, 23201 (2000); *Loral Corp.*, 12 FCC Rcd 24325, 24322 (1997)).

that consumers will benefit, and our goals of promoting localism and competition will be furthered, to the extent that the transaction increases the number of DMAs that receive local-into-local broadcast television channels. To ensure that this benefit is realized, we impose a condition described below that is intended to ensure that News Corp. will adhere to its promised build-out plans. Third, we find that the proposed transaction is likely to yield some benefits in the form of increased economies of scale and scope, improved customer satisfaction and reduced churn, and a reduction in double marginalization. We assign little weight to those claimed benefits, however, for the reasons given below. Finally, as discussed below, we do not recognize as potential public interest benefits the Applicants' claims that the proposed transaction will result in increased operating efficiencies, improved access to capital, or expanded program and employment diversity and equal opportunity.

A. Analytical Framework

316. The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products."⁸⁶⁴ Under Commission precedent, however, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transfer outweigh the potential public interest harms.⁸⁶⁵

317. There are several criteria the Commission applies in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be *transaction- or merger-specific*. This means that the claimed benefit "must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects."⁸⁶⁶ Second, the claimed benefit must be *verifiable*. Because much of the information relating to the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each benefit claim so that the Commission can verify the likelihood and magnitude of the claimed benefit.⁸⁶⁷ In addition, as the Commission has noted, "the magnitude of benefits

⁸⁶⁴ See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630, ¶ 188; Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control, 12 FCC Rcd 19885, 20063 ¶ 158 (1997) ("*Bell Atlantic-NYNEX Order*"); see also *DOJ/FTC Guidelines* § 4

⁸⁶⁵ See, e.g., *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630, ¶ 188; see also *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157; Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer of Control, 14 FCC Rcd 14712, 14825 ¶ 256 (1999) ("*SBC-Ameritech Order*").

⁸⁶⁶ *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 189; see also *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 158 ("Pro-competitive efficiencies include only those efficiencies that are merger-specific, *i.e.*, that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger."); *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255 ("Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger. . ."); *Comcast-AT&T Order*, 17 FCC Rcd 23246, 23313 ¶ 173 (Commission considers whether benefits are "merger-specific"). Cf. *DOJ/FTC Guidelines* § 4.

⁸⁶⁷ *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 190; see also, *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157 ("These pro-competitive benefits include any efficiencies arising from the transaction if such efficiencies . . . are sufficiently likely and verifiable. . ."); *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173 (Commission considers whether benefits are "verifiable"); *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255; *DOJ/FTC Guidelines* § 4 ("[T]he merging firms must substantiate efficiency claims so that the Agency can verify (continued....)

must be calculated net of the cost of achieving them."⁸⁶⁸ Furthermore, speculative benefits that cannot be verified will be discounted or dismissed. Thus, as the Commission explained in the *EchoStar – DirectTV HDO*, "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present."⁸⁶⁹ Third, the Commission has stated that it "will more likely find marginal cost reductions to be cognizable than reductions in fixed cost."⁸⁷⁰ The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.⁸⁷¹

318. Finally, the Commission applies a "sliding scale approach" to evaluating benefit claims. Under this sliding scale approach, where potential harms appear "both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand."⁸⁷²

B. Claimed Benefits

319. The Applicants claim that the proposed transaction will generate several types of public interest benefits. These claimed benefits are summarized and evaluated below.

1. Improvements in DirecTV's Service Offerings Resulting from News Corp's Innovative Management

320. Claiming that News Corp. "has a proven track record of innovation in programming and DTH services," Applicants contend that News Corp. will apply its innovative management style to Hughes.⁸⁷³ In particular, the Applicants claim that News Corp. will enhance DirecTV's interactive television offerings and increase the penetration of integrated set-top boxes among DirecTV customers.

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by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm's ability to compete. . .").

⁸⁶⁸ *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20630 ¶ 190.

⁸⁶⁹ *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20630 ¶ 190.

⁸⁷⁰ *See EchoStar-DirectTV HDO*, 17 FCC Rcd at 20630 ¶ 191; *see also DOJ/FTC Guidelines* § 4.

⁸⁷¹ *See EchoStar-DirectTV HDO*, 17 FCC Rcd at 20630 ¶ 191; *see also DOJ/FTC Guidelines* § 4.

⁸⁷² *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20630 ¶ 192 (citing *SBC-Ameritech Order*, 14 FCC Rcd at 14825). *Cf. DOJ/FTC Guidelines* § 4 ("The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.").

⁸⁷³ As examples of innovations News Corp. introduced into DTH services, the Applicants cite: (1) BSkyB's conversion to digital technology in 1998 and its decision to provide free set-top-boxes and dishes in 1999; (2) BSkyB's introduction of an interactive news service in 2000, which offered multiple segments broadcast simultaneously; (3) BSkyB's subsequent introduction of additional interactive services, such as "shopping, banking, games, e-mail, travel, tourism and information services;" and (4) BSkyB's introduction of "Europe's first fully integrated DVR." As examples of News Corp.'s innovations in programming, the Applicants, among other (continued....)

321. *Interactive Television.* News Corp. claims that it will use its experience from launching interactive television (“ITV”) services in the U.K. through BSkyB to “enhance the ITV capabilities available to DirecTV subscribers and to create a greater level of awareness among consumers.”⁸⁷⁴ According to Applicants, BSkyB’s SkyActive service offers interactive news and delivers “online shopping, banking, games, e-mail, travel, tourism, and information services with all the look, feel, and immediacy that customers expect from television.”⁸⁷⁵ Subscribers can “choose from multiple segments being broadcast simultaneously on a news channel,” “view multiple screens of programming within a certain genre and click on the one that interests them, and can choose from among multiple camera angles during the broadcast of sporting events.”⁸⁷⁶ Applicants contend that an ITV offering will make DirecTV a better competitor in the MVPD market.⁸⁷⁷

322. Applicants have additionally stated that, as a first step toward introducing “robust interactive services,” the merged entity would release a new user interface in 2004 that will be incorporated in all new set-top-boxes and will be downloaded to as many as 10 million legacy set-top-boxes that are already operating in subscribers’ homes.⁸⁷⁸ Applicants further state that, by the end of 2004, the parties will incorporate new middleware into subscriber set-top-boxes that will enable DirecTV to introduce new interactive services, including interactive news, weather, traffic, and games.⁸⁷⁹

323. Several parties opposing the transaction contend that allowing News Corp. to apply its experience and assets relating to ITV services to DirecTV will result in public interest harms, rather than a benefit.⁸⁸⁰ These arguments are addressed in section VI.C.4.d, *supra*.

324. *Integrated Set-top Boxes.* Applicants also claim that the proposed transaction will increase the penetration of digital video recorders (“DVRs”) contained in integrated set-top boxes. According to Applicants, the merged entity, by “drawing on the marketing expertise within FEG, BSkyB
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things, point to: (1) News Corp.’s introduction of the Fox Network in 1986; (2) its launch of Fox News Channel in 1996; (3) its innovations in the news and informational programming offered by Fox Television Stations; and (4) its founding of Fox Sports Net in 1997. Application at 21-27.

⁸⁷⁴ Application at 22; Giacalone Decl. ¶¶ 19-20.

⁸⁷⁵ *Id.*; see also News Corp. July 28 Response at 41.

⁸⁷⁶ *Id.*

⁸⁷⁷ Application at 23; see also News Corp. Sept. 10 Ex Parte at 2 and Attachment 2.

⁸⁷⁸ Applicants’ Sept. 22 Ex Parte at 4.

⁸⁷⁹ Applicants’ Sept. 22 Ex Parte at 4. To facilitate implementation of its ITV plans, News Corp. entered into two agreements with Thomson on September 13, 2003. Under the first agreement, News Corp. purchased the *MEDIAHIGHWAY* middleware business from Thomson. The Applicants claim the *MEDIAHIGHWAY* product line will enable set-top-boxes to better interpret and execute interactive applications. Under the terms of the second agreement, News Corp. and Thomson will enter into a non-exclusive preferred supplier relationship, which the Applicants claim will enable News Corp. to capture economies of scale and scope. *Id.* at 5-6.

⁸⁸⁰ See CDD Petition at 4; NAB Comments at 20. For example, NAB argues generally that beyond simple blatant denials of access to DirecTV, the post-transaction entity could discriminate against content owners in such technology-related areas as interactivity, channel assignment and positioning, use of navigation devices and electronic program guides, data transfer speed and downstream and upstream return path traffic. *Id.*

and other affiliated companies . . . [will] create consumer awareness of and demand for the product.”⁸⁸¹ Applicants state that they plan to deploy set-top-boxes with integrated DVRs at more competitive prices by 2005.⁸⁸² In addition, they claim that they are “exploring the potential of incorporating digital terrestrial television tuners into DirecTV set-top boxes.”⁸⁸³ They further claim that “these digital signals can be seamlessly processed by the set-top-box with the DirecTV satellite signal in a manner that will be transparent to the viewer.”⁸⁸⁴ Applicants also contend that the “proposed transaction should result in a significant reduction in signal piracy” because of the post-transaction combination of efforts by DirecTV (which currently uses its own proprietary conditional access technology) and News Corp.'s subsidiary, NDS, a leading provider of conditional access technology.⁸⁸⁵

325. *Discussion.* We find that News Corp., under the leadership of Rupert Murdoch, has demonstrated a willingness to take risks, introduce innovative services, and fundamentally change the nature of competition in multiple media markets. And in numerous cases, this willingness to take risks has benefited both News Corp. and consumers. For example, in its management of BSkyB, Sky Italia, and its other DTH operations, News Corp has demonstrated a willingness to take risks in introducing and promoting new services, including, in particular, interactive services and new programming channels. We further find that these innovations have generated increased subscriber growth and reduced churn, indicating increased consumer satisfaction. For example, in October 1998 BSkyB introduced digital satellite service and aggressively promoted it by giving away set-top boxes and introducing a new low-cost entry-level digital tier.⁸⁸⁶ Between its introduction of digital DTH service in October 1998 and June 2002, News Corp. increased the total number of subscribers to BSkyB from 3,547,000 to 6,101,000 (an increase of 72%), while reducing churn significantly.⁸⁸⁷ Moreover, the majority of this increase followed the introduction of digital interactive services.⁸⁸⁸ In fact, in the first six months after the introduction of

⁸⁸¹ Application at 23.

⁸⁸² Applicants' Sept. 22 Ex Parte at 5.

⁸⁸³ Application at 29-30. The Applicants contend that, “[b]y mounting a small antenna for receiving broadcast signals at the same point where the satellite dish is located, most subscribers would be able to receive digital television broadcast signals from their local stations over-the-air.” *Id.*

⁸⁸⁴ *Id.* at 30.

⁸⁸⁵ Application at 37. NDS is also “a leading supplier of open end-to-end digital systems and solutions for the secure delivery of entertainment and information to televisions and IP devices. NDS enables broadcasters, network operators and content providers to profit from the deployment of digital TV technologies including innovative interactive applications and personal TV, secure broadband and datacasting solutions.” *See* NDS, About NDS, at http://www.nds.com/about_nds/about_nds.html (visited Sept. 11, 2003).

⁸⁸⁶ *See, e.g.,* Dan Milmo, *BSkyB Does Digital Dash to 7 m Subscribers Mark*, THE GUARDIAN (Sep. 29, 2003) (“Sky Digital's growth was backed by a high-risk strategy . . . of giving away set-top boxes to customers for free.”); Paul Davies, *BSkyB Makes Bid for Mass-Market with £ 6.99 Entry-Level Digital Tier*, NEW MEDIA MARKETS 1 (Aug. 13, 1998)(BSkyB offers cheaper than expected entry-level digital tier). .

⁸⁸⁷ Letter from Gary M. Epstein, Counsel for General Motors Corp. and Hughes Electronics Corp., *et al.* to Marlene H. Dortch (Sept. 10, 2003) (“Applicants' Sept. 10 Ex Parte”) at Attachment 2. *See also* Applicants' Sept. 22 Ex Parte at 8.

⁸⁸⁸ Applicants' Sept. 10 Ex Parte, Attachment 2.

interactive TV news in June 2000, BSkyB's subscribership increased by 12 percent.⁸⁸⁹ News Corp. has also aggressively introduced new programming and programming services in its Sky Italia and STAR operations. For example, Sky Italia launched a new 24-hour news channel in August 2003.⁸⁹⁰ Similarly, in Asia, STAR expanded its offering of services, ranging from radio to television to interactive digital cable TV,⁸⁹¹ and including the introduction of Xing Kong Wei Shi, the first all-new channel granted cable carriage in mainland China.⁸⁹²

326. News Corp. has pursued a similar strategy of innovation and aggressive competition in the United States and in many cases has successfully challenged incumbent broadcast and cable programming networks. For example, in the mid-1980s, News Corp. purchased six television stations and then challenged the long-standing dominance of the then big-three broadcast television networks by launching a fourth broadcast network, despite widespread skepticism that no such network could survive.⁸⁹³ Over the years, News Corp. acquired additional independent broadcast television stations and entered into affiliation agreements with more, and News Corp. helped the local stations build market share by, among other things, introducing prime-time local news broadcasts (the 10:00 p.m. time slot), by introducing new and popular programming on the Fox network (such as *The Tracey Ullman Show*, *Married. . . With Children*, *The Simpsons*, *America's Most Wanted*, *The X-Files*, and *24*) and by outbidding CBS for the right to broadcast National Football Conference games.⁸⁹⁴ News Corp. has been similarly aggressive in introducing new cable networks. For example, its launch of Fox News Channel brought a new perspective on cable news and brought heightened competition to a market that previously had been dominated by CNN.⁸⁹⁵ Similarly, News Corp., by accumulating stakes in a number of regional networks and by aggressively bidding for broadcast rights, built Fox Sports Net into the largest RSN that now challenges ESPN.⁸⁹⁶ Finally, News Corp. has introduced new and innovative programming on its various overseas DTH platforms.⁸⁹⁷

327. Given News Corp.'s history of taking significant risks and introducing new and innovative media services, including in particular DTH services, we find credible the Applicants' claim that they will accelerate the introduction of new DTH services, including interactive services. Moreover, it has been reported that cable MSOs, in anticipation of the consummation of this proposed transaction,

⁸⁸⁹ *Id.*

⁸⁹⁰ *Id.*; Gagliardi Aff. at 2.

⁸⁹¹ News Corp. 2003 Annual Report at 17.

⁸⁹² News Corp. 2002 Annual Report at 21.

⁸⁹³ *See, e.g.*, WALL ST. J. May 17, 1985; WASHINGTON POST, May 19, 1985; BUSINESS WEEK, May 20, 1985; Application at 24.

⁸⁹⁴ *See, e.g.*, WALL ST. J., May 27, 1987; LOS ANGELES DAILY NEWS, Jan. 1, 1990; WALL ST. J. Dec. 20, 1993; PORTLAND OREGONIAN, May 15, 1994; ST. LOUIS DISPATCH, October 31, 1996; Application at 24.

⁸⁹⁵ *See, e.g.*, ROCKY MOUNTAIN NEWS, Mar. 3, 1996; Application at ii-iii, 23-24; Applicants' Reply at 78.

⁸⁹⁶ FORTUNE, Oct. 26, 1998, at 92 *et seq.*; Fox Entertainment Group, Form 10-K (for the year ending Jun. 30, 2000); Application at 26.

⁸⁹⁷ News Corp. 2003 Annual Report at 17 & 21; Application, Gagliardi Decl. ¶ 12; Applicants' Sept. 22, 2003 *ex parte* at 10.

are already stepping up plans to introduce new interactive services.⁸⁹⁸ In this regard, we find that News Corp.'s recent acquisition of *MEDIAHIGHWAY* from Thomson for \$66.5 million indicates a commitment on the part of News Corp. to interactive television.⁸⁹⁹ Although we can not estimate exactly the value to consumers of News Corp.'s innovative management style, we find it to be a major benefit to the public of the transaction.⁹⁰⁰

328. On the other hand, we find that the Applicants have not demonstrated that their claims concerning increased penetration of integrated set-top-boxes are either credible or transaction-specific. More specifically, we find that the Applicants make broad claims about set-top boxes without providing adequate supporting evidence. In addition, with respect to the claim that they might integrate digital terrestrial television tuners into DirecTV set-top boxes, they do not explain why this integration could not take place in the absence of the transaction.

2. Increased Offering of Local-into-Local, HDTV, and Broadband Services

329. Applicants claim that, after the merger, News Corp.: (1) will bring its commitment to local-into-local to DirecTV and thus increase the number of DMAs in which local broadcast signals are available; (2) will increase the amount of HDTV programming that DirecTV makes available; and (3) will develop new options for consumer broadband services.⁹⁰¹ Applicants state that they will consider using new satellites and new technologies to achieve that goal, and they specifically point to the possibility of using Ka-band satellite capacity and/or integrating digital terrestrial tuners into the DirecTV set-top boxes. Applicants further assert that News Corp. will work aggressively to expand broadband options to better compete with cable's video and broadband offerings.

330. NRTC and ACA respond that Applicants have not explained how the merged firm will expand local-into-local service and have not made a commitment as to how many markets it will serve. NRTC asserts that, while Applicants claim that they will increase both local-into-local and HDTV, they do not explain how they will accomplish both at the same time.⁹⁰² NRTC asserts that the same is true with respect to broadband services -- that the Applicants have failed to discuss how or when DirecTV's satellite broadband offerings will be expanded.⁹⁰³ ACA asserts that News Corp. could increase the availability of HDTV nationwide by broadcasting HD on Fox Network.⁹⁰⁴ JCC claim that Applicants admit that Hughes can expand DirecTV's local-into-local offerings absent the transaction.⁹⁰⁵ EchoStar

⁸⁹⁸ See MULTICHANNEL NEWS, December 1, 2003.

⁸⁹⁹ *Id.* at 5; see also Applicants' Sept. 22, 2003 Ex Parte at 5.

⁹⁰⁰ Certain parties, including CDD, contend that the transaction will give News Corp. a "stranglehold" over ITV technologies and products, including conditional access technologies. These comments are addressed in section VI.C.4.d.ii, *supra*.

⁹⁰¹ Application at 27.

⁹⁰² NRTC Petition at 17-18; ACA Comments at 25-26.

⁹⁰³ NRTC Petition at 19. NRTC urges that we require Applicants to make specific commitments to deploy broadband services to rural America. *Id.* at 19-20.

⁹⁰⁴ ACA Comments at 26-27.

⁹⁰⁵ JCC Comments at 68.

contends that these claims are not transaction-specific, and that DirecTV, absent the transaction, has access to all the means cited by Applicants for providing local-into-local in additional markets. EchoStar also states that DirecTV has already announced that, without the merger, it will offer additional HDTV, for a total of seven HDTV channels. Finally, EchoStar asserts that, to the extent that News Corp. enters into partnering arrangements with existing broadband providers, this will not create new broadband options.⁹⁰⁶

331. Responding to critics' questioning of the claim that the merger will result in an increase in the number of DMAs receiving local broadcast television signals via satellite, Applicants point to News Corp's expertise and commitment to local services, and the economies of scale and scope and improved access to capital that will result from the transaction. And they contend that these factors provide sufficient evidence that such an expansion will occur. With respect to NRTC and EchoStar's argument concerning expanded broadband deployment, Applicants acknowledge that Hughes already provides broadband and could engage in various partnering solutions, but maintain that, as a result of the proposed transaction, DirecTV will be able to increase these offerings, due to its improved capital structure.⁹⁰⁷

332. Applicants subsequently committed to a schedule for providing a greater number of local channels and/or HDTV channels than DirecTV previously announced. Specifically, they committed to provide by end of 2004, either local channels in 30 additional DMAs, or 30 more national HDTV channels, or some combination of additional local-into-local DMAs and HDTV channels, based on the bandwidth requirements.⁹⁰⁸ In addition, Applicants claim that, in the longer term, they will design and launch a new generation of satellites as early as 2006 and no later than 2008 that will provide much greater capacity for DirecTV services. This effort, which involves a financial commitment above that which Hughes's current owner has authorized, will enable DirecTV to provide local broadcast channels in all 210 DMAs, including local channels in HDTV format in select markets.⁹⁰⁹ Applicants stated that, "as early as 2006 and no later than 2008, (1) DirecTV will offer a seamless, integrated local channel package in all 210 DMAs, and (2) DirecTV will offer at least 200 to 300 channels of local and national HDTV programming." Applicants claim that DirecTV will be the strongest possible competitor to cable *only if* it can provide consumers with their local broadcast channels and with HDTV programming and that they intend to extend that capability as quickly and efficiently as possible.⁹¹⁰

333. *Discussion.* The Commission has long recognized the importance of local broadcast television and its contribution to the Commission's goal of fostering localism in media. To the extent that the transaction results in an increase in the amount of DBS-provided local-into-local service and/or the number of HDTV channels offered to subscribers, this should increase competition in MVPD markets and should benefit consumers through increased choice, lower prices, or both. In addition, we find that

⁹⁰⁶ EchoStar Petition at 40-43.

⁹⁰⁷ Applicants' Reply at n. 224; Applicants' July 28 Response at 35.

⁹⁰⁸ See Letter from William M. Wiltshire, Counsel for The News Corporation, *et al.*, to Marlene H. Dortch, Secretary, FCC, (September 22, 2003) ("Applicants' Sept. 22 Ex Parte") at 3.

⁹⁰⁹ *Id.* at 2, 4.

⁹¹⁰ *Id.* at 4.

increasing the number of DMAs in which DirecTV subscribers can receive local broadcast television stations furthers the Commission's goal of promoting localism.⁹¹¹

334. Applicants have alleged that a benefit of the transaction will be the provision by the end of 2004, by DirecTV of either local channels in an additional 30 DMAs or 30 more channels of HDTV, or a combination of local channels and HDTV channels that have similar bandwidth requirements above and beyond what had been previously funded, projected or planned by Hughes/DirecTV.⁹¹² In order to ensure that Applicants live up to their commitment to achieve the important public interest benefit of increased local channel service to all regions of the country, we require, as a condition of our license transfer approval, that, by year end 2004, Applicants provide local channel service in an additional 30 DMAs beyond what had been previously funded, projected or planned by Hughes/DirecTV. In the event that circumstances beyond DirecTV's control limit its ability to fulfill this license condition, DirecTV may petition the Commission for waiver pursuant to Commission rules.⁹¹³

3. Increased Operating Efficiencies

335. Applicants claim that, as a result of the transaction, DirecTV will realize savings in annual overhead and other operating expenses in the range of \$65 million to \$135 million. These savings, according to the Applicants, will be due largely to News Corp.'s experience in direct to home satellite services and its commitment to cost-efficient operations. The major elements of these claimed savings are: (1) savings of \$40-80 million from reduced customer service costs, of which \$20-40 million is assumed to be merger-specific; (2) savings of \$40-80 million from reduced general and administrative expenses; and (3) savings of \$7-15 million from drawing on News Corp.'s experience and rationalizing operational areas of overlap.⁹¹⁴

336. ACA responds that, to the extent that the Applicants might realize any efficiencies, they will provide the merged firm with resources to support anticompetitive conduct.⁹¹⁵ EchoStar and JCC state that the claimed efficiencies are unsupported by the evidence, are not transaction-specific and verifiable, and that the benefits of those efficiencies would flow to News Corp. rather than to consumers.⁹¹⁶

337. *Discussion.* Excluding for the moment savings that result from integration of the current distribution facilities of News Corp. and DirecTV, Applicants have not provided sufficient supporting evidence for us to verify and quantify the claimed savings resulting from increased operating efficiency. More importantly, Applicants have not demonstrated that the claimed savings in operating costs are transaction specific. In this regard, we note that many of the claimed savings are related to the introduction of "best practices," but Applicants fail to demonstrate why DirecTV, by itself or through other means that pose fewer competitive risks than the merger, could not also introduce those same best

⁹¹¹ See, e.g., 2002 Biennial Review Order, 18 FCC Rcd at 13643-45 ¶¶ 73-79.

⁹¹² Applicants' Sept. 22 Ex Parte at 2.

⁹¹³ See 47 C.F.R. § 1.925.

⁹¹⁴ Application at 31-33, Giacalone Decl. ¶¶ 9-14.

⁹¹⁵ ACA Comments at 26.

⁹¹⁶ EchoStar Petition at 43-44; JCC Comments at 69-70.

practices. For example, Applicants claim that, with the proposed transaction, DirecTV might reduce its costs by scaling back its reliance on third-party customer service centers, and performing that function in-house. Applicants estimate annual savings of \$40-\$80 million annually by instituting this change. Applicants claim that half those savings would be transaction specific, but provide no evidence that the incentive or ability to increase the use of in-house service centers is unique to News Corp. or that specific synergies exist by which News Corp. could operate in-house customer service facilities more efficiently than an outside contractor, or than could DirecTV itself if it provided customer service solely on an in-house basis. In fact, DirecTV currently has ten customer service centers, one of which is operated in-house.

338. Applicants also estimate annual savings of \$7-15 million by rationalizing operational areas, including the sharing of national distribution facilities operated by Fox Cable Networks and by DirecTV.⁹¹⁷ We note, however, that News Corp. will have only a partial interest in DirecTV, and this may affect the feasibility of realizing benefits related to rationalizing operational areas.⁹¹⁸ In particular, the Applicants have not demonstrated that, with a 34% interest in DirecTV, News Corp. could realize benefits above that which DirecTV could already realized through contractual agreement with News Corp. or some other entity.⁹¹⁹ Thus, we exclude these savings from estimated benefits of this transaction.

4. Economies of Scope and Scale

339. Applicants claim that the proposed transaction, by more than doubling the post-transaction entity's subscriber base (from 11.4 million for DirecTV alone to over 23 million subscribers for News Corp./DirecTV worldwide), will allow the merged entity to take advantage of economies of scale and scope. For example, Applicants claim that, by spreading the costs of research and development ("R&D") over all News Corp.'s satellite operations and by pursuing common technology standards for both hardware and software, will be able to develop and introduce innovations more economically.⁹²⁰ Applicants further claim that the transaction will permit the merged entity to explore more efficiently next-generation technologies, such as improved video and audio compression, improved spectrum efficiency using 8PSK and other advanced modulation techniques and Turbo coding.⁹²¹ Finally,

⁹¹⁷ It appears that these claimed savings were not included in the estimate of the total savings that would result from the merger. *See* Application, Giacalone Decl. ¶ 7.

⁹¹⁸ In this regard, we note that the Applicants attempt to rebut claims that News Corp. and DirecTV will engage in temporary foreclosure on the ground that News Corp. will possess only a minority interest in DirecTV and that consequently joint profit maximization is not feasible. The logic of this argument also suggests that News Corp.'s minority interest should also limit the ability of the Applicants to jointly achieve operating efficiencies.

⁹¹⁹ We use the 34% ownership stake in evaluating this claimed benefit because this is the ownership stake that News Corp. will possess immediately after consummation of the transaction, and there is no certainty that News Corp. will increase that stake. In analyzing potential harms, however, we use higher ownership stakes because News Corp. may increase its ownership interest without further Commission review, and this may affect its incentive to engage in temporary foreclosure.

⁹²⁰ Application at 34.

⁹²¹ Application at 34.

Applicants claim that the vertical integration that will result from the transaction will reduce the risks of developing and launching new programming.⁹²²

340. In addition, Applicants contend that the proposed transaction can achieve “significant economies of scope and scale” in the area of set-top boxes.⁹²³ According to Applicants, DirecTV’s set-top boxes, which use a DirecTV proprietary standard, can be incorporated into the set-top-box platform used by News Corp. satellite affiliates.⁹²⁴ They argue that, by specifying the design of its set-top-boxes in greater detail than DirecTV has in the past, set-top-box manufacturers will be able to minimize their development costs and maximize component purchasing power, resulting in lower costs to DirecTV.⁹²⁵ Applicants further argue that research and development costs can be reduced by pursuing common technology standards across DirecTV and its other satellite affiliates.⁹²⁶ According to Applicants, these cost savings will amount to about \$10 per set-top box (or approximately \$60 million annually).⁹²⁷ The Applicants claim that these cost savings will not only benefit the customer purchasing a new set-top-box, but also reduce the subsidies required by the operators.⁹²⁸ Applicants contend that “this will all be possible without swapping out set top boxes.”⁹²⁹

341. JCC counter that, in concluding that set-top-box costs will decrease by \$10 per box, Applicants have, erroneously, assumed that News Corp. manufactures its own set-top-boxes. JCC maintain that the third party set-top-box vendors already compete to provide the best technology at the lowest price, and that the proposed transaction will only decrease the number of buyers in that market.⁹³⁰ EchoStar claims that any savings would flow to News Corp.’s shareholders, and not to consumers.⁹³¹

342. *Discussion.* To the extent that the proposed transaction enables the parties to combine their R&D efforts and to spread the cost of those R&D efforts over multiple satellite operations, this may increase the merged entity’s incentive to innovate, which could result in new products and services that would not have been introduced absent the proposed transaction. To the extent this occurs, such benefits should be taken into account. On the other hand, if the innovations were developed by a third party who could sell its innovation to DBS or DTH providers worldwide (or if, absent the transaction, News Corp. and DirecTV would sell their innovations generally), then, as JCC point out, it is not clear that the proposed transaction would increase the incentive to innovate.

⁹²² *Id.* at 35.

⁹²³ The Applicants' claims concerning economies of scale in set-top boxes are discussed in greater detail in section VI.C.3.d *infra*.

⁹²⁴ Application at 33-35; News Corp. July 28 Response at 39.

⁹²⁵ *Id.*

⁹²⁶ *Id.*

⁹²⁷ *Id.*, at 35; Giacalone Decl. ¶ 22.

⁹²⁸ News Corp. July 28 Response at 39.

⁹²⁹ *Id.* at 39 n.30.

⁹³⁰ JCC Comments at 70-71.

⁹³¹ EchoStar Comment at 45.

343. Similarly, if the merged entity can secure larger volume discounts from suppliers, and then pass those lower costs through to consumers in the form of lower end-user prices, this likewise would constitute a public interest benefit that should be considered in balancing the potential harms and benefits of the proposed transaction. If, on the other hand, the volume discounts take the form of savings in fixed costs, and those savings are not passed on to consumers, then we would be less inclined to treat such savings as a public interest benefit.

344. Based on the evidence presented by Applicants, we believe that the transaction is likely to enable the merged entity to achieve certain economies of scale and scope, particularly in R&D, that absent the transaction the parties individually could not have achieved. At the same time, it is not clear that all \$60 million estimated by Applicants would qualify as a cognizable public interest benefits, either because the savings are not transaction specific (such as when innovations are produced by third parties and sold generally) or because it is not clear that the savings will be flowed through to consumers. Thus, while we believe that the proposed transaction will yield certain transaction-specific, cognizable benefits resulting from economies of scale and scope, we do not accept the total savings estimated by Applicants. Accordingly, while we accept these benefits in theory, we do not give significant weight to them in our balancing of potential public interest harms and benefits.

5. Improved Customer Satisfaction and Reduced Churn

345. Applicants claim that, because the post-transaction entity will offer more and better quality DBS products, customer satisfaction will increase. This in turn should enable DirecTV to increase its subscriber base and reduce churn and generally make it more competitive vis-à-vis other MVPD providers.⁹³² Applicants also contend that the proposed transaction, by bringing together the conditional access technology owned by News Corp.'s NDS subsidiary, and DirecTV's conditional access technology, will enable the merged entity to reduce signal piracy.⁹³³ Based on Applicants' estimates of incremental new subscribers and its estimates of savings resulting from reduced churn, Applicants project an annual increase in earnings of \$450 million to \$525 million by 2006.⁹³⁴ Applicants assert that these revenues will be used for additional initiatives that will produce better products and services.

346. JCC counter that the claim of efficiencies related to increased customer satisfaction is simply a restatement of the claim that News Corp. will bring innovative offerings to DirecTV, and that this claim is too vague to be recognized.⁹³⁵ EchoStar argues that this claim rests on the earlier assumptions of increased local-into-local, HDTV, interactive services and DVRs, and that Applicants have not shown those claims to be transaction-specific. Noting that the claim relating to reduced churn is based in part on BSKyB's low churn rate, EchoStar further argues that that News Corp. faces different MVPD competitors in the U.K., and it points out that News Corp. has not specified how they will reduce churn for DirecTV.⁹³⁶

⁹³² Application at 36.

⁹³³ *Id.* at 37.

⁹³⁴ *Id.* at 36-37.

⁹³⁵ JCC Comments at 70-71.

⁹³⁶ EchoStar Petition at 44-45.

347. *Discussion.* As various opponents of the transaction suggest, this claimed benefit, to a large extent, duplicates portions of previous claims, including claims that the proposed transaction will allow News Corp. to: (1) introduce more innovative services; (2) provide more local-into-local and HDTV; and (3) take advantage of economies of scale and scope. To the extent that this claimed benefit is duplicative of other claimed benefits, the benefits should not be counted twice. On the other hand, to the extent that the earlier benefits are cognizable, it is appropriate, in evaluating the earlier claims, to consider not only the cost savings, but also the demand response to any resulting decrease in price.

348. To the extent that the earlier benefits would reduce churn, that reduction would be a cognizable component of those benefits, provided that the earlier benefits are found to be transaction-specific. Applicants have not attempted to quantify these potential consumer benefits, however, but have only estimated the potential revenue gain to the merged entity of between \$450 million and \$525 million by 2006. When we balance potential harms and benefits of the transaction, however, we will not give significant weight to the Applicants' estimate because it is not clear whether some benefits are counted twice and because there is no attempt to quantify the benefits that might flow through to consumers.

6. Improved Capital Structure

349. *Positions of the Parties.* Applicants claim that, because Hughes is a wholly owned and controlled subsidiary of GM and currently has only a tracking stock, it is limited in its ability to pursue outside financing. The proposed transaction, Applicants claim, will eliminate this problem. ACA responds that DirecTV, while under the control of General Motors, attracted substantial investment, including a \$1.5 billion investment from AOL. ACA further argues that GM's decision on how much to invest in Hughes should have no bearing on the public interest.⁹³⁷

350. *Discussion.* Although the proposed transaction may improve Hughes' access to capital, as Applicants contend, we do not believe this to be a transaction-specific benefit. Rather, the gist of Applicants' argument is that DirecTV cannot obtain direct access to the capital markets (because it only has a tracking stock) and that General Motors has no significant interest in further significant investments in this business. To the extent that access to capital is a problem, however, it could be ameliorated through other means that pose fewer competitive risks than the proposed transaction, such as spinning off DirecTV so that it has its own traded stock. Thus, since the capital structure could be improved through other means that pose fewer competitive risks, this claimed benefit is not transaction-specific.

7. Reduction in Double Marginalization

351. Applicants claim that the reduction in "double marginalization" which results from vertical integration "will create a downward incentive for News Corp.'s programming prices."⁹³⁸ As discussed in greater detail above, we agree that vertical integration can reduce prices by reducing double marginalization.⁹³⁹ Nevertheless, because Applicants have neither attempted to quantify this benefit nor provided sufficient information for the Commission to quantify the benefit, we will not take it into account when weighing the potential harms and benefits of the proposed transaction.

⁹³⁷ ACA Comments at 27-28.

⁹³⁸ Applicants' Sept. 22, 2003 Ex Parte at 12. *See also* Applicants' Reply, Lexecon Report at 6; Applicants' Reply, CRA Analysis at 10-12 & Appendix B.

⁹³⁹ *See* Section VI.C.4.b.iii, *supra*.

8. Increased Program and Employment Diversity

352. *Positions of the Parties.* Applicants contend that the transaction will benefit the public by increasing programming geared to linguistic, ethnic, and cultural minorities, and by promoting employment diversity.⁹⁴⁰ These claims are summarized and discussed below.

353. Applicants assert that the proposed transaction would increase program diversity because the transaction will bring News Corp.'s "deep commitment" to diversity to Hughes, resulting in DirecTV's carriage of more programming targeted at culturally, ethnically, and linguistically diverse audiences.⁹⁴¹ In support of this claim, News Corp. cites several examples of its commitment to diversity in programming, including television programming and films with prominent minority cast members and minority directors.⁹⁴² Applicants assert that the nationwide reach of DBS service will allow News Corp. to efficiently aggregate and reach niche audiences. In response to these claims, as with other diversity benefits claimed by Applicants, commenters contend that Applicants have failed to show that there is anything lacking in DirecTV's commitment to diverse programming.⁹⁴³ Moreover, several commenters contend that the transaction poses potential harms to program diversity.⁹⁴⁴

354. The Commission has traditionally sought to increase employment of women and minorities by broadcasters and MVPDs through its equal employment opportunity ("EEO") rules and policies.⁹⁴⁵ The Commission's rules prohibit discrimination in hiring and employment. In addition, FCC EEO outreach rules require broadcasters and MVPDs to: provide wide dissemination of job vacancies; undertake initiatives such as jobs fairs and internships to assist jobseekers develop skills and training; and evaluate regularly the efficacy of these efforts.⁹⁴⁶

355. Applicants contend that the proposed transaction will serve the public interest by promoting employment diversity.⁹⁴⁷ Applicants submit that News Corp. is a leader in promoting employment diversity, and that its commitment to such diversity will be expanded to DirecTV as a result

⁹⁴⁰ Application at 39-43.

⁹⁴¹ Application at 42.

⁹⁴² *Id.*; Applicants' Sept. 11 Ex Parte at 3-4.

⁹⁴³ ACA Comments at 28; JCC Comments at 72.

⁹⁴⁴ ACA Comments at 3, 7, 16, 29; Cablevision Comments at 23-29; CDD Petition at 2-3; CFA Reply Comments at 9-12; EchoStar Petition at 39-40; NRTC Petition at 9-16. Commenters' concerns about potential harms to program diversity are discussed at section VII.A.2 above. There, we conclude that the transaction is unlikely to reduce program diversity.

⁹⁴⁵ See 47 CFR §73.2080 (Broadcast EEO Rule); 47 CFR §76.75 (Cable EEO Rule).

⁹⁴⁶ In 2000, the Commission adopted EEO rules subsequently invalidated by the US Court of Appeals for the District of Columbia Circuit. *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), *rehearing denied* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002). The Commission adopted its current broadcast and MVPD EEO rules pursuant to a further rulemaking proceeding. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd 24018 (2002) ("*EEO Second Report and Order*").

⁹⁴⁷ Application at 39-43.

of the proposed transaction.⁹⁴⁸ Applicants cite several News Corp. EEO initiatives, including its Diversity Development Department, which is focused on ensuring a diverse workforce as well as diversity in procurement.⁹⁴⁹ Applicants report that News Corp.'s efforts have resulted in increased opportunities for writers, directors, producers and actors from diverse backgrounds.⁹⁵⁰ Applicants also cite News Corp.'s internship and apprenticeship programs,⁹⁵¹ a Fox mentoring program for minority film and television entrepreneurs,⁹⁵² and the fact that the Fox group of companies now has a much more diverse group of suppliers.⁹⁵³ Applicants assert that, after consummating the transaction, it will: (1) launch a mentoring program for female and minority entrepreneurs who seek to launch niche cable channels; (2) recruit and/or seek to promote women and minorities into leadership positions at Hughes; (3) implement an internship program at Hughes designed to attract diverse candidates; (4) evaluate and/or modify Hughes' procurement programs to ensure that they provide opportunities for minorities; and (5) upgrade Hughes' internal and external communications to facilitate diversity initiatives.⁹⁵⁴

356. As with Applicants' program diversity claims, commenters contend that these claimed benefits are not transaction-specific. More specifically, they argue Applicants have not shown that DirecTV is any less committed to diversity than is News Corp.⁹⁵⁵

357. *Discussion.* We agree with commenters that Applicants have failed to demonstrate that either the claimed program diversity or employment diversity benefits are transaction-specific. Applicants have described several News Corp. initiatives, which are much like those we seek to promote through our EEO rules.⁹⁵⁶ They have also identified a significant amount of News Corp. programming developed by production staff from diverse backgrounds which is targeted to diverse viewing audiences. In addition, News Corp. contends that it has taken steps to create a more diverse base of suppliers of equipment and services. These data may very well evidence high levels of program diversity and successful EEO policies at News Corp. However, Applicants have not demonstrated that DirecTV would not adopt similarly effective EEO initiatives or provide similarly diverse programming absent the transaction. As several commenters note, there is no evidence in the record that DirecTV's current

⁹⁴⁸ Application at 39.

⁹⁴⁹ Application at 40.

⁹⁵⁰ Application at 40-41.

⁹⁵¹ *Id.* at 41; Applicants' Sept. 11 Ex Parte at 4-7.

⁹⁵² Application at 42.

⁹⁵³ Application at 42; Applicants' Sept. 11 Ex Parte at 7-9.

⁹⁵⁴ Application at 42-43.

⁹⁵⁵ ACA Comments at 28; JCC Comments at 72.

⁹⁵⁶ We note also the presentation at the inaugural meeting on September 29, 2003, of the Advisory Committee on Diversity for Communications in the Digital Age of Mitsy Wilson, Senior Vice President, Fox Entertainment Group, News Corp. Ms. Wilson described diversity initiatives at Fox. The Federal Advisory Committee on Diversity was established by Chairman Powell in May 2003 to bring together experts from the communications, financial, and technology communities to develop recommendations to identify potential regulatory actions and education initiatives that can promote and enhance opportunities for minorities and women.

programming is not diverse, or that its EEO polices need improvement. Thus, we cannot find that these claimed diversity benefits are transaction specific.

IX. BALANCING POTENTIAL PUBLIC INTEREST HARMS AND BENEFITS

358. Our task under the Communications Act is to determine whether the “public interest, convenience and necessity will be served” by the granting of the Application.⁹⁵⁷ The public interest standard involves a balancing of potential public interest harms of the proposed transaction and the potential public interest benefits.⁹⁵⁸ The Applicants bear the burden of proving, by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.⁹⁵⁹ Our options at this stage are to approve the application without conditions, approve it with conditions, or hold a hearing if we are unable to make the findings required for approval.⁹⁶⁰ The Application and the substantial record before us make clear that, on balance, the public interest will be served by approval of the application as amended by the conditions that we impose herein.

359. The proposed transaction would combine News Corp., a major supplier of, *inter alia*, video programming, including one of four national broadcast networks, 35 owned and operated local broadcast television stations as well as various cable programming program networks, with Direct TV, the second largest MVPD and one of the two incumbent nationwide DBS providers. Integration of programming with distribution is not new in the media industry. Broadcasters, cable operators and DBS providers are all permitted to own programming assets, although the terms and conditions of the sale of vertically integrated satellite cable programming to rival distribution networks is subject to certain rules to ensure that vertical integration does not cause anticompetitive outcomes.⁹⁶¹

360. The potential harms of the combination of News Corp. and Hughes’ assets are in many respects those inherent in such supplier/distributor integration, and in balancing the potential public interest harms and benefits, we take into account how such potential harms have been dealt with in related contexts. On the one hand, certain of the potential competitive harms inherent in vertically integrated programming/MVPD providers have been recognized as requiring special remedies to prevent potential abuses. On the other hand, the remedies chosen, at least in recent years, have not generally been structural remedies, such as prohibitions on common ownership of programming and distribution assets, but behavioral remedies, such as requirements for program access and nondiscrimination.⁹⁶² This choice reflects the general recognition that vertical integration is less likely than horizontal integration to have

⁹⁵⁷ See 47 U.S.C. §§ 310(d), 309(a)&(d).

⁹⁵⁸ See, e.g., *AT&T-Comcast Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DirectTV Order*, 17 FCC Rcd at 205784 ¶ 25.

⁹⁵⁹ See *id.*

⁹⁶⁰ If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, Section 309(e) of the Act requires that we designate the application for hearing. 47 U.S.C. §309(e).

⁹⁶¹ See, e.g., Section 628 of the Communications Act of 1934, as amended, 47 U.S.C. § 548.

⁹⁶² See, e.g., 47 C.F.R. § 76.100, *et seq.*; *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*, 17 FCC Rcd 12124 (2002).

anticompetitive effects and is more likely to promote efficiency.⁹⁶³

361. There are, of course, obvious differences among broadcast television, cable, and direct broadcast satellite distribution systems. Full-CONUS direct broadcast satellite distribution systems, such as DirecTV's, are both multichannel and nationwide in scope, and this transaction will result in an unprecedented level of integration of both broadcast and cable programming assets with an incumbent nationwide DBS provider. At the same time, while the two primary incumbent DBS competitors have attracted enough subscribers nationwide to rank them among the largest MVPDs, they rank far behind cable operators in most local markets, including all the most populous urban areas.⁹⁶⁴ Cable remains the predominant provider of MVPD services in these markets.

362. We must choose the action on the pending application that will serve the public interest with due attention to the context and structure of the current marketplace. Our primary objective is to promote the interest of the consumer of video programming—to maximize the variety, quality and innovation of available programming and minimize its price where possible. The mechanism of choice to achieve this goal is generally to encourage a competitive marketplace.

363. The proposed transaction will shift control of one of the two incumbent full-CONUS DBS providers from a non-media owner who has made no secret of its desire to exit the business in recent years to a media company that has a proven record of innovation and success in providing satellite television services (and, incidentally, competing with cable distribution systems) in other markets throughout the world. As indicated above, we find that the potential improvement in DirecTV's service offerings under News Corp.'s innovative and aggressively competitive management, while inherently difficult to quantify precisely, would be a major public interest benefit. Another tangible benefit that we can ensure will be realized is News Corp.'s commitment to achieve the important public interest benefit of increased local channel service offerings to all regions of the country.

364. Based on our review of the record, we have found that where Applicants lack market power, such as in the programming-related technologies and fixed satellite services markets, no potential public interest harms will arise.⁹⁶⁵ At the same time, we also have found that the proposed transaction would create the potential for competitive and other public interest harms in areas in which the Applicants have market power and the transaction would increase their incentive and ability to exercise that market power to the detriment of the public. We reiterate that because local MVPD markets already are highly concentrated,⁹⁶⁶ changes in vertical relationships between a major input and output supplier in such a market can have significant competitive effects.

365. Applicants themselves have suggested conditions, analogous to those applicable to vertically integrated cable companies, to mitigate potential harms. We accept these proposed conditions as sufficient, together with our existing program access rules, to protect against any potential competitive harms with respect to ensuring non-discriminatory access to the DirecTV platform for unaffiliated

⁹⁶³ See para. 155, note 458, and para. 353, *supra*.

⁹⁶⁴ See *2002 Video Competition Report*, 17 FCC Rcd at 26903 ¶¶ 4-7, 26929-31 ¶ 58-60.

⁹⁶⁵ See Sections VI.C.4.d (Electronic Programming Guides and Interactive Television Markets) and VI.C.4.e (Fixed Satellite Services), *supra*.

⁹⁶⁶ *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20616 ¶ 139.

programming providers and for ensuring non-discriminatory access to national and non-sports regional programming for rival MVPDs. Consequently, we impose no additional remedial actions with respect to these video programming products beyond those offered by the Applicants.

366. In contrast, based on our review of the record, we find substantial evidence that competitive and consumer harms would likely result from the increase in News Corp.'s ability to leverage its market power with respect to both regional sports networks and local broadcast television once it acquires control of DirecTV. The record indicates that temporary withdrawal of regional sports programming networks and local broadcast television station signals during disputed carriage negotiations will cause a significant number of customers to shift from their current MVPD, which is subject to the foreclosure, to DirecTV. In addition, there is significant evidence in the record that the per-subscriber profits generated by each additional DirecTV subscriber are sufficiently large that the increased downstream revenues resulting from temporary foreclosure are likely to exceed the costs of foreclosure in many local markets. Accordingly, we find that, as a result of the transaction, the increased profits accruing to DirecTV and News Corp. as a result of the temporary withdrawal of regional sports programming and broadcast signals will give News Corp. an increased incentive to adopt a strategy of temporary foreclosure in order to uniformly raise the price of its broadcast television and regional sports programming and/or obtain other carriage concessions. News Corp.'s post-transaction ability to act anti-competitively to increase its competitors' programming costs is greater than it would otherwise be due to News Corp.'s post-transaction ability to off-set temporary revenue losses arising from foreclosure with increased profits accruing to DirecTV as subscribers drop the affected MVPD and subscribe to News Corp.'s affiliated MVPD. This increased ability and incentive to seek and obtain higher programming prices and/or obtain other carriage concessions through temporary foreclosure would likely lead to higher prices to MVPD consumers and thereby harm the public interest. To avoid public interest harms that would result from such conduct, we impose several conditions to maintain the balance of bargaining power between News Corp. and other MVPDs at roughly pre-transaction levels.

367. In addition, we have found that the increase in News Corp.'s market power with respect to its RSN and local broadcast station programming would likely, if not checked, permit News Corp. to inflict additional collateral damage on rival MVPDs. For example, the incremental increase in News Corp.'s market power resulting from its acquisition of control of DirecTV could be used to force MVPDs to carry or use technologies such as its electronic and interactive programming guides as conditions of accessing its "must have" programming. We also found that this same potential for increased use of temporary foreclosure would reduce program diversity on a short term basis because consumers lack access to the foreclosed programming and that, in the long run, the increased costs paid by MVPDs to News Corp. would also likely reduce program diversity because absent these increased costs, the MVPD might have elected to carry a new niche network that would have expanded the types of programming available to its subscribers. We made similar findings with respect to the impact of the transaction on viewpoint diversity.

368. To mitigate the increased market power the transaction provides to News Corp. with respect to carriage negotiations for RSN and local broadcast station signals, we impose the additional conditions described above and set forth in Appendix F below. With respect to local television broadcast stations on whose behalf News Corp. negotiates retransmission consent, we extend the good faith and exclusivity requirements of SHVIA beyond their scheduled sunset date to run concurrently with the program access rules applicable to satellite cable programming. In addition, we extend News Corp.'s proposed non-discrimination safeguards to its broadcast programming, so that News Corp. must make its programming subject to retransmission consent available to all MVPDs on a non-discriminatory basis. To deter the more frequent use of temporary foreclosure strategies following News Corp.'s acquisition of control of DirecTV, the principal harm associated with vertical integration identified in the record, we

direct News Corp. to submit carriage disputes over RSNs and local broadcast stations, at an MVPD's request, to commercial arbitration. Our commercial arbitration remedy is intended to provide a neutral backstop mechanism for the MVPD if commercial negotiations fail to produce a carriage agreement that is mutually satisfactory to News Corp. and the MVPD. Under our condition, an MVPD purchasing News Corp. RSN programming or negotiating a retransmission consent agreement may elect to send its dispute to commercial arbitration with a right of appeal to the Commission. In connection with the election of arbitration, we limit the power of News Corp. to withdraw its broadcast and RSN networks pending resolution of the carriage dispute by the arbitrator. In addition, cable operators with fewer than 5000 subscribers, for whom arbitration would be unreasonably expensive, are given special relief with respect to retransmission consent, and those with fewer than 400,000 subscribers are permitted to bargain collectively and collectively avail themselves of the arbitration remedy for both RSN and broadcast programming.

369. In assessing the potential harms and benefits of the proposed transaction, we note that the major benefit—improved service offerings under News Corp.'s innovative and aggressive management—while adequately supported under the rather unique circumstances of this case, is inherently difficult to quantify. Other claimed benefits, such as merger-related efficiencies, that are not so difficult to quantify have not been adequately supported by Applicants on the record here. Finally, consistent with our commitment to localism and as a tangible confirmation of the benefits of the proposed transaction, we adopt, as a condition of our approval, the requirement that, by year end 2004, DirecTV will offer local channel service in an additional 30 DMAs.

370. With these conditions to mitigate the potential harms and confirm the potential benefits, a fair and balanced assessment of the proposed transaction demonstrates that News Corp.'s acquisition of a controlling interest in Hughes will, as required by the Communications Act, serve "the public interest, convenience, and necessity."⁹⁶⁷

X. CONCLUSION

371. We conclude that the positive public interest benefits promised by this transaction are sufficient to support the Commission's approval of GM's, Hughes', and News Corp.'s Application, under the public interest balancing test of section 310(d) of the Communications Act, subject to the conditions specified in this Order.

XI. ORDERING CLAUSES

372. Accordingly, having reviewed the Application 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 of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the application for consent to transfer control to The News Corporation Ltd., News Publishing Australia Limited, and Fox Entertainment Group, Inc., various Commission authorizations as set forth in Appendix G, including DBS and fixed satellite space station authorizations, earth station authorizations, and other related authorizations, held by wholly- or majority-owned subsidiaries of General Motors Corporation and Hughes Electronics Corporation IS GRANTED subject to the conditions stated below.

⁹⁶⁷ See 47 U.S.C. §§ 309(a) and 310(d).

373. IT IS FURTHER ORDERED that as a condition of this grant The News Corporation Ltd., its wholly- and majority-owned subsidiaries, and Hughes Electronics Corporation shall comply with the conditions set forth in Appendix F of this Order.

374. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309 and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 309, 310(b) and (d), that the Petition to Adopt Conditions to Authorization and Licenses filed by the U.S. Department of Justice and Federal Bureau of Investigation, on November 25, 2003, IS GRANTED, and that the authorizations and licenses related thereto which are to be assigned or transferred as a result of this Order are subject to compliance with provisions of the Agreement between General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited on the one hand, and the U.S. Department of Justice and the Federal Bureau of Investigation on the other, as further set forth in Paragraph 38 and Appendix E of this Order, which Agreement is designed to address the national security, law enforcement, and public safety concerns of the U.S. Department of Justice and the Federal Bureau of Investigation regarding the authority granted herein, is fully binding upon General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited and those subsidiaries, successors and assigns of both companies that provide telecommunications services within the United States. Nothing in the Agreement is intended to limit any obligation imposed by Federal law or regulation.

375. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petitions to Deny filed by EchoStar Corporation, Center for Digital Democracy, and National Hispanic Media Coalition and all similar petitions ARE DENIED.

376. IT IS FURTHER ORDERED that the Petition to Condition the Transfer of Control filed by Wyser-Pratte Management Co., Inc., and the Petition to Designate the Application for Hearing filed by National Rural Telecommunications Cooperative ARE DENIED.

377. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE on December 19, 2003,⁹⁶⁸ in accordance with Section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁹⁶⁸ On December 19, 2003, the Commission released a public notice announcing the Commission's adoption of this *Order*. Public Notice, "Subject to Conditions, Commission Approves Transaction Between General Motors Corporation, Hughes Electronics Corporation and The News Corporation Limited," FCC 03-328 (rel. Dec. 19, 2003).

APPENDIX A**LIST OF COMMENTERS****Petitions To Deny**

Center for Digital Democracy (“CDD”)
EchoStar Satellite Corporation (“EchoStar”)
National Hispanic Media Coalition (“NHMC”)
National Rural Telecommunications Cooperative (“NRTC”)

Initial Comments

Advance/Newhouse Communications, Cable One, Cox Communications & Insight Communications (“JCC”)
American Cable Association (“ACA”)
Association of Public Television Stations and the Public Broadcasting Service (“APTS”)
Cablevision Systems Corporation (“Cablevision”)
Intelsat Global Service Corporation (“Intelsat”)
Johnson Broadcasting of Dallas, Inc. (“Johnson”)
Maranatha Broadcasting Company, Inc. (“Maranatha”)
Microcom (“Microcom”)
National Association of Broadcasters (“NAB”)
RCN Telecom Services, Inc. (“RCN”)

Opposition and Reply Comments

General Motors, Hughes Electronics Corporation and The News Corporation Limited (“Applicants”)

Reply Comments

Advance/Newhouse Communications, Cable One, Cox Communications & Insight Communications (“JCC”)
American Cable Association (“ACA”)
Cablevision Systems Corporation (“Cablevision”)
Consumer Federation of America, Consumers Union, Center for Digital Democracy & Media Access Project (“CFA”)
Maranatha Broadcasting Company, Inc. (“Maranatha”) (late-filed)
National Hispanic Media Coalition (“NHMC”) (late-filed)

APPENDIX B

MODIFICATIONS TO RULES FOR ARBITRATION
INVOLVING REGIONAL SPORTS NETWORKS

1. We modify the Rules in several respects as they apply to arbitration involving regional sports networks.

2. **Initiation of Arbitration.** Arbitration shall be initiated as provided in Rule R-4 except that, under Rule R-4 (a) (ii) the MVPD shall not be required to submit copies of the arbitration provisions of the contract, but shall instead refer to this Order in the demand for arbitration. Such reference shall be sufficient for the AAA to take jurisdiction.

3. **Appointment of the Arbitrator.** Appointment of an arbitrator shall be in accordance with rule E-4 of the Rules. Arbitrators included on the list referred to in rule E-4 (a) of the Rules shall be selected from a panel jointly developed by the American Arbitration Association and the Commission and will be based on the following criteria:

The arbitrator shall be a lawyer admitted to the bar of a state of the United States;

The arbitrator shall have been practicing law for at least 10 years;

The arbitrator shall have prior experience in mediating or arbitrating disputes concerning media programming contracts;

The arbitrator shall have negotiated or have knowledge of the terms of comparable cable programming network contracts.

4. **Exchange of Information.** At the request of any party, or at the discretion of the arbitrator, the arbitrator may direct the production of current and previous contracts between either of the parties and MVPDs, broadcast stations, video programming networks, and sports teams, leagues, and organizations as well as any additional information that is considered relevant in determining the value of the programming to the parties. Parties may request that access to information of a commercially sensitive nature be restricted to the arbitrator and outside counsel and experts of the opposing party.

5. **Administrative Fees and Expenses.** If the arbitrator finds that one parties' conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other parties costs and expenses (including reasonable attorneys' fees) against the offending party.

6. **Locale.** In the absence of agreement between the parties, the arbitration shall be held in the city that contains the headquarters of the MVPD.

7. **Form of Award.** The arbitrator shall render a written award containing the arbitrator's findings of fact and reasons supporting the award. If the award contains confidential information, the arbitrator shall compile two versions of the award; one containing the confidential information and one with such information redacted. The version of the award containing the confidential information shall only be disclosed to persons bound by the Protective Order issued in connection with the arbitration. The parties shall include such confidential version in the record of any review of the arbitrator's decision by the Commission.

APPENDIX C

MODIFICATIONS TO RULES FOR ARBITRATION
INVOLVING RETRANSMISSION CONSENT

1. We modify the Rules in several respects as they apply to arbitration over retransmission consent.

2. **Initiation of Arbitration.** Arbitration shall be initiated as provided in Rule R-4 except that, under Rule R-4 (a) (ii) the MVPD shall not be required to submit copies of the arbitration provisions of the contract, but shall instead refer to this Order in the demand for arbitration. Such reference shall be sufficient for the AAA to take jurisdiction

3. **Appointment of the Arbitrator.** Appointment of an arbitrator shall be in accordance with rule E-4 of the Rules. Arbitrators included on the list referred to in rule E-4 (a) of the Rules shall be selected from a panel jointly developed by the American Arbitration Association and the Commission and will be based on the following criteria:

- a. The arbitrator shall be a lawyer admitted to the bar of a state of the United States;
- b. The arbitrator shall have been practicing law for at least 10 years;
- c. The arbitrator shall have prior experience in mediating or arbitrating disputes concerning media programming contracts;
- d. The arbitrator shall have negotiated or have knowledge of the terms of retransmission contracts.

4. **Exchange of Information.** At the request of any party, or at the discretion of the arbitrator, the arbitrator may direct the production of current and previous contracts between either of the parties and MVPDs and broadcast stations as well as any additional information that is considered relevant in determining the value of the programming to the parties. Parties may request that access to information of a commercially sensitive nature be restricted to the arbitrator and outside counsel and experts of the opposing party.

5. **Administrative Fees and Expenses.** If the arbitrator finds that one parties' conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other parties costs and expenses (including reasonable attorneys' fees) against the offending party.

6. **Locale.** In the absence of agreement between the parties, the arbitration shall be held in the city that contains the headquarters of the MVPD.

7. **Form of Award.** The arbitrator shall render a written award containing the arbitrator's findings of fact and reasons supporting the award. If the award contains confidential information, the arbitrator shall compile two versions of the award; one containing the confidential information and one with such information redacted. The version of the award containing the confidential information shall only be disclosed to persons bound by the Protective Order issued in connection with the arbitration. The parties shall include such confidential version in the record of any review of the arbitrator's decision by the Commission.

APPENDIX D

TECHNICAL APPENDIX

I. STAFF ANALYSIS OF THE LIKELIHOOD OF FORECLOSURE IN THE BROADCAST TELEVISION PROGRAMMING MARKET

1. The two primary scenarios of competitive harm that have been alleged are: (1) permanent foreclosure, where the broadcast signal is permanently removed from rival MVPDs and (2) temporary foreclosure, where the broadcast signal is removed for a brief period, possibly during the negotiations for retransmission consent. We first analyze the allegations that following the transaction Applicants will have an incentive to permanently withhold consent to retransmit the local broadcast signal from rival MVPDs. While Cablevision and JCC believe that temporary foreclosure is much more likely in this situation,¹ other commenters argue that permanent foreclosure is also a legitimate concern.² Our analysis is similar for both forms of the alleged harm. We determine the number of consumers that must switch to DirecTV to compensate News Corp. for the loss in revenue that occurs when the signal is removed from rival MVPDs. We refer to this as the critical value. If more than this number of customers are likely to switch to DirecTV following the withdrawal of the local broadcast signal, then News Corp. would find it profitable to withhold the local broadcast signal from a rival MVPD.

A. Permanent Withdrawal of the Broadcast Signal from Rival MVPDs

2. Concerned parties in this proceeding have alleged that the transaction will give News Corp. an increased incentive and ability to profitably withhold consent to retransmit broadcast television signals from rival MVPDs.³ Applicants argue that permanently withholding the right to retransmit the signals of News Corp. owned and operated (“O&O”) broadcast television stations would not be profitable given the likely reactions of consumers.⁴ Applicants estimate that DirecTV would need to increase its market share from 13% to between 44% and 53%, depending on the assumptions used.⁵ We analyze the incentives to engage in permanent withdrawal of the broadcast signal from rival MVPDs weighing the arguments of the parties over the various methods and assumptions used in the analysis.⁶ In addition to analyzing the incentives to withhold the signals of News Corp.’s owned and operated stations, we analyze the incentives to withhold the local broadcast signals of independently owned affiliates. We perform this calculation because evidence in the record indicates that [REDACTED].⁷ We begin with determining the loss News Corp. will suffer if it permanently removes its local broadcast signal from rival MVPDs. If News Corp. removes its signal from rival MVPDs it stands to lose the

¹ JCC Aug. 4 Ex Parte, Rogerson Analysis II at 15; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 6.

² EchoStar Petition at 14-15; ACA Comments at 10-11.

³ *Id.*

⁴ Applicants’ Reply at 39.

⁵ Applicant’s Reply, CRA Analysis, ¶ 71 and ¶ 73.

⁶ Many of the values used in analyzing the situation of temporary withdrawal are also used in analyzing a situation of permanent withdrawal, we will discuss some of the values proposed by the parties for use in the analysis of temporary withdrawal as they arise in our analysis of permanent withdrawal.

⁷ [REDACTED].

advertising revenues from those consumers that remain with the rival MVPDs but no longer receive the local broadcast station's signal. Since the signal remains available over the air, some fraction of the rival MVPD viewers will continue to watch News Corp. broadcast programming, therefore reducing the economic loss suffered by News Corp. News Corp. stands to gain a share of the additional profits DirecTV will earn from the consumers that switch from rival MVPDs as well as the advertising revenues those new subscribers generate for the local broadcast station. Our critical value is then the number of rival MVPD subscribers that must switch to DirecTV in order for the revenue loss from the foreclosure to equal the revenue gain to News Corp.⁸

3. The analysis requires a number of values to complete the calculation. News Corp. has provided information on the advertising revenues earned by each of its broadcast stations and the Fox broadcast network, and in the absence of any objections from commenters, we accept these values as presented.⁹ In addition, we use information on the advertising revenues of independently owned local affiliates from the BIA Master Access Database. Applicants also have presented calculations on the additional profit, or profit margin, DirecTV earns on each additional subscriber. Applicants use a value of [REDACTED] before factoring in a subscriber acquisition cost of [REDACTED] per subscriber.¹⁰ Cablevision questions the values used by Applicants, and instead suggests that a more reasonable value would be \$29.84 prior to factoring in subscriber acquisition costs.¹¹ They base their proposal on an unexplained analysis of SEC filings. We find Applicants' detailed documentation of DirecTV revenues, variable costs, and subscriber acquisition costs convincing, and will use these values in our analysis. We also must account for the fact that subscriber acquisition costs are a one-time expense associated with the acquisition of a new customer. To do this we follow the standard method, used by both Applicants and commenters, of amortizing those costs over the length of time that the subscriber is expected to stay with DirecTV.¹² To perform the amortization, two values are required, the average tenure of a subscriber and an appropriate discount, or interest, rate to use in spreading out the one-time cost over the tenure of the subscriber. Cablevision assumes the average tenure of a subscriber to be 60 months based on an analyst's report,¹³ while Applicants report that the actual value for DirecTV subscribers is [REDACTED] months.¹⁴ We will use an average subscriber tenure of [REDACTED] months since DirecTV is likely to have more accurate information regarding its subscribers than is an unaffiliated analyst, though we note that the difference between these two values is relatively minor. The difference between the discount rates used by Applicants and JCC in their analyses is more substantial. Applicants use a rate of [REDACTED], based on the so-called hurdle rate used by DirecTV in its planning

⁸ Mathematically, the critical value is
$$\left[\frac{(1-a) \cdot (Ad\ Revenue) \cdot (RivalMVPDSubs)}{s \cdot (DTV\ Profits) + (Ad\ Revenue)} \right]$$
, where 'a'

represents the fraction of rival MVPD subscribers that obtain the News Corp. broadcast programming off of the air and 's' represents the share of DirecTV profits that will accrue to News Corp.

⁹ News Corp. July 28, 2003 Response [REDACTED] and Applicants' Reply, CRA Analysis ¶ 70.

¹⁰ Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶ 23 and DirecTV July 30, 2003 Response [REDACTED].

¹¹ Cablevision Sept. 25 Ex Parte, Rubinfeld Analysis II at 11-12.

¹² Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶ 23; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 29.

¹³ Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 16, citing SG Cowen, *DBS Sector Upgrade*.

¹⁴ Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶ 23.

processes,¹⁵ and Cablevision offers a range of between 5% and 10% with a stated preference for using News Corp.'s weighted average cost of capital of 8%.¹⁶

4. We find that the use of the hurdle rate would be an inappropriate value to use for discounting cash flows. The hurdle rate is "the rate of interest in a capital budgeting study that a proposed project must exceed before it can be regarded as worthy of consideration."¹⁷ "The hurdle rate is often based on the cost of capital or the weighted average cost of capital, adjusted by a factor to represent the risk characteristics of the projects under consideration."¹⁸ We prefer to use a more objective measure of the opportunity cost of capital to the firm such as the weighted average cost of capital.¹⁹ However, we note that News Corp.'s weighted average cost of capital is unusually low when compared with MVPDs.²⁰ We will use 10% as our discount rate, this is a reasonable compromise between News Corp.'s weighted average cost of capital, which does not include the impact of MVPD operations, and the weighted average cost of capital of firms in the MVPD industry.

5. The previous discussion focused on determining the profit margin on customers serviced by DirecTV. However, not all customers receiving DirecTV services are serviced by DirecTV; some are serviced by the National Rural Telecommunications Cooperative (NRTC). Some of the customers that shift to DirecTV service in the event of a permanent withdrawal of a broadcast station signal will be serviced by NRTC rather than DirecTV. DirecTV earns a substantially lower margin on these customers. Applicants estimate that this value is less than [REDACTED] per NRTC subscriber per month.²¹ Absent any further data, we will use this value as the profit margin on DirecTV customers serviced by NRTC in our analysis. We will assume that the customers switching to DirecTV after a permanent withdrawal will be serviced by DirecTV and NRTC in the same proportion as existing customers in the DMA.

6. Before performing the calculation we must identify reasonable values for the share of rival MVPD customers that will use over-the-air reception to obtain the broadcast signal. Applicants, in their analysis, use the figure of 33%.²² Cablevision assumes values of 33% and 50% and JCC use the

¹⁵ *Id.*

¹⁶ Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 13. Estimates of Fox Entertainment Group's weighted average cost of capital range between 8.8% and 9.7%. JP Morgan Securities, *Media & Entertainment: December 2002 Quarterly Review and Outlook*, Feb. 24, 2003 at 28; Bank of America Securities, *Entertainment Industry Overview*, July 2003 at 163.

¹⁷ *A Dictionary of Finance and Banking 2nd Edition*, Oxford University Press, 1997 at 167.

¹⁸ *Id.*

¹⁹ "The WACC is a company cost of capital. Strictly speaking, it works only for projects that are carbon copies of the firm's existing assets, in both business risk and financing. Often it is used as a companywide benchmark discount rate; the benchmark is adjusted upward for unusually risky projects and downward for unusually safe ones." Richard A. Brealey and Stewart C. Myers, *Principles of Corporate Finance, 5th Edition*, McGraw-Hill, 1996 at 523.

²⁰ See for example Morgan Stanley, *The Copernicus Theorem*, July 2, 2003 which reports weighted average costs of capital for the major firms in the MVPD industry ranging from 10.0% to 11.25%.

²¹ Applicants' Reply, CRA Analysis at fn. 39.

²² Applicants' Reply, CRA Analysis ¶ 73.

complete range of possible values.²³ No one has presented any evidence to indicate what an appropriate value should be. We will use a value of 33%, since in our judgment it is a reasonable approximation, being twice the fraction of television households that currently receive video programming only via broadcast reception.²⁴

7. We also need to determine the allocation of the additional profits that would be generated by the withholding of programming. Applicants have suggested the use of two different figures: 34%, representing the fraction of Hughes Electronics that would be acquired by News Corp. pursuant to the transaction documents as well as 50%, representing the fraction of Hughes that News Corp. is permitted to acquire without further approval by Hughes stockholders.²⁵ Cablevision and JCC argue that a value of 100% is more appropriate and would be consistent with joint profit maximization.²⁶ News Corp. counters that there are strong checks on News Corp.'s ability to engage in self-dealing, including an independent audit committee.²⁷ Cablevision and JCC argue that the harms being analyzed result from the joint profit maximizing behavior of both firms and that "News Corp. and DirecTV would simply strike a bargain that maximized their joint profits and then distribute the gains so that everyone would be better off."²⁸ We reject the 34% value since the new Hughes certificate of incorporation allows News Corp. to acquire up to 50% ownership without further approval by Hughes stockholders.²⁹ We instead analyze the transaction's effects assuming a 50% division of the additional joint profits earned through the withdrawal of programming, as well as 100%. We analyze the worst-case scenario where News Corp. obtains 100% of the additional joint profits generated by a foreclosure strategy for several reasons. As our discussion of corporate governance has pointed out, the incentive and ability of DirecTV's audit committee to ensure arms-length contracting between News Corp. and DirecTV is limited.³⁰ In addition, we note that any split of the additional profits in excess of News Corp.'s ownership share would not make Hughes stockholders worse off. This is because any DirecTV profits achieved through foreclosure would result directly from the actions of News Corp., and those profits would not otherwise be available to Hughes stockholders. The proposed joint endeavors between News Corp. and DirecTV that are a basis for many of the Applicant's claimed benefits provide ample opportunities to compensate News Corp. for the losses in programming revenue associated with foreclosure and make the strategy profitable for both firms and their stockholders.

8. Applicants calculate the critical value based on the average advertising revenues of all News Corp. owned and operated stations as well as average market shares of cable and DBS in the United States.³¹ Applicants find that on average, it would not be profitable to engage in permanent

²³ Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 13; JCC Aug. 4 Ex Parte, Rogerson Analysis II at 54.

²⁴ *2002 Annual Video Competition Report* ¶ 4.

²⁵ Applicants' Reply, CRA Analysis at 52.

²⁶ JCC Aug. 4 Ex Parte, Rogerson Analysis II at 11; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 18.

²⁷ Applicants' Reply, CRA Analysis at 53.

²⁸ JCC Aug. 4 Ex Parte, Rogerson Analysis II at 11.

²⁹ Hughes Electronics Corporation, SEC Form S-4, June 5, 2003 at 26.

³⁰ See Section IV.C.2.

³¹ Applicants' Reply, CRA Analysis ¶ 73.

foreclosure. We find this analysis incomplete and suffering from the “fallacy of division.”³² Accordingly, we will calculate the critical values that would make permanent foreclosure of broadcast station’s programming at the smallest geographic level possible. Ideally that would be at the level of a cable franchise within a Nielsen Designated Market Area (“DMA”). However, we do not have reliable figures on cable subscribers by franchise in a DMA. We do have estimates of the cable and DirecTV households in a DMA.³³ Therefore we perform our calculations at the DMA level and assume that the programming is withdrawn from all competing MVPDs within the DMA. We find this a reasonable assumption and a feasible strategy since [REDACTED].³⁴

9. Our analysis of the incentives for News Corp. to permanently withhold retransmission consent of broadcast signals from rival MVPDs indicates that this strategy is unlikely to be profitable to News Corp. and its affiliates. If News Corp. could claim 50% of joint profits of a withdrawal strategy, it would find a withdrawal of the local broadcast station from rival MVPDs to be profitable if, depending on the broadcast station, between [REDACTED] and [REDACTED] of cable customers switched to a DBS provider. If News Corp. receives 100% of the joint profits from the strategy, the percentage of rival MVPD customers that must switch to make temporary foreclosure profitable is between [REDACTED] and [REDACTED] for the various local broadcast stations. Table A-1 presents the percentage of all rival MVPD subscribers that reside in areas where News Corp. would find it profitable to permanently withdraw the local broadcast signal. This value will depend on the percent of rival MVPD subscribers that shift in response to the removal of the local broadcast station from their chosen MVPD. We hypothesize a range of values from [REDACTED] to [REDACTED]. If we can expect [REDACTED] of rival MVPD customers to defect to DirecTV following a withdrawal of the broadcast station, News Corp. would find the withdrawal a profitable endeavor against companies serving [REDACTED] of all rival MVPD subscribers if News Corp. can lay claim to 50% of the additional joint profits. If News Corp. gains 100% of the additional joint profits, [REDACTED] of all rival MVPD subscribers would be at risk from suffering under a permanent withdrawal of the programming.

10. Table A-1. Percentage of Rival MVPD Subscribers at Risk of a Permanent Withdrawal of their Local Broadcast Signal.[REDACTED]

B. Temporary Withdrawal of the Broadcast Signal from Rival MVPDs

11. Commenters raise the concern that the more likely harm to rivals will occur from the temporary withdrawal of the broadcast signal from rival MVPDs, rather than permanent withdrawal. Cablevision estimates that DirecTV need only add between 0.7 and 1.4 points to its market share for temporary withholding of the broadcast signal to be profitable.³⁵ Applicants argue that using more

³² The “fallacy of division” occurs when one argues that what is true for the whole is also true for the parts. In this context, News Corp. argues that since it would not be profitable to permanently withhold retransmission consent of all of its owned and operated stations, it would also be true that it is not profitable to withhold consent for any single station.

³³ DirecTV July 30, 2003 Response [REDACTED]; BIA MasterAccess Database of Television Stations. We assume that the number of subscribers to EchoStar is proportional to DirecTV’s share in the DMA in the same proportion as the two firms’ market shares nationally.

³⁴ News Corp. July 28, 2003 Response [REDACTED].

³⁵ Cablevision Sept. 25 Ex Parte, Rubinfeld Analysis II at 13.

appropriate assumptions, DirecTV would need to increase its market share by [REDACTED] points.³⁶ In our analysis of the incentives to engage in temporary foreclosure, we build upon the assumptions evaluated in our permanent withholding analysis, and examine several new factors.

12. The possibility of temporary foreclosure presents a different risk of competitive harms. Under this strategy, News Corp. would remove its broadcast signal from rival MVPDs for a short period of time, thereby limiting the loss in advertising revenues it incurs. JCC point out that this withdrawal benefits Applicants in two ways.³⁷ The first benefit is the same as that analyzed under the hypothesis of permanent foreclosure where the additional customers switching to DirecTV generate profits that accrue to DirecTV and are shared with News Corp. The second benefit accrues solely to News Corp. That benefit is the increased compensation for retransmission consent that News Corp. will be able to extract from MVPDs due to the reduction in the costs of withholding retransmission consent and the greater credibility that the threat of withholding carries. Our analysis of the incentives to temporarily foreclose the local broadcast signals from rival MVPDs is only able to measure the effect of the first benefit, the additional profits that are earned when consumers switch to DirecTV. The effect of the increased credibility of withholding of retransmission on the compensation for retransmission of the local broadcast station's signal is difficult to quantify. As JCC point out, the effect of this increased credibility can have a substantial effect on compensation, even when the profits that accrue from switching subscribers cannot compensate for the advertising revenues lost due to foreclosure.³⁸ However, the extent of the effect depends on the relative strengths of the bargaining positions of News Corp. and MVPDs. There is no evidence in the record regarding the relative strengths of News Corp. and MVPDs in this area, therefore we are unable to estimate the full magnitude of the increase in the incentive and ability to obtain additional compensation in return for granting retransmission consent. Our analysis will provide an estimate of increased incentive and ability that is likely to occur due to the additional profit News Corp. earns when consumers switch from rival MVPDs to DirecTV, as such it is an estimate of the *minimum* increase in incentive and ability to obtain additional compensation from MVPDs.

13. Unlike the case of permanent foreclosure, with temporary foreclosure, the timing of the various effects becomes important. Because some of the consumers that switch to DirecTV will return to their previous MVPD after the period of withdrawal, we must account for the timing of the subscriber acquisition costs as well as the timing of consumers' return to their original MVPD. We adopt a discounted cash flow approach to allow us to compare these benefits and costs over time.³⁹ DirecTV requires that customers agree to purchase 12 months of programming before DirecTV will provide free or subsidized equipment and installation.⁴⁰ Because [REDACTED], we assume that all of the customers

³⁶ Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶ 24.

³⁷ JCC Sept. 23 Ex Parte, Rogerson Analysis III at 2.

³⁸ JCC Sept. 23 Ex Parte, Rogerson Analysis III at 7-9.

³⁹ The discounted cash flow analysis is the method used by both Cablevision (Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis) and Applicants (Applicants' Sept. 8 Ex Parte, CRA Analysis II) when examining the incentives to engage in temporary withholding of programming. It is the standard method for comparing flows of costs and benefits that vary over time. See for example Richard A. Brealey and Stewart C. Myers, *Principles of Corporate Finance*, 5th Edition, McGraw-Hill, 1996, Chapter 3.

⁴⁰ Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶ 12.

that switch to DirecTV agree to purchase twelve months of programming.⁴¹ After that period of time, a number will return to their previous MVPD. Applicants report that [REDACTED] of new DirecTV customers drop service over the course of one year.⁴² They believe that a larger fraction of the customers induced to switch because of the temporary withholding will leave and consequently assume that [REDACTED] customers will leave after the first year.⁴³ Following the initial churn of these new customers, Applicants assume that these new customers will exit at DirecTV's average churn rate of [REDACTED] per month.⁴⁴ Cablevision and JCC argue that customers who switched to DirecTV due to the temporary withdrawal are, if anything, less likely to churn than the average DirecTV customer.⁴⁵ We assume this initial churn rate is [REDACTED], which is [REDACTED] the normal 12 month churn rate of DirecTV. We base this value on the regression analysis described later in this appendix where we analyze the impact on DirecTV customer disconnects of the introduction of the YES cable network on Cablevision cable systems in New York, which signaled the return of New York Yankees baseball games to those systems. Our analysis also indicates that [REDACTED]. Therefore, following the initial churn of these new customers, we assume that the continuing churn rate of these new customers will be equal to [REDACTED] per month.

14. Cablevision suggests that an additional adjustment should be made to account for the positive impact the temporary foreclosure would have on the future growth rate of DirecTV.⁴⁶ We reject this proposed adjustment. In Section I.C of this appendix we examine the effects of the temporary withdrawal of a local broadcast station signal from one of DirecTV's competitors and [REDACTED].

15. With these assumptions, as well as those discussed in analyzing the impact of permanent withholding of the local broadcast station's signal, the losses and gains from a temporary foreclosure can be calculated. Applicants, as well as Cablevision, propose that the calculation for the withholding of retransmission rights for a local broadcast station be based upon a one month withholding.⁴⁷ We will adopt this assumption as well. In the first period News Corp. will suffer the loss of a month's worth of advertising revenue. In the succeeding month, the temporary foreclosure will have ended and News Corp. will no longer suffer the loss associated with it and is assumed to earn the same advertising revenue and compensation from retransmission consent as it did prior to the withholding. The gain experienced by News Corp. will be its share of the profit margin from each new customer that arrives from a rival MVPD. News Corp. also will be assessed its share of the one-time subscriber acquisition costs associated with each new subscriber. For 11 successive months, News Corp. will earn its share of the profit margin on the customers that shifted due to the temporary foreclosure. It continues to receive these profits because these customers, in order to receive free installation and equipment, have committed to purchase 12 months of DirecTV programming. However, in the thirteenth month, when the new customers' commitments expire, DirecTV will lose [REDACTED] of the customers it acquired

⁴¹ DirecTV July 30, 2003 Response [REDACTED].

⁴² Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶ 15

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ JCC Sept. 23 Ex Parte, Rogerson Analysis III at 14; Cablevision Sept. 25 Ex Parte, Rubinfeld Analysis II at 9.

⁴⁶ Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 14.

⁴⁷ Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶ 23; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 6.

due to the temporary foreclosure. In each continuing month, DirecTV will lose [REDACTED] of the remaining customers. Given this monthly pattern of gains and losses, we discount the earnings of future periods using a discount rate of 10%. We calculate the number of rival MVPD customers that must switch to DirecTV for the one month withdrawal to be profitable to News Corp. and DirecTV for each owned and operated broadcast station as well as independently owned affiliates of the Fox Broadcast Network.

16. Our analysis indicates that a temporary withdrawal of local broadcast signals from rival MVPDs is a credible negotiating tactic. It demonstrates that in most areas of the country, following the transaction, News Corp. can earn additional profits based on the consumers that switch to DirecTV when the local broadcast signal is withheld from rival MVPDs. Rival MVPDs facing this situation during retransmission consent negotiations will have two choices, either give News Corp. additional considerations for retransmission consent or have News Corp. earn those additional profits through the mechanism of temporary withholding. If News Corp. could claim 50% of joint profits of a withdrawal strategy, it would find a withdrawal of the local broadcast station's signal from rival MVPDs to be profitable if, depending on the broadcast station, between [REDACTED] and [REDACTED] of cable customers switched to DirecTV. If News Corp. receives 100% of the joint profits from the strategy, the percentage of rival MVPD customers that must switch to make temporary foreclosure profitable is between [REDACTED] and [REDACTED] for the various broadcast stations. Table A-2 presents the percentage of rival MVPD subscribers that reside in areas where News Corp. would find it profitable to temporarily withhold the local broadcast signal. This value depends on the percent of subscribers to rival MVPDs that shift in response to the one month withdrawal of the local broadcast station from their MVPD. We examine the extent of the profitability of temporary withholding for a range of values of the consumer response. If [REDACTED] of rival MVPD customers defect to DirecTV following a withdrawal of the local broadcast station, News Corp. would find the withdrawal profitable in areas with [REDACTED] of rival MVPD subscribers if News Corp. can lay claim to 50% of the joint profits. If News Corp. gains 100% of the joint profits, [REDACTED] of rival MVPD subscribers are at risk from suffering under a temporary withdrawal of the programming.

17. Table A-2. Percentage of Rival MVPD Subscribers at Risk of a Temporary Withdrawal of their Local Broadcast Signal. [REDACTED]

C. Estimation of the Impact of the Withdrawal of a Broadcast Station from Rival MVPDs on DirecTV

18. The preceding analysis of the incentives to either permanently or temporarily withhold a broadcast signal from a rival MVPD informs us about the necessary responses from consumers to make the hypothesized harms real. Cablevision has analyzed the results of a retransmission consent dispute between Time Warner and the ABC owned and operated broadcast television station in Houston.⁴⁸ Based on their early analysis, they believe that as many as 3% of Time Warner's subscribers may have switched to DirecTV. Subsequent econometric analysis led to a refinement in their conclusion. Cablevision argues that DirecTV [REDACTED] of MVPD subscribers in the Houston DMA.⁴⁹

⁴⁸ Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 3-5.

⁴⁹ Letter from Tara Corvo, , Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Nov. 20, 2003), Daniel L. Rubinfeld and Duncan Cameron, Estimating the Effect on MVPD Subscribership of the May 2000 Withholding of ABC Network Retransmissions from Time Warner Houston Cable Subscribers at 11.

Applicants argue that the situation in Houston is not relevant since it involved a case of a cable company removing the broadcast signal from its system rather than a broadcaster withholding the signal from a cable company.⁵⁰ We disagree with the Applicant's position. The value of the Houston incident is not in determining which firm found it more advantageous to carry through on the removal or withholding of the signal. The value is in analyzing how Time Warner customers reacted when the signal was no longer available on the cable system. To that extent, Applicants have not convinced us that the specific details in Houston bias estimates of consumer reactions to the withdrawal of a broadcast signal from a cable system.

19. We approach the problem from the standpoint of researchers estimating the impact of a policy. We obtain data from two separate groups. A control group which is unaffected by the policy for the entire period under observation, and a treatment group, that for some period of time has the policy applied to them. In the case at hand, the policy or treatment is the removal of the ABC affiliate from the Time Warner cable system. Our treatment group consists of those ZIP codes within the Houston DMA that where Time Warner offers service to at least 75% of the households. For our control group we use those ZIP codes within the Houston DMA where Classic Cable or Northwoods Cable offer service to at least 75% of the households.⁵¹ Both firms in the control group carried the ABC affiliate on an uninterrupted basis during 2000. We measure the effect of these events on the growth rate in DirecTV subscribers for each month between December 1999 and July 2000.

20. We use an econometric method known as "fixed effects estimation."⁵² This method estimates DirecTV's subscriber growth rate in a ZIP code as depending on a ZIP code-specific effect, which varies across ZIP codes, but does not vary over time, and a time-specific effect which varies over time, but is the same across all ZIP codes. The treatment effect is measured by indicator variables for the Time Warner ZIP codes for each month between December of 1999 and July of 2000. These indicator variables will measure the difference between DirecTV's growth in Time Warner ZIP codes and in the Classic and Northwoods ZIP codes after accounting for the factors that are due either to constant characteristics of the ZIP code, such as household income, population density, and consumer preferences, or effects at one point in time that affect both sets of ZIP codes equally, such as changes in DirecTV programming.

21. The estimated monthly difference in DirecTV's growth rate in areas served by Time Warner as compared to the control group that was not in a retransmission consent dispute is given in table A-3. The results indicate a statistically significant increase in the growth rate of DirecTV in the ZIP codes where consumers were continually being told that they were likely to be losing access to the ABC affiliate on the incumbent cable operator.⁵³

⁵⁰ Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶¶ 21-22.

⁵¹ To make a determination of which ZIP codes and the fraction of households that fall within the service areas of the firms we use the May 2003 GDT Dynamap 2000 ZIP code boundaries, 3rd Quarter 2002 incumbent cable operator service territories from MediaPrints™, ©Warren Communications News Inc. and The Janus Group, and 2000 Census Summary File 1.

⁵² See Jeffrey Wooldridge, *Econometric Analysis of Cross Section and Panel Data*, The MIT Press, 2002, Chapter 10.

⁵³ See for example, Mike McDaniel, *Picture Looking Dark in TV Feud, Channel 13 May Go Off Cable Tonight*, HOUSTON CHRONICLE, March 9, 2000.

22. Table A-3. Additional DirecTV Subscriber Growth in Houston due to Retransmission Consent Dispute between ABC and Time Warner. [REDACTED]

23. We can calculate the impact of the warnings and actual withdrawal of the ABC affiliate from Time Warner cable systems in Houston by applying the excess growth rates [REDACTED].⁵⁴ [REDACTED] Therefore, we estimate that the effect on DirecTV of the withdrawal of broadcast programming from the rival cable operator was an additional [REDACTED] subscribers. We estimate that because of the 39-hour withdrawal of the ABC affiliate Time Warner lost [REDACTED] of its customer base to DirecTV. If we assume that EchoStar gained customers at a rate equivalent to its market share relative to DirecTV, Time Warner would have lost a further [REDACTED] of its customer base to EchoStar.

24. We would like to verify our assumptions about the churn rate of DirecTV customers following the return of the signal, but are unable to do so, because the churn resulting from this incident would not evidence itself until 2001 when the 1-year contracts signed by consumers expired. The data submitted by DirecTV exhibits a discontinuity between 2000 and 2001 due to the acquisition and conversion of PrimeStar customers. Consequently, we must rely on our analysis of churn following the return of withdrawn regional sports programming.

II. STAFF ANALYSIS OF THE LIKELIHOOD OF FORECLOSURE IN THE REGIONAL SPORTS NETWORK MARKET

25. The analysis of the incentive and ability of News Corp. to withhold carriage of regional sports networks (RSNs) from DirecTV's competitors in the MVPD market closely follows the methods used in the analysis of the same issue in the local broadcast programming market. We calculate the number of consumers that must switch to DirecTV to compensate for the loss in revenue when a cable system no longer carries the RSN. As with our analysis of the withholding of broadcast television station signals, we consider cases of permanent and temporary withholding.

A. Permanent Withdrawal of the Regional Sports Network from Rival MVPDs

26. The case of permanent foreclosure differs slightly from that examined in the local broadcast station segment since RSN programming is generally not available over the air. If News Corp. removes its RSN from a rival MVPD it loses the advertising revenues associated with all of those subscribers, not just a fraction as was the case with the local broadcast station. In addition to a loss in advertising revenue, there is also the loss in the affiliate fees paid by the rival MVPD for the right to carry the RSN. The gain to News Corp. of a permanent withholding strategy is its share of the joint profits earned from the consumers that switch from the rival MVPD, as well as the affiliate fees and advertising revenues those consumers bring with them.

27. Applicants assert that permanent withholding of a RSN from a rival MVPD is not a rational economic act.⁵⁵ Their analysis, using the same method as they employed in analyzing the

⁵⁴ This estimate is based upon DirecTV October 24, 2003 Response to the Commission's Second Information and Document Request [REDACTED] as well as GDT ZIP code boundaries and MediaPrints™ cable system boundaries.

⁵⁵ Applicants' Reply at 27-36.

permanent withholding of a broadcast station, indicates that for the strategy to be profitable DirecTV's market share must increase between 93% and 128%.⁵⁶

28. News Corp. has provided the affiliation revenue and subscriber counts of each MVPD distributing a RSN it manages, as well as the aggregate advertising revenues for each network.⁵⁷ From these data we calculate the average advertising revenue per subscriber for each RSN. We also calculate the average revenue per subscriber for each RSN carried by each MVPD. In association with subscriber counts, these are the costs of removing a RSN from a rival MVPD.

29. A portion of the benefits of removing a RSN from a rival MVPD are the additional profits that accrue from those customers that switch to DirecTV service. We use the same value we used when calculating the critical values for the withholding of a broadcast station signal. News Corp. also receives the RSN affiliate fees and advertising revenue the switching customers generate. We make one significant modification from the analysis of permanent withholding of broadcast station signals. We assume that the RSN is withdrawn from the competing cable company, but not from EchoStar. We make this assumption because [REDACTED].⁵⁸ The effect of this assumption is to reduce the number of cable subscribers defecting to DirecTV following the withdrawal of the RSN from the rival cable provider. Since EchoStar also carries the RSNs, some of the defecting cable subscribers will choose to purchase service from EchoStar rather than DirecTV. News Corp. will not share in any of the additional profit EchoStar earns from those customers, but it will receive advertising revenues as well as affiliate fees. We assume that switching cable subscribers go to the two DBS companies in the same proportion as the firms' national market shares, 42% will go to EchoStar and 58% will go to DirecTV.⁵⁹ As in the previous analysis, we calculate the critical values for situations where News Corp. can lay claim to 50% and 100% of the joint profits generated by the withdrawal of the RSN.⁶⁰

30. We calculate a critical value for each of [REDACTED] cable systems carrying a RSN owned and managed by News Corp.⁶¹ This allows us to replicate the pattern of previous withdrawals and [REDACTED], as well as address ACA's claims that small cable companies are particularly vulnerable to this tactic.⁶² We do not calculate a critical value for any RSNs carried by EchoStar because

⁵⁶ Applicants' Reply, CRA Analysis at 51.

⁵⁷ News Corp. July 28, 2003 Response [REDACTED].

⁵⁸ See News Corp. July 28, 2003 Response [REDACTED].

⁵⁹ Applicants' Reply, CRA Analysis ¶ 32.

⁶⁰ The critical value is

$$\left[\frac{(Ad\ Revenue + CableAffiliateFee) \bullet (RivalCableSubs)}{\alpha \bullet (s \bullet (DTV\ Profits) + DTVAffiliateFee) + (1 - \alpha) \bullet EchoAffiliateFee + Ad\ Revenue} \right], \text{ where}$$

's' represents the share of the joint profits that will accrue to News Corp. and 'α' is the fraction of subscribers leaving cable that shift to DirecTV.

⁶¹ We do not perform this calculation for Fox Sports Net Rocky Mountain because it has only recently merged with Fox Sports Net Utah and the exact status of carriage and revenue amounts are unclear.

⁶² ACA Comments at 18.

we do not possess sufficient information about the locations and market shares of the cable systems that carry and do not carry the relevant RSNs to make precise calculations regarding News Corp.'s incentives to withhold programming. However, to the extent that DirecTV and EchoStar are much closer substitutes, News Corp. would have an even greater incentive to withhold programming from EchoStar since a larger fraction of EchoStar's customers would be likely to shift to DirecTV than to cable.

31. The analysis of the incentives for News Corp. to permanently withhold regional sports networks from rival MVPDs indicates that this is unlikely to be a profitable endeavor for News Corp. If News Corp. could claim 50% of the joint profits from a withdrawal strategy, it would find permanently withholding a RSN from a rival MVPD to be profitable if between [REDACTED] and [REDACTED] of cable customers switched to a DBS provider. If News Corp. receives 100% of the joint profits from the strategy, the percentage of the rival MVPD's customers that must switch to make permanent foreclosure profitable is between [REDACTED] and [REDACTED]. Table A-4 presents the percentage of all rival cable subscribers that reside in areas where News Corp. would find it profitable to permanently withdraw its RSN. This value will depend on the percent of rival cable subscribers that shift to DBS in response to the removal of the local broadcast station from their chosen MVPD. We hypothesize a range of values from [REDACTED] to [REDACTED]. If we can expect [REDACTED] of rival cable customers to defect to DBS following a withdrawal of the RSN, News Corp. [REDACTED] when they can lay claim to 50% of the additional joint profits. If News Corp. gains 100% of the additional joint profits, [REDACTED] of all rival cable subscribers would be at risk from suffering under a permanent withdrawal of the programming.

32. Table A-4. Percentage of Cable Subscribers at Risk of a Permanent Withdrawal of Regional Sports Programming. [REDACTED]

B. Temporary Withdrawal of Regional Sports Networks from Rival MVPDs

33. JCC argue that the more likely harm is from temporary withdrawal of an RSN during pricing disputes as a tactic to negotiate higher affiliate fees, rather than the threat to permanently withdraw the RSN.⁶³ They estimate that as few as [REDACTED] of cable subscribers must shift to DirecTV for a strategy of temporary withholding to be a credible threat in affiliate fee negotiations.⁶⁴ Applicants instead contend that at least [REDACTED] of cable subscribers must shift to DirecTV for News Corp. to earn a profit by temporarily withholding a RSN.⁶⁵

34. The analysis of temporary foreclosure of RSNs by News Corp. takes a slightly different tack than the analysis of temporary foreclosure of the local broadcast stations' signals. In that analysis, the losses and gains of foreclosure were based on advertising revenue, which were the same regardless of which MVPD in a DMA was the rival. With RSNs, the losses from foreclosure also depend upon the affiliate fees, and those vary across MVPDs. Therefore we will analyze a temporary foreclosure situation assuming that News Corp. removes an RSN from a specific MSO, but not from EchoStar. Again, we analyze this scenario because [REDACTED]. As with our analysis of permanent foreclosure of a RSN, we do not have adequate data to allow us to analyze the likelihood of a temporary withdrawal of a RSN from EchoStar, [REDACTED].

⁶³ JCC Aug. 4 Ex Parte, Rogerson Analysis II at 2.

⁶⁴ JCC Sept. 23 Ex Parte, Rogerson Analysis III at 11.

⁶⁵ Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶ 16.

35. Applicants' in their calculations assume that the withdrawal of the RSN lasts for three months, after which time it is returned to the rival MVPD.⁶⁶ JCC suggests that a more appropriate assumption would be a one month withdrawal, the same period as Applicants and Cablevision use to analyze the profitability of withdrawal of a broadcast television station signal.⁶⁷ As with the temporary foreclosure analysis of the local broadcast station market, we will assume that the foreclosure lasts for one month, during which time a fraction of the MSO's subscribers will shift to a DBS provider carrying the RSN. We assume that switching cable subscribers go to the two DBS companies in the same proportion as their national market shares, 42% will go to EchoStar and 58% will go to DirecTV.⁶⁸ We will also assume that the rate at which customers return to their original MVPD is the same regardless which DBS firm they moved to. The pattern will match that of our local broadcast station analysis in that no customers will leave the DBS firms for the first 12 months following the temporary foreclosure, [REDACTED] will leave once their contracts expire, and in all following months, [REDACTED] of the remaining customers will return to their original MVPDs.

36. Under this scenario, the cost to News Corp. of the temporary foreclosure in the first month is the foregone affiliate fees from the cable company for the first month, as well as the advertising revenues those subscribers would have generated. In subsequent months, News Corp. will continue to lose a fraction of the affiliate fees and advertising revenue from the cable provider since a portion of the cable subscriber base will have switched to EchoStar and DirecTV, although over time as subscribers shift back to cable, this loss diminishes. The gain to News Corp. in the first month consists of its share of DirecTV's profit margin minus the subscriber acquisition cost. It receives this gain from the 58% of defecting cable subscribers that choose to switch to DirecTV. It also receives affiliate fees and advertising revenue from DirecTV and EchoStar for the fractions of defecting subscribers that switch to those services. In the second through twelfth months, News Corp. receives its share of DirecTV's additional profits as well as the RSN affiliate fees and advertising revenues from the DBS providers. In the thirteenth month, [REDACTED] of the former cable customers that switched to DirecTV and EchoStar will return to the cable MSO. In each subsequent month, EchoStar and DirecTV will lose [REDACTED] of the remaining customers. These flows of costs and benefits are discounted in the same manner as in our analysis of the broadcast station segment.

37. Our analysis of the incentives for News Corp. to engage in a strategy of temporary foreclosure against any of the [REDACTED] MSOs carrying a News Corp.-managed RSN indicates that there is a strong possibility that this type of behavior can be profitable following the transaction. If News Corp. could claim 50% of the additional joint profits, it would find a one month temporary withdrawal of the RSN to be profitable if, depending on the RSN and cable operator, between [REDACTED] and [REDACTED] of cable customers switched to a DBS provider. If News Corp. can lay claim to 100% of the additional joint profits, the percentage of cable customers that must switch to make temporary foreclosure profitable is between [REDACTED] and [REDACTED] for the various cable operators and RSNs. Table A-5 presents the percentage of rival cable subscribers that reside in areas where News Corp. would find it profitable to temporarily withhold its RSN. This value depends on the percent of subscribers to cable companies that shift in response to the one month withdrawal of the RSN. We examine the extent of the profitability of temporary withholding for a range of values of the consumer

⁶⁶ *Id.*

⁶⁷ JCC Sept. 23 Ex Parte, Rogerson Analysis III at 10.

⁶⁸ Applicants' Reply, CRA Analysis ¶ 32.

response. If [REDACTED] of cable customers defect to DirecTV following a withdrawal of the RSN, News Corp. would find the withdrawal profitable in areas with [REDACTED] of RSN cable subscribers if News Corp. can lay claim to 50% of the joint profits. If News Corp. gains 100% of the joint profits, [REDACTED] of RSN cable subscribers are at risk from suffering under a temporary withdrawal of the programming.

38. Table A-5. Percentage of Cable Subscribers at Risk of a Temporary Withdrawal of Regional Sports Programming. [REDACTED]

C. Estimation of the Impact on DirecTV of the Withdrawal of Regional Sports Networks from Rival MVPDs

39. Parties in this proceeding have alleged that News Corp., once the transaction has been completed, will have an incentive to engage in temporary foreclosure as a strategy to increase rates for the Fox-managed RSNs, as well as shift subscribers from rival MVPDs to DirecTV. At the heart of these claims are suppositions about how consumers react when a RSN is removed from one MVPD, but remains available on other MVPDs. We estimate the actual shifts in subscribers that occurred during periods when the Yankees Entertainment and Sports Network (YES) was unavailable to subscribers of the Cablevision cable system and the EchoStar DBS service, but was available to DirecTV subscribers.

40. On March 19, 2002 the YES network was launched as a regional sports network in the New York area. At the time of launch, the network had agreements with several professional sports teams, as well as an assortment of local high school and college sporting events. At launch, the network carried New York Yankees baseball games.⁶⁹ In November of 2002 New Jersey Nets basketball games became available.⁷⁰ These teams had previously been available on competing RSNs which were carried by many local cable companies and both DBS providers.⁷¹ Prior to launch, YES network reached affiliate agreements with 35 cable companies as well as DirecTV.⁷² It did not reach an agreement with either Cablevision or EchoStar. On March 31, 2003, approximately 25 minutes prior to the start of the first Yankees game of the season, Cablevision and YES reached an interim agreement for carriage.⁷³ EchoStar still does not carry the YES network.

41. This episode of availability, followed by withdrawal, followed by availability exhibits the pattern of temporary foreclosure proposed by some parties in this proceeding. Several parties have argued that this episode can provide a prime example of the likely shifts in MVPD subscribers when faced with a temporary withdrawal of a RSN.⁷⁴ Applicants argue that the impact on Cablevision of the loss of New York Yankees games, as well as other professional sports teams, was on the order of 30,000

⁶⁹ Christopher Schultz, *The Starting Lineup*, Cable World, March 18, 2002.

⁷⁰ Steve Zipay, *Nets Latest Victim of Cablevision Greed*, Newsday, November 13, 2002.

⁷¹ Erin McClam, *Opening Day Deal for Cablevision, YES Network*, Associated Press, April 1, 2003.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ JCC Sept. 23 Ex Parte, Rogerson Analysis III at 16; Applicants' Sept. 8 Ex Parte, CRA Analysis II at 10-11; Letter from Pantelis Michalopoulos, Steptoe and Johnson, L.L.P., to Marlene H. Dortch, Secretary, FCC (Dec. 15, 2003) ("EchoStar Dec. 15 Ex Parte") at 4-5.

customers.⁷⁵ However no party conducted a thorough examination of the effect of this episode on the numbers of DirecTV subscribers, while accounting for pre-existing patterns of subscriber shifts which are naturally occurring in the MVPD marketplace.⁷⁶

42. We approach the problem in the same fashion as we estimated the impact of the warnings and ultimate withdrawal of the ABC affiliate in Houston. We obtain data from two separate groups. A control group which is unaffected by the policy for the entire period under observation, and a treatment group, that for some period of time has the policy applied to them. The policy or treatment is the removal of Yankees and Nets games from the cable system. Our treatment group consists of those ZIP codes within the New York DMA that are wholly served by Cablevision. For our control group we use those ZIP codes within the New York DMA that are wholly served by Time Warner, which had reached an agreement to carry the YES network.⁷⁷ We measure the effect of these events on the growth rate in DirecTV subscribers for each month between January 2001 and June 2003.

43. Table A-6 presents the estimated treatment effects for each month since January 2002. The values represent the additional percentage growth in subscribers above what would have been predicted to occur had Cablevision been carrying the YES network. The pattern in growth rates follows what we might reasonably expect to see happen. [REDACTED].

44. Table A-6. Additional DirecTV Subscriber Growth in New York due to YES Dispute with Cablevision. [REDACTED]

45. We can calculate the short-term impact of the withdrawal of New York Yankees games by applying the excess growth rates [REDACTED].⁷⁸ [REDACTED].⁷⁹ Therefore we estimate that the withdrawal of Yankees games during April of 2002 cost Cablevision [REDACTED] of its customer base. If we assume that a similar shift away from Cablevision would occur if both competitors, EchoStar and DirecTV, carried the desired programming but Cablevision did not, our results indicate that DirecTV would capture [REDACTED] of Cablevision's customers and EchoStar would capture [REDACTED] during a one month withdrawal of programming. Over the entire one-year course of the dispute, our analysis predicts that DirecTV gained an additional [REDACTED] subscribers due to the absence of the YES network on Cablevision and EchoStar. This equates to an increase of [REDACTED] of DirecTV customers and a loss of [REDACTED] to Cablevision.

⁷⁵ Some press reports put this figure as high as 39,400. See for example Erin McClam, *Opening Day Deal for Cablevision, YES Network*, Associated Press, April 1, 2003.

⁷⁶ EchoStar did perform an analysis of its loss in customers due to its lack of the YES network. However, the additional incentive to engage in temporary foreclosure that this transaction creates is derived from the customers that shift to DirecTV. EchoStar's analysis only examines an unknown fraction of that shift. EchoStar Dec. 15 Ex Parte, Exhibit 1.

⁷⁷ To make a determination of which ZIP codes fall within the service areas of the two firms we use the May 2003 GDT Dynamap 2000 ZIP code boundaries and the 3rd Quarter 2002 incumbent cable operator service territories from MediaPrints™.

⁷⁸ This estimate is based upon DirecTV July 30, 2003 Response [REDACTED] as well as GDT ZIP code boundaries and MediaPrints™ cable system boundaries.

⁷⁹ CSC HOLDINGS INC 8-k, May 15, 2003.

46. Applicants have argued that the maximum shift from Cablevision to DirecTV was on the order of 30,000 subscribers for the entire one year period. We reject that estimate for a number of reasons. First and foremost, we have no information on how this value was generated and what factors it takes into account. Cablevision's SEC reports indicate that between December 2000 and December 2001 the percentage of homes served rose from 68.0% to 69.4%. However, by the end of March 2002, this penetration rate had fallen to 69.1% of homes passed. This decline continued through March 2003, when it reached a low of 67.5%. The most recent figures, for June of 2003, indicate that this trend has been reversed, with the penetration rate rising to 67.6%. Cablevision passes slightly more than 4 million homes in the New York area, so each point of penetration corresponds to approximately 40,000 customers. This naive analysis would indicate that Cablevision may have lost 64,000 customers over the course of the year in which it did not carry YES. Cablevision's own data indicate a substantial loss in customers, a loss in excess of the 30,000 claimed by Applicants.

47. We also need to assess the extent to which the return of withdrawn programming to an MVPD provider influences the behavior of consumers. Applicants argue that once the temporarily withdrawn programming has returned to an MVPD those households that switched to DirecTV are more likely to leave DirecTV and return to their previous service providers.⁸⁰ Other parties however argue that those customers that switched may be less likely to move back for a number of reasons, including a concern that the programming may be withdrawn again.⁸¹ Using the same technique as we did to examine the shift in consumers, we can examine the churn, or disconnect, rate of DirecTV subscribers in Time Warner and Cablevision service areas of the New York DMA. Our previous regression results indicate that [REDACTED]. Estimating exactly the same regression specification with the exception of using the percentage of customers disconnecting in a month as the dependent variable, we find [REDACTED]. We would have expected the monthly disconnect rate in Cablevision ZIP codes to have been [REDACTED]. Therefore, we will assume that the disconnect rate is [REDACTED] that for other DirecTV customers in the time period when the DirecTV contracts expire for those customers who shifted due to the temporary withdrawal. Applicants report that [REDACTED] of customers drop DirecTV service after 1 year, so we estimate that [REDACTED] of customers induced to switch to DirecTV during a temporary withdrawal will drop DirecTV service once their contract expires.

⁸⁰ Applicants' Sept. 8 Ex Parte, CRA Analysis II ¶ 12

⁸¹ JCC Aug. 4 Ex Parte, Rogerson Analysis II at 17; Cablevision Sept. 25 Ex Parte, Rubinfeld Analysis II at 9.

APPENDIX E

**HUGHES ELECTRONICS CORPORATION
(hereinafter called the "Corporation")
AMENDED AND RESTATED BY-LAWS****EXHIBIT 1**STOCKHOLDERS

Section 1. Annual Meeting; Notice of Stockholders Nominations and Other Proposed Stockholder Action. The Annual Meeting of the stockholders for the purpose of electing Directors and for the transaction of such other business as may properly come before the meeting in accordance with these By-Laws, shall be held at such place, on such date, and at such time as may be fixed by the Board of Directors (the "Board") and stated in the notice of meeting.

(a) Nominations of persons for election to the Board and the proposal of business to be transacted by the stockholders may be made at an Annual Meeting of stockholders (i) pursuant to the Corporation's notice with respect to such meeting, (ii) by or at the direction of the Board or (iii) by any stockholder of record of the Corporation who was a stockholder of record at the time of the giving of the notice provided for in the following paragraph, who is entitled to vote at the meeting and who has complied with the notice procedures set forth in Section 1(b) below.

(b) For nominations or other business to be properly brought before an Annual Meeting of stockholders by a stockholder pursuant to clause (iii) of the foregoing paragraph, (i) the stockholder must have given timely notice thereof in writing to the Secretary of the Corporation; (ii) such business must be a proper matter for stockholder action under the General Corporation Law of the State of Delaware (the "DGCL"); (iii) if the stockholder has provided the Corporation with a Solicitation Notice (as defined herein) such stockholder must, in the case of a proposal, have delivered a proxy statement and form of proxy to holders of at least the percentage of the Corporation's voting shares required under applicable law to carry any such proposal, or, in the case of a nomination or nominations, have delivered a proxy statement and form of proxy to holders of a percentage of the Corporation's voting shares reasonably believed by such stockholder to be sufficient to elect the nominee or nominees proposed to be nominated by such stockholder, and must, in either case, have included in such materials the Solicitation Notice; and (iv) if no Solicitation Notice relating thereto has been timely provided pursuant to this Section 1, the stockholder or Beneficial Owner proposing such business or nomination must not have solicited a number of proxies sufficient to have required the delivery of such a Solicitation Notice under this Section 1.

To be timely, a stockholder's notice shall be delivered to the Secretary of the Corporation at the principal executive offices of the Corporation not later than the close of business on the 120th day nor earlier than the close of business on the 150th day prior to the first anniversary (the "Proxy Mailing Anniversary") of the date on which the Corporation first mailed its proxy materials for the preceding year's Annual Meeting of stockholders; provided, however, that if the date of the Annual Meeting is advanced more than 30 days prior to or delayed by more than 30 days after the anniversary of the preceding year's Annual Meeting, notice by the stockholder to be timely must be so delivered not later than the close of business on the later of (i) the 150th day prior to the first anniversary of the preceding year's Annual Meeting or (ii) the 10th day following the day on which public announcement of the date of such meeting is first made.

Such stockholder's notice shall set forth (i) as to each person whom the stockholder proposes to nominate for election or reelection as a Director all information relating to such person as would be required to be disclosed in solicitations of proxies for the election of such nominees as Directors pursuant to Regulation 14A under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and such person's written consent to be named as a nominee and to serve as a Director if elected; (ii) as to any other business that the stockholder proposes to bring before the meeting, a brief description of such business, the reasons for conducting such business at the meeting and any material interest in such business of such stockholder; and (iii) as to the stockholder giving the notice (A) the name and address of such stockholder, as they appear on the Corporation's books, (B) the class and number of shares of the Corporation that are owned beneficially or of record by such stockholder, and (C) whether either such stockholder intends to deliver a proxy statement and form of proxy to holders of, in the case of a proposal, at least the percentage of the Corporation's voting shares required under applicable law to carry the proposal or, in the case of a nomination or nominations, a sufficient number of holders of the Corporation's voting shares to elect such nominee or nominees (an affirmative statement of such intent, a "Solicitation Notice").

Notwithstanding anything in the second sentence of Section 1(b) to the contrary, in the event that (x) the number of Directors to be elected to the Board is increased and (y) there is no public announcement naming all of the nominees for Director or specifying the size of the increased Board made by the Corporation on or prior to the 120th day prior to the Proxy Mailing Anniversary, a stockholder's notice required by this By-Law shall also be considered timely, but only with respect to nominees for any new positions created by such increase, if it shall be delivered to the Secretary at the principal executive offices of the Corporation not later than the close of business on the 10th day following the day on which such public announcement is first made by the Corporation.

Only persons nominated in accordance with the procedures set forth in this Section 1(b) shall be eligible to serve as Directors and only such business shall be conducted at an Annual Meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this Section 1(b). The chairman of the meeting shall have the power and the duty to determine whether a nomination or any business proposed to be brought before the meeting has been made in accordance with the procedures set forth in these By-Laws and, if any proposed nomination or business is not in compliance with these By-Laws, to declare that such defective proposed business or nomination shall not be presented for stockholder action at the meeting and shall be disregarded.

Nominations by stockholders of persons for election to the Board may be made at a special meeting of stockholders if the stockholder's notice required by this Section 1(b) shall be delivered to the Secretary at the principal executive offices of the Corporation not later than the close of business on the later of the 150th day prior to such special meeting or the 10th day following the day on which public announcement is first made of the date of the special meeting and of the nominees proposed by the Board to be elected at such meeting.

For purposes of this Section 1, "public announcement" shall mean disclosure in a press release reported by the Dow Jones News Service, Associated Press or a comparable national news service or in a document publicly filed by the Corporation with the Securities and Exchange Commission pursuant to Section 13, 14 or 15(d) of the Exchange Act.

Notwithstanding the foregoing provisions of this Section 1(b), a stockholder shall also comply with all applicable requirements of the Exchange Act and the rules and regulations

thereunder with respect to matters set forth in this Section 1(b). Nothing in this Section 1(b) shall be deemed to affect any rights of stockholders to request inclusion of proposals in the Corporation's proxy statement pursuant to Rule 14a-8 under the Exchange Act.

Section 2. Special Meetings; Notice.

Special meetings of the stockholders, other than those required by statute, may be called at any time by (a) the Board pursuant to a resolution approved by a majority of the Board, (b) the Chairman or a Vice Chairman or (c) any stockholder of the Corporation who Beneficially Owns (as defined herein) 10% or more of the Corporation's Voting Securities (as defined herein) then outstanding. No other person or persons may call a special meeting of stockholders except as provided in the Company's Certificate of Incorporation, as amended from time to time (the "Certificate of Incorporation"). Only such business as is stated in the notice may be acted upon thereat. The foregoing notwithstanding, unless otherwise provided in the Certificate of Incorporation, whenever the holders of any one or more outstanding series of Preferred Stock shall have the right, voting separately by class or by series, as applicable, to elect Directors at any Annual Meeting or special meeting of stockholders, the calling of special meetings of the holders of such class or series shall be governed by the terms of the applicable resolution or resolutions of the Board establishing such series of preferred stock pursuant to the Certificate of Incorporation. The Board may postpone or reschedule any previously scheduled special meeting.

Nominations of persons for election to the Board may be made at a special meeting of stockholders at which Directors are to be elected pursuant to the Corporation's notice of meeting (a) by or at the direction of the Board, or (b) by any stockholder of record of the Corporation who is a stockholder of record at the time of the giving of notice provided for in Section 1(b) of this Article I entitled to vote at the meeting who complies with the notice provisions set forth in Section 1(b) of this Article I.

Section 3. Notice of Meetings; Adjournment.

Except as otherwise provided herein or required by "applicable law" (meaning, here and hereinafter, as required from time to time by the DGCL) or the Certificate of Incorporation, written notice of the place, date, and time of all meetings of the stockholders and the purpose or purposes for which such meeting is called shall be given by mailing, postage prepaid, a copy of such notice addressed to each stockholder of the Corporation entitled to vote at such meeting at his address as recorded on the books of the Corporation, not less than 10 nor more than 60 days before the date on which the meeting is to be held.

Any meeting may be adjourned from time to time, whether or not there is a quorum, either (i) in the discretion of the chairman of the meeting where necessary for the proper and orderly conduct of the meeting (including, without limitation, where necessary to tabulate any vote the tabulation of which is necessary for the continued conduct of the meeting) or (ii) by vote of the holders of a majority of the voting power of the shares of stock present at the meeting.

When a meeting is adjourned to another place, date or time, written notice need not be given of the adjourned meeting if the place, date and time thereof are announced at the meeting at which the adjournment is taken; provided, however, that if the date of any adjourned meeting is more than 30 days after the date for which the meeting was originally noticed, or if a new record date is fixed for the adjourned meeting, written notice of the place, date and time of the adjourned meeting shall be given in

conformity herewith. At any adjourned meeting, any business may be transacted which might have been transacted at the original meeting.

Section 4. Quorum.

At any meeting of the stockholders, the holders of a majority of all of the shares of the stock entitled to vote at the meeting, present in person or represented by proxy, shall constitute a quorum for all purposes, unless or except to the extent that the presence of a larger number may be required by these By-Laws, the Certificate of Incorporation or by applicable law. Where a separate vote by a class or classes or series is required by law or by the Certificate of Incorporation, a majority of the shares of such class or classes or series present in person or represented by proxy shall constitute a quorum entitled to take action with respect to that vote on that matter.

If a quorum shall fail to attend any meeting, the chairman of the meeting may adjourn the meeting from time to time, without notice other than by announcement to the meeting, to another date, place and time until a quorum shall be present.

Section 5. Organization.

The Chairman of the Board of the Corporation, or, in his or her absence, such person as the Board may have designated or, in the absence of such a person, such person as may be chosen by the holders of a majority of the shares entitled to vote who are present, in person or represented by proxy, shall call to order any meeting of the stockholders and act as chairman of the meeting. The Secretary of the Corporation, or if he or she is not present, any Assistant Secretary, or in the absence of any Assistant Secretary of the Corporation, any person the chairman of the meeting appoints shall act as the Secretary of the meeting.

Section 6. Place of Meeting.

Meetings of the stockholders for the election of Directors or for any other purpose shall be held at such time and place, either within or outside the State of Delaware, as shall be designated from time to time by the Board and stated in the notice of the meeting or in a duly executed waiver of notice thereof.

Section 7. Conduct of Business.

The date and time of the opening and closing of the polls for each matter upon which the stockholders will vote at the meeting shall be announced at the meeting. The Board may adopt by resolution such rules and regulations for the conduct of meetings as it shall deem appropriate. Except to the extent inconsistent with such rules and regulations as adopted by the Board, the chairman of any meeting shall have the right and authority to prescribe such rules, regulations and procedures and to do all such acts as, in the judgment of the chairman, are appropriate for the proper conduct of the meeting. Such rules, regulations or procedures, whether adopted by the Board or prescribed by the chairman of the meeting, may include, without limitation, the following: (i) the establishment of an agenda or order of business at the meeting; (ii) rules and procedures for maintaining order at the meeting and the safety of those present; (iii) limitations on attendance at or participation in the meeting of stockholders of record of the Corporation, their duly authorized and constituted proxies and such other persons as the chairman of the meeting shall determine; (iv) restrictions on entry to the meeting after the time fixed for the commencement thereof; and (v) limitations on the time allotted to questions or comments by participants.

Section 8. Proxies and Voting.

At any meeting of the stockholders, every stockholder entitled to vote may vote in person or by proxy authorized by an instrument in writing or by a transmission permitted by law filed in accordance with the procedure established for the meeting. Unless otherwise provided in the Certificate of Incorporation, each stockholder represented at a meeting of stockholders shall be entitled to cast one vote for each share of capital stock entitled to vote thereat held by such stockholder. If the Certificate of Incorporation provides for the issuance of any class or series of stock which is convertible into any other class or series of stock, as a condition to counting the votes cast by any holder of shares at any annual or special meeting of stockholders, the Board or a duly authorized committee thereof, in its discretion, may require the holder of any shares to furnish such affidavits or other proof as the Board or such committee deems necessary and advisable to determine whether such shares have been converted pursuant to the terms governing the issuance and conversion of such shares in the Certificate of Incorporation. Any copy, facsimile telecommunication or other reliable reproduction of the writing or transmission created pursuant to this paragraph may be substituted or used in lieu of the original writing or transmission for any and all purposes for which the original writing or transmission could be used, provided that such copy, facsimile telecommunication or other reproduction shall be a complete reproduction of the entire original writing or transmission. All voting, except as may be required by law, including voting for the election of Directors may be by a voice vote; provided, however, that upon demand therefor by a stockholder entitled to vote or by his or her proxy, or upon resolution by the Board in its discretion or by action of the chairman of the meeting, in his or her discretion, a stock vote may be taken. Every stock vote shall be taken by written ballots, each of which shall state the name of the stockholder or proxy voting and such other information as may be required under the procedure established for the meeting. Unless otherwise specified by the Certificate of Incorporation or these By-Laws, (i) at all meetings of stockholders for the election of Directors, a plurality of the votes cast shall be sufficient to elect, and (ii) any other question brought before any meeting of stockholders shall be determined by the votes cast affirmatively or negatively by the holders of a majority of the stock represented and entitled to vote thereon.

Section 9. Stock List.

The officer of the Corporation who has charge of the stock ledger of the Corporation shall prepare and make, at least 10 days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, during ordinary business hours, for a period of at least 10 days prior to the meeting, either at a place within the city where the meeting is to be held, which place shall be specified in the notice of the meeting, or, if not so specified, at the place where the meeting is to be held. The list shall also be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder of the Corporation who is present. The stock ledger of the Corporation shall be the only evidence as to who are the stockholders entitled to examine the list required by this Section 9 or the books of the Corporation, or to vote in person or by proxy at any meeting of stockholders.

Section 10. Inspector of Elections.

Before any meeting of stockholders, the Board shall appoint one or more inspectors to act at the meeting and make a written report thereof. The Board may designate one or more persons as

alternate inspectors to replace any inspector who fails to act. If no inspector or alternate is able to act at a meeting of stockholders, the chairman of the meeting shall appoint one or more inspectors to act at the meeting. Each inspector, before entering upon the discharge of his or her duties, shall take and sign an oath faithfully to execute the duties of inspector with strict impartiality and according to the best of his or her ability.

The inspectors shall, in accordance with these By-Laws and the Certificate of Incorporation, ascertain the number of shares outstanding and the voting power of each, determine the shares represented at the meeting and the validity of proxies and ballots, count all votes and ballots, determine and retain for a reasonable period a record of the disposition of any challenges made to any determination made by the inspectors, and certify their determination of the number of shares represented at the meeting and their count of all votes and ballots.

The inspectors may appoint or retain other persons or entities to assist the inspectors in the performance of their duties. In determining the validity and counting of proxies and ballots, the inspectors shall act in accordance with applicable law.

BOARD OF DIRECTORS

Section 1. Number, Election and Term of Directors.

Except as otherwise fixed by or pursuant to the provisions of the Certificate of Incorporation relating to the rights of the holders of any class or series of preferred stock, the number of Directors of the Corporation shall be fixed from time to time by resolution adopted by a majority of the entire Board, but the number of Directors shall at no time be less than eleven (11) and initially shall be eleven (11). Directors need not be stockholders. Directors shall (except as hereinafter provided for the filling of vacancies) be elected by the holders of the shares of stock entitled to vote thereon, by a plurality vote thereof, at the Annual Meeting of stockholders. Each Director so elected shall hold office until such Director's successor is duly elected and qualified, or until such Director's death, or until such Director's earlier disqualification, resignation, retirement or removal.

Section 2. Certain Definitions. For the purposes of these By-Laws:

“Acquisition-Related Agreements” means the Merger Agreement, the Stock Purchase Agreement and any other Transaction Agreements (as defined in the Stock Purchase Agreement).

“Affiliate” with respect to any person shall mean any other person who, directly or indirectly, controls, is controlled by or is under common control with such person.

“Beneficially Owns” (and variations thereof) shall have the same meaning as under Section 13(d) of the Exchange Act and Regulation 13D-G thereunder (or any successor provision of law).

“Employee Director” means a Director, who at the time of taking office as a Director, is an employee of the Corporation or any Subsidiary of the Corporation.

“Independent Director” means a director who qualifies as an “independent director” under the rules and regulations of the New York Stock Exchange in effect from time to time; provided,

however, that if, at any particular time, the New York Stock Exchange has not then adopted a definition of “independent director”, “Independent Director” shall mean a director who, as determined in good faith by the Board (other than the “Independent Director” in question), has no relationship to the Corporation that may interfere with the exercise of his or her independence from management of the Corporation and the Corporation and no material relationship with any member of the Purchaser Group (as defined in the Certificate of Incorporation) or any Purchaser Successor (as defined in the Certificate of Incorporation). “Merger Agreement” shall mean the Agreement and Plan of Merger, dated as of April 9, 2003, as amended, by and among the Corporation, The News Corporation Limited and GMH Merger Sub, Inc.

“Purchaser” means The News Corporation Limited and any successor (by merger, consolidation, transfer of assets or otherwise) to all or substantially all of its business and assets, which also succeeds to ownership of all or substantially all of its ownership of Voting Securities.

“Stock Purchase Agreement” shall mean the Stock Purchase Agreement, dated as of April 9, 2003, as amended, by and among The News Corporation Limited, GMH Merger Sub, Inc., and General Motors Corporation.

“Subsidiary” with respect to a Person, means any corporation, limited liability company, partnership, trust or unincorporated organization of which such Person owns, directly or indirectly, 50% or more of the outstanding stock or other equity interests, the holders of which are entitled to vote for the election of the board of directors or others performing similar functions with respect to such corporation, limited liability company, partnership, trust or unincorporated organization.

“Voting Securities” means the common stock, par value \$0.01 per share, of the Corporation and any shares of capital stock of the Corporation entitled to vote generally in the election of Directors. A stated percentage of the Voting Securities shall mean a number of shares of the Voting Securities as shall equal in voting power that stated percentage of the total voting power of the then outstanding shares of Voting Securities entitled to vote in the election of Directors.

Section 3. Nomination of Directors.

(a) Only persons who are nominated in accordance with the following procedures shall be eligible for election as Directors of the Corporation, except as may be otherwise provided in the Certificate of Incorporation with respect to the right of holders of any class or series of preferred stock of the Corporation to nominate and elect a specified number of Directors in certain circumstances. Nominations of persons for election to the Board may be made at any Annual Meeting of stockholders, or at any special meeting of stockholders called for the purpose of electing Directors, (i) by or at the direction of the Nominating Committee or (ii) by any stockholder of record of the Corporation who is a stockholder of record at the time of the giving of notice provided for in Section 1(b) or Section 2 of Article I entitled to vote at the meeting who complies with the notice provisions set forth in Section 1(b) of Article I.

Section 4. Newly Created Directorships and Board Vacancies.

Subject to applicable law and except as otherwise provided for or fixed by or pursuant to the Certificate of Incorporation relating to the rights of the holders of any class or series of preferred stock with respect to such class or series of preferred stock, newly created Directorships resulting from any increase in the authorized number of Directors or, subject to Section 12(b) of this Article II below, any vacancies on the Board resulting from death, resignation, retirement, disqualification, removal from office or other cause between meetings of stockholders shall be filled only by the affirmative vote of a majority

of all of the Directors then in office, even if less than a quorum, or a duly appointed committee of the Board, but in any event not by the stockholders. Directors so chosen shall hold office until such Director's successor shall have been duly elected and qualified or until his earlier death, resignation, retirement, disqualification or removal from office in accordance with the Certificate of Incorporation, these By-Laws, or any applicable law or pursuant to an order of a court. No decrease in the number of authorized Directors constituting the entire Board shall shorten the term of any incumbent Director.

Section 5. Regular Meetings.

A meeting of the Board shall be held after the Annual Meeting of the stockholders and regular meetings of the Board shall be held at such place or places, on such date or dates, and at such time or times as shall have been established by the Board and publicized among all Directors. Meetings may be held either within or outside the State of Delaware. A notice of each regular meeting shall not be required.

Section 6. Special Meetings.

Special meetings of the Board may be called by the Chairman of the Board, by the Vice Chairman, by the President or by two or more Directors then in office and shall be held at such place, on such date, and at such time as they or he or she shall fix. Meetings may be held either within or outside the State of Delaware. Notice thereof, stating the place, date and time of each such special meeting shall be given each Director by whom it is not waived by mailing written notice not less than four (4) days before the meeting or personally by telephone, or electronic mail, facsimile transmission of notice, or by similar means of communication not less than 12 hours before the meeting or on such shorter notice as the person or persons calling the meeting may deem necessary and appropriate under the circumstances. Unless otherwise indicated in the notice thereof, any and all business may be transacted at a special meeting.

Section 7. Quorum.

Except as may be otherwise provided by applicable law, the Certificate of Incorporation or these By-Laws, at all meetings of the Board, a majority of the entire Board shall constitute a quorum for the transaction of business. The act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board. The Directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present.

Section 8. Participation in Meetings by Conference Telephone.

Members of the Board, or of any committee thereof, may participate in a meeting of such Board or committee by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other and such participation shall constitute presence in person at such meeting.

Section 9. Conduct of Business; Action by Written Consent.

At any meeting of the Board, business shall be transacted in such manner as the Board may from time to time determine, and all matters shall be determined by the vote of a majority of the Directors present, except as otherwise provided herein or required by law. The Board may take action

without a meeting if all members thereof consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board.

Section 10. Powers.

The property, business and affairs of the Corporation shall be managed by or under the direction of the Board which may exercise all such powers of the Corporation and do all such lawful acts and things as are not by statute or by the Certificate of Incorporation or by these By-Laws directed or required to be exercised or done by the stockholders of the Corporation, including, without limiting the generality of the foregoing, the unqualified power:

- (1) To declare dividends from time to time in accordance with law;
- (2) To purchase or otherwise acquire any property, rights or privileges on such terms as it shall determine;
- (3) To authorize the creation, making and issuance, in such form as it may determine, of written obligations of every kind, negotiable or non-negotiable, secured or unsecured, and to do all things necessary in connection therewith;
- (4) To remove any officer of the Corporation with or without cause, and from time to time to devolve the powers and duties of any officer upon any other person for the time being;
- (5) To confer upon any officer of the Corporation the power to appoint, remove and suspend subordinate officers, employees and agents;
- (6) To adopt from time to time such stock option, stock purchase, bonus or other compensation plans for Directors, officers, employees and agents of the Corporation and its Subsidiaries as it may determine;
- (7) To adopt from time to time such insurance, retirement, and other benefit plans for Directors, officers, employees and agents of the Corporation and its Subsidiaries as it may determine; and
- (8) To adopt from time to time regulations, not inconsistent with these By-Laws, for the management of the Corporation's business and affairs.

Section 11. Compensation of Directors.

Unless otherwise restricted by the Certificate of Incorporation, the Board shall have the authority to fix the compensation of the Directors. The Directors may be paid their expenses, if any, of attendance at each meeting of the Board and may be paid a fixed sum for attendance at each meeting of the Board or paid a stated salary or paid other compensation as Director. No such payment shall preclude any Director from serving the Corporation in any other capacity and receiving compensation therefor. Members of special or standing committees may be allowed like compensation for attending committee meetings.

Section 12. Removal; Employee Director Removal.

(a) Except as otherwise provided by the Certificate of Incorporation, any Director may be removed from office with or without cause but only by the affirmative vote of the holders of a majority of the combined voting power of the then outstanding shares of stock of the Corporation entitled to vote for the election of Directors, voting together as a single class.

(b) Notwithstanding anything set forth in this Section 12, unless otherwise determined by the Board, an Employee Director shall cease to be qualified to serve as a Director and shall automatically be removed from office (an "Employee Director Removal") without any action on the part of the stockholders or the other members of the Board, if such person ceases to be an employee of the Corporation or any one of its Subsidiaries, with the removal of such Director to take place upon the earliest of (i) such Director's cessation of employment, (ii) delivery by such Employee Director to the Corporation, or such Subsidiary or Subsidiaries, as the case may be, of a notice of resignation of employment, or (iii) delivery by the Corporation or one of its Subsidiaries, as the case may be, to such Employee Director of a notice of termination of employment.

Section 13. Special Election or Appointment.

Notwithstanding anything to the contrary contained in Section 3 and Section 4 of this Article II, any Directors elected or appointed (including to fill a vacancy due to the increase of the size of the Board), in accordance with Exhibit A to the Merger Agreement (or otherwise agreed upon by and among the parties to the Merger Agreement) so as to take office not later than immediately following the Merger Effective Time (as defined in the Merger Agreement), shall be deemed to be validly elected and appointed irrespective of the provisions of the above referenced Sections.

COMMITTEES

Section 1. Committees of the Board.

The Board, by a vote of a majority of the entire Board then in office, may from time to time designate committees of the Board, with such lawfully delegable powers and duties as it thereby confers, to serve at the pleasure of the Board and shall, for those committees and any others provided for herein, elect a Director or Directors to serve as the member or members, designating, if it desires, other Directors as alternate members who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of any member of any committee and any alternate member in his or her place, the member or members of the committee present at the meeting and not disqualified from voting, whether or not he or she or they constitute a quorum, may by unanimous vote appoint another member of the Board to act at the meeting in the place of the absent or disqualified member. Notwithstanding the foregoing provisions of this Section if either (A) required by the applicable rules and regulations of the New York Stock Exchange or the Securities and Exchange Commission (in each case, as may be amended from time to time) or (B) under the Certificate of Incorporation the Board is required to consist of a majority of Independent Directors, then from and after the Merger Effective Time, and for so long as the conditions in clauses (A) or (B) above are satisfied, the Standing Committees (as defined herein), shall at all such times consist solely of Independent Directors, except as otherwise provided by these By-Laws. Without limiting the foregoing, the Board shall designate the following committees (the

“Standing Committees”): Audit Committee, Nominating / Corporate Governance Committee and Compensation Committee.

Section 2. Conduct of Business.

Any committee, to the extent allowed by law and provided in the resolution establishing such committee, shall have and may exercise all the duly delegated powers and authority of the Board in the management of the business and affairs of the Corporation. The Board shall have the power to prescribe the manner in which proceedings of any such committee shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted. Unless the Board or such committee shall otherwise provide, regular and special meetings and other actions of any such committee shall be governed by the provisions of Article II applicable to meetings and actions of the Board. Each committee shall keep regular minutes and report to the Board when required.

Section 3. Audit Committee.

(a) The Audit Committee shall have at least three (3) members.

(b) The Audit Committee shall have such responsibilities, and such powers and authority, as are required under the rules and regulations of the New York Stock Exchange, applicable law and the rules and regulations of the Securities and Exchange Commission, or as are normally incident to the functions of an audit committee (including authority to retain counsel and consultants to assist it in carrying out its responsibilities) or as may be determined by the Board.

(c) The Audit Committee shall have the sole authority on behalf of the Corporation to assert, defend or settle any claims under and relating to any Acquisition-Related Agreement, except as may be expressly provided in Section 9.4(f) of the Stock Purchase Agreement.

(d) The Audit Committee shall have sole authority to review, consider and pass upon any Related Party Transaction, and no such transaction shall be effected without the approval of or authorization of a majority of the Audit Committee, provided that the committee may ratify any such transaction.

(e) The Audit Committee shall have the powers to (i) engage advisers at the reasonable expense of the Corporation to assist in its review and decision regarding any matter including any Related Party Transaction; (ii) utilize internal Corporation resources, including requiring the assistance of an executive employee of the Corporation; and (iii) review Corporation contracts, books and records.

(f) The Audit Committee may have additional responsibilities as shall be set forth in the Audit Committee Charter from time to time.

(g) Until such time as the United States Department of Justice, Federal Bureau of Investigation, and the United States Department of Homeland Security confirm to the Corporation in writing that the following provisions need no longer apply, then

(i) All members of the Audit Committee shall be United States citizens.

(ii) The Audit Committee shall have sole authority over the establishment, oversight and evolution of policies, practices and procedures related to or materially affecting the Corporation's actions concerning (a) requests from a Foreign government or other Foreign entity to conduct electronic surveillance using the domestic communications network or to obtain information relating to domestic communications or electronic surveillance conducted using the domestic communications network, (b) requests or directives from a Foreign government or other Foreign entity to alter, affect or obtain information about the operations, security, personnel or infrastructure of the domestic communications network, (c) any decision by the Corporation involving document preservation requests from any government agency in the United States related to the domestic communications network, where those decisions relate to Foreign laws or requests from a Foreign government or other Foreign entity, (d) any requests or directives from a Foreign government or other Foreign entity relating to the preservation, storage, retention or destruction of documents related to the domestic communications network, (e) any attempt by a Foreign government or other Foreign entity to induce an employee of the Corporation to violate United States law, and (f) any decision by the Corporation relating to compliance with lawful U.S. process where Foreign laws or requests from a Foreign government or other Foreign entity may be a factor. For the purposes of this subsection only, the term "Foreign" means non-U.S.; and the term "domestic communications" means (x) wire communications or electronic communications (whether stored or not) from one U.S. location to another U.S. location and (y) the U.S. portion of a wire communication or electronic communication (whether stored or not) that originates or terminates in the United States.

For the purposes of this Section 3 only, "Related Party Transaction" means any transaction or series of transactions between the Corporation or any of its subsidiaries on the one hand, and another party or parties on the other hand, in such amounts and related to such matters that the Audit Committee determines could be considered an interested transaction between the Company or its subsidiaries and such other party or parties.

Section 4. Compensation Committee.

(a) The Compensation Committee shall be composed of at least three (3) Directors. The Compensation Committee shall have the power and authority to approve, adopt and implement the incentive, stock option and similar plans of the Corporation and its Subsidiaries. The Compensation Committee shall have the power to approve, disapprove, modify or amend all plans designed and intended to provide compensation primarily for officers of the Corporation. The Compensation Committee shall review, fix and determine from time to time the salaries and other remunerations of all officers of the Corporation.

(b) The Compensation Committee shall have such powers and authority as necessary to carry out the foregoing responsibilities and shall have such other responsibilities, and such other powers and authority, as may be determined by the Board.

(c) The Compensation Committee may have additional responsibilities as shall be set forth in the Compensation Committee Charter from time to time.

Section 5. Nominating / Corporate Governance Committee.

(a) The Nominating / Corporate Governance Committee shall be composed of at least three (3) Directors. The Nominating / Corporate Governance Committee shall have the full and exclusive power and authority to evaluate Director candidates for election to the Board and committees of

the Board, to nominate Directors for election to the Board at any annual or special meeting of stockholders. The Committee shall also be responsible for matters related to service on the Board, and associated issues of corporate governance.

(b) The Nominating / Corporate Governance Committee shall have such powers and authority as necessary to carry out the foregoing responsibilities and shall have such other responsibilities, and such other powers and authority, as may be determined by the Board.

(c) The Nominating / Corporate Governance Committee may have additional responsibilities as shall be set forth in the Nominating / Corporate Governance Committee Charter from time to time.

OFFICERS

Section 1. General.

The officers of the Corporation shall be elected by the Board and shall be a Chairman of the Board (who must be a Director), a President (who shall also be the Chief Executive Officer), a Secretary and a Treasurer. The Board, in its sole discretion, may also choose one or more Vice Chairmen, Senior Executive Vice Presidents, Executive Vice Presidents, Senior Vice Presidents, Vice Presidents, Assistant Secretaries, Assistant Treasurers and other officers. Any number of offices may be held by the same person, unless otherwise prohibited by law, the Certificate of Incorporation or these By-Laws. The Board may, from time to time, delegate the powers or duties of any officer to any other officers or agents, notwithstanding any contrary provision hereof.

Section 2. Election; Removal.

The Board at its first meeting held after each Annual Meeting of stockholders shall elect the officers of the Corporation who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time solely by the Board, which determination may be by resolution of the Board or in any By-Law provisions duly adopted or approved by the Board and all officers of the Corporation shall hold office until their successors are chosen and qualified, or until their earlier resignation or removal. The salaries of the officers elected by the Board shall be fixed from time to time by the Board or by such officers as may be designated by resolution of the Board, upon recommendation or action of the Compensation Committee. Any officer elected by the Board may be removed at any time by the Board with or without cause. Only the Board may fill any vacancy occurring in any office of the Corporation.

Section 3. Chairman of the Board.

The Chairman of the Board shall be initially appointed in accordance with the Merger Agreement, shall preside at all meetings of the Board and of stockholders (unless the Board designates another person) and, except where by applicable law the signature of the President is required, the Chairman of the Board shall possess the same power as the President to sign all contracts, certificates and other instruments of the Corporation which may be authorized by the Board. The Chairman of the Board shall also perform such other duties and may exercise such other powers as may from time to time be assigned by these By-Laws or by the Board.

Section 4. Vice Chairmen of the Board.

The Vice Chairmen, if such are appointed by the Board, shall report and be responsible to the Chairman of the Board or, if the Board so directs, the President and Chief Executive Officer. The Vice Chairmen shall have such powers and perform such duties as from time to time may be assigned or delegated to him or her by the Board or are incident to the office of Vice Chairman. During the absence, disability, or at the request of the Chairman of the Board, a Vice Chairman shall perform the duties and exercise the powers of the Chairman of the Board. In the absence or disability of both the Vice Chairmen and the Chairman of the Board, the President or another person designated by the Board shall perform the duties and exercise the powers of the Vice Chairmen, and unless otherwise determined by the Board, the duties and powers of the Chairman.

Section 5. President and Chief Executive Officer.

The President shall report and be responsible to the Board and shall be initially appointed in accordance with the Merger Agreement. The President shall be the Chief Executive Officer of the Corporation and shall have general supervision of the business of the Corporation and shall have the authority to see that all orders and resolutions of the Board are carried into effect and shall have such powers and perform such duties as from time to time may be assigned or delegated to him or her by the Board or are incident to the office of President. During the absence or disability of the Vice Chairman (if there be one so appointed), or at the request of the Chairman of the Board, the President shall perform the duties and exercise the powers of the Vice Chairman of the Board. During the absence or disability of the Chairman of the Board and the Vice Chairman, or at the request of the Chairman of the Board, the President shall perform the duties and exercise the powers of the Vice Chairman and the Chairman of the Board. In the absence or disability of the President, the person designated by the Board shall perform the duties and exercise the powers of the President, and unless otherwise determined by the Board, the duties and powers of the Vice Chairman.

Section 6. Senior Executive Vice Presidents.

The Senior Executive Vice Presidents shall have such powers and perform such duties as from time to time may be prescribed for them respectively by the Board or are incident to the office of Senior Executive Vice President.

Section 7. Executive Vice Presidents.

The Executive Vice Presidents shall have such powers and perform such duties as from time to time may be prescribed for them respectively by the Board or are incident to the office of Executive Vice President.

Section 8. Senior Vice Presidents.

The Senior Vice Presidents shall have such powers and perform such duties as from time to time may be prescribed for them respectively by the Board or are incident to the office of Senior Vice President.

Section 9. Vice Presidents.

The Vice Presidents shall have such powers and perform such duties as from time to time may be prescribed for them respectively by the Board or are incident to the office of Vice President.

Section 10. Secretary.

The Secretary shall keep or cause to be kept, at the principal executive office of the Corporation or such other place as the Board may order, a book of minutes of all meetings of stockholders, the Board and its committees, with the time and place of holding, whether regular or special, and if special, how authorized, the notice thereof given, the names of those present at Board and committee meetings, the number of shares present or represented at stockholders' meetings, and the proceedings thereof. The Secretary shall keep, or cause to be kept, a copy of the By-Laws of the Corporation at the principal executive office of the Corporation or such other place as the Board may order.

The Secretary shall keep, or cause to be kept, at the principal executive office of the Corporation or at the office of the Corporation's transfer agent or registrar, if one be appointed, a stock register, or a duplicate stock register, showing the names of the stockholders and their addresses, the number and classes of shares held by each, the number and date of certificates issued for the same, and the number and date of cancellation of every certificate surrendered for cancellation.

The Secretary shall give, or cause to be given, notice of all meetings of the stockholders, and of the Board and any committees thereof required by these By-Laws or by law to be given, shall keep the seal of the Corporation in safe custody and shall have such other powers and perform such other duties as may be prescribed by the Board.

Section 11. Treasurer.

The Treasurer shall have custody of the corporate funds and securities of the Corporation and shall keep and maintain, or cause to be kept and maintained, adequate and correct accounts of the properties and business transactions of the Corporation, and shall send or cause to be sent to the stockholders of the Corporation such financial statements and reports as are required by law or these By-Laws to be sent to them.

The Treasurer shall deposit all monies and valuables in the name and to the credit of the Corporation with such depositories as may be designated by the Board. The Treasurer shall disburse the funds of the Corporation as may be ordered by the Board, shall render to the President and the Board, whenever they request it, an account of all transactions and of the financial condition of the Corporation, and shall have such other powers and perform such other duties as may be prescribed by the Board.

Section 12. Other Officers.

Such other officers or assistant officers as the Board may designate shall perform such duties and have such powers as from time to time may be assigned to them by the Board. The Board may delegate to any other officer of the Corporation the power to choose such other officers and to prescribe their respective duties and powers.

Section 13. Execution of Contracts and Other Documents.

Each officer of the Corporation may execute, affix the corporate seal and/or deliver, in the name and on behalf of the Corporation, deeds, mortgages, notes, bonds, contracts, agreements, powers of attorney, guarantees, settlements, releases, evidences of indebtedness, conveyances, or any other document or instrument which is authorized by the Board or is required to be executed in the ordinary course of business of the Corporation, except in cases where the execution, affixation of the corporate seal and/or delivery thereof shall be expressly and exclusively delegated by the Board to some other officer or agent of the Corporation.

Section 14. Action with Respect to Securities of Other Corporations.

Powers of attorney, proxies, waivers of notice of meeting, consents and other instruments relating to securities owned by the Corporation may be executed in the name of and on behalf of the Corporation by the Chairman of the Board or the President or any other officer or officers authorized by the Board, the Chairman of the Board or the President, and any such officer may, in the name of and on behalf of the Corporation, vote, represent and exercise on behalf of the Corporation all rights incident to any and all shares of any other corporation and take all such action as any such officer may deem advisable to vote in person or by proxy at any meeting of security holders of any corporation in which the Corporation may own securities and at any such meeting shall possess and may exercise any and all rights and power incident to the ownership of such securities and which, as the owner thereof, the Corporation might have exercised and possessed if present. The Board may, by resolution from time to time, confer like powers upon any other person or persons.

STOCK

Section 1. Certificates of Stock.

The interest of each stockholder of the Corporation shall be evidenced by certificates for shares of stock in such form as the appropriate officers of the Corporation may from time to time determine, provided that the Board may provide by resolution or resolutions that some or all of any or all classes or series of the stock of the Corporation shall be represented by uncertificated shares. Notwithstanding the adoption of such a resolution or resolutions by the Board, each stockholder shall be entitled, upon request, to a certificate certifying the number of shares owned by him or her and signed in the name of the Corporation (i) by the Chairman or Vice Chairman of the Board, the President or any Executive Vice President, Senior Vice President or Vice President and (ii) by the Secretary or an Assistant Secretary, or the Treasurer or an Assistant Treasurer. Where a certificate is countersigned by (i) a transfer agent or (ii) a registrar, any other signature on the certificate may be a facsimile. In case any officer, transfer agent or registrar whose signature appears on the certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the Corporation with the same effect as if he or she were such officer, transfer agent or registrar at the date of issue. Except as expressly provided by law, the rights and obligations of the holders of uncertificated shares and the rights and obligations of the holders of certificates representing stock of the same class and series shall be identical.

Section 2. Transfers of Stock.

Transfers of shares of capital stock of the Corporation shall be made only on the stock record of the Corporation by the holder of record thereof or by his, her or its attorney thereunto

authorized by the power of attorney duly executed and filed with the Secretary of the Corporation or the transfer agent thereof, and, in the case of certificated shares, only on surrender of the certificate or certificates representing such shares, properly endorsed or accompanied by a duly executed stock transfer power. Upon receipt of proper transfer instructions from the registered owner of uncertificated shares, such uncertificated shares shall be cancelled and issuance of new equivalent uncertificated shares or certificated shares shall be made to the person entitled thereto and the transaction shall be recorded in the books of the Corporation. Registration of transfer of any shares shall be subject to applicable provisions of the Certificate of Incorporation and applicable law with respect to the transfer of such shares. The Board may make such additional rules and regulations as it may deem expedient concerning the issue and transfer of certificates representing shares of the capital stock of the Corporation.

Section 3. Record Date.

(a) In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or entitled to receive payment of any dividend or other distribution or allotment of any rights, or entitled to exercise any rights in any other lawful action, the Board may fix, in advance, a record date in respect of such meeting, which record date shall not be more than 60 nor less than 10 days before the date of such meeting; provided, however, that if no record date is fixed by the Board, the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held, and, for determining stockholders entitled to receive payment of any dividend or other distribution or allotment of rights or to exercise any rights of change, conversion or exchange of stock or for any other purpose, the record date shall be at the close of business on the day on which the Board adopts a resolution relating thereto. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board may fix a new record date for the adjourned meeting.

(b) Notwithstanding Section 3(a) of this Article V, the record date for determining stockholders entitled to express consent to corporate action in writing without a meeting shall be as fixed by the Board or as otherwise established under this Section 3(b). Any person seeking to have the stockholders authorize or take corporate action by written consent without a meeting shall, by written notice addressed to the Secretary and delivered to the Corporation, request that a record date be fixed for such purpose. The Board may fix a record date for such purpose, which shall be no more than 10 days after the date upon which the resolution fixing the record date is adopted by the Board and shall not precede the date such resolution is adopted. If the Board fails within 10 days after the Corporation receives such notice to fix a record date for such purpose, the record date shall be the day on which the first written consent is delivered to the Corporation in the manner described in Section 3(c) below unless prior action by the Board is required under the DGCL, in which event the record date shall be at the close of business on the day on which the Board adopts the resolution taking such prior action.

(c) Every written consent purporting to take or authorizing the taking of corporate action and/or revocations (each such written consent and related revocation is referred to in this Section 3(c) as a "Consent") shall bear the date of signature of each stockholder who signs the Consent, and no Consent shall be effective to take the corporate action referred to therein unless, within 60 days of the earliest dated Consent delivered in the manner required by this Section 3(c), Consents signed by a sufficient number of stockholders to take such action are so delivered to the Corporation. A Consent shall be delivered to the Corporation by delivery to its registered office in the State of Delaware, its principal place of business, or an officer or agent of the Corporation having custody of the book in which

proceedings of meetings of stockholders are recorded. Delivery to the Corporation's registered office, to its principal place of business or to such officer or agent shall be made by hand or by certified or registered mail, return receipt requested. In the event of the delivery to the Corporation of a Consent, the Secretary of the Corporation shall provide for the safe-keeping of such consent and shall promptly conduct such ministerial review of the sufficiency of the Consents and of the validity of the action to be taken by stockholder consent as he or she deems necessary or appropriate, including, without limitation, whether the holders of a number of shares having the requisite voting power to authorize or take the action specified in the Consent have given consent; provided, however, that if the corporate action to which the Consent relates is the removal or replacement of one or more members of the Board, the Secretary or the Corporation shall promptly designate two persons who shall not be members of the Board, to serve as inspectors with respect to such Consent and such inspectors shall discharge the functions of the Secretary of the Corporation under this Section 3(c). If the Certificate of Incorporation provides for the issuance of any class or series of stock which is convertible into any other class or series of stock, as a condition to counting the votes cast by any holder of shares at any annual or special meeting of stockholders, or in connection with any Consent of stockholders, the Board or a duly authorized committee thereof, in its discretion, may require the holder of any shares to furnish such affidavits or other proof as the Board or such committee deems necessary and advisable to determine whether such shares have been converted pursuant to the terms governing the issuance and conversion of such shares in the Certificate of Incorporation. If after such investigation the Secretary or the inspectors (as the case may be) shall determine that the Consent is valid and that the action therein specified has been validly authorized, that fact shall forthwith be certified on the records of the Corporation kept for the purpose of recording the proceedings of meetings of stockholders, and the Consent shall be filed in such records, at which time the Consent shall become effective as stockholder action. In conducting the investigation required by this Section 3(c), the Secretary or the inspectors (as the case may be) may, at the expense of the Corporation, retain special legal counsel and any other necessary or appropriate professional advisors, and such other personnel as they may reasonably deem necessary or appropriate to assist them, and shall be fully protected in relying in good faith upon the opinion of such counsel or advisors.

Section 4. Lost, Stolen or Destroyed Certificates.

The Board may direct a new certificate to be issued in place of any certificate theretofore issued by the Corporation alleged to have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming the certificate of stock to be lost, stolen or destroyed. When authorizing such issue of a new certificate, the Board may, in its discretion and as a condition precedent to the issuance thereof, require the owner of such lost, stolen or destroyed certificate, or his or her legal representative, to advertise the same in such manner as the Board shall require and/or to give the Corporation a bond in such sum as it may direct as indemnity against any claim that may be made against the Corporation with respect to the certificate alleged to have been lost, stolen or destroyed.

Section 5. Regulations.

The issue, transfer, conversion and registration of certificates of stock shall be governed by such other regulations as the Board may establish.

Section 6. Record Owners.

The Corporation shall be entitled to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, and to hold liable for calls and assessments a person registered on its books as the owner of shares, and shall not be bound to

recognize any equitable or other claim to or interest in such share or shares on the part of any other person, whether or not it shall have express or other notice thereof, except as otherwise provided by law.

NOTICES

Section 1. Notices.

Whenever written notice is required by law, the Certificate of Incorporation or these By-Laws, except as otherwise specifically provided herein or required by law, all notices required to be given to any stockholder, Director, officer, employee or agent shall be in writing and may in every instance be effectively given by hand delivery to the recipient thereof, by depositing such notice in the mails, postage paid, recognized overnight delivery service or by sending such notice by facsimile, receipt acknowledged, or by prepaid telegram or mailgram. Any such notice shall be addressed to such stockholder, Director, officer, employee or agent at his or her last known address as the same appears on the books of the Corporation. The time when such notice is received, if hand delivered, or dispatched, if delivered through the mails or by telegram or facsimile shall be the time of the giving of the notice.

Section 2. Waivers.

A written waiver of any notice, signed by a stockholder, Director, officer, employee or agent, whether before or after the time of the event for which notice is to be given, shall be deemed equivalent to the notice required to be given to such stockholder, Director, officer, employee or agent. Neither the business nor the purpose of any meeting need be specified in such a waiver. Attendance at any meeting shall constitute waiver of notice of such meeting except attendance for the sole purpose of objecting to the timeliness of notice.

MISCELLANEOUS

Section 1. Facsimile Signatures.

In addition to the provisions for use of facsimile signatures elsewhere specifically authorized in these By-Laws, facsimile signatures of any officer or officers of the Corporation may be used whenever and as authorized by the Board or a committee thereof.

Section 2. Corporate Seal.

The Board may provide a suitable seal, containing the name of the Corporation, which seal shall be in the charge of the Secretary. If and when so directed by the Board or a committee thereof, duplicates of the seal may be kept and used by the Treasurer or by an Assistant Secretary or Assistant Treasurer.

Section 3. Reliance upon Books, Reports and Records.

Each Director, each member of any committee designated by the Board, and each officer of the Corporation shall, in the performance of his or her duties, be fully protected in relying in good faith

upon the books of account or other records of the Corporation and upon such information, opinions, reports or statements presented to the Corporation by any of its officers or employees, or committees of the Board so designated, or by any other person as to matters which such Director or committee member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Corporation.

Section 4. Fiscal Year.

The fiscal year of the Corporation shall be as fixed by the Board.

Section 5. Time Periods.

In applying any provision of these By-Laws which requires that an act be done or not be done a specified number of days prior to an event or that an act be done during a period of a specified number of days prior to an event, calendar days shall be used, the day of the doing of the act shall be excluded, and the day of the event shall be included.

Section 6. Disbursements.

All checks or demands for money and notes of the Corporation shall be signed by such officer or officers or such other person or persons as the Board may from time to time designate.

INDEMNIFICATION

Section 1. Power to Indemnify in Actions, Suits or Proceedings Other Than Those by or in the Right of the Corporation.

Subject to Section 3 of this Article VIII, the Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Corporation) by reason of the fact that such person is or was a Director or officer of the Corporation, or is or was a Director or officer of the Corporation serving at the request of the Corporation as a director or officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with such action, suit or proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe such person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which such person reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that such person's conduct was unlawful.

Section 2. Power to Indemnify in Actions, Suits or Proceedings by or in the Right of the Corporation.

Subject to Section 3 of this Article VIII, the Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that such person is or was a Director or officer of the Corporation, or is or was a Director or officer of the Corporation serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation; except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

Section 3. Authorization of Indemnification.

Any indemnification under this Article VIII (unless ordered by a court) shall be made by the Corporation only as authorized in the specific case upon a determination that indemnification of the Director or officer is proper in the circumstances because such person has met the applicable standard of conduct set forth in Sections 1 or 2 of this Article VIII, as the case may be. Such determination shall be made, with respect to a person who is a Director or officer at the time of such determination, (i) by a majority vote of the Directors who are not parties to such action, suit or proceeding, even though less than a quorum, or (ii) by a committee of such Directors designated by a majority vote of such Directors, even though less than a quorum, or (iii) if there are no such Directors, or if such Directors so direct, by independent legal counsel in a written opinion or (iv) by the stockholders. Such determination shall be made, with respect to former Directors and officers, by any person or persons having the authority to act on the matter on behalf of the Corporation. To the extent, however, that a present or former Director or officer of the Corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding described above, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith, without the necessity of authorization in the specific case.

Section 4. Good Faith Defined.

For purposes of any determination under Section 3 of this Article VIII, a person shall be deemed to have acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation, or, with respect to any criminal action or proceeding, to have had no reasonable cause to believe such person's conduct was unlawful, if such person's action is based on the records or books of account of the Corporation or another enterprise, or on information supplied to such person by the officers of the Corporation or another enterprise in the course of their duties, or on the advice of legal counsel for the Corporation or another enterprise or on information or records given or reports made to the Corporation or another enterprise by an independent certified public accountant or by an appraiser or other expert selected with reasonable care by the Corporation or another enterprise. The term "another enterprise" as used in this Section 4 shall mean any other corporation or any partnership, joint venture, trust, employee benefit plan or other enterprise of which such person is or was serving at the request of the Corporation as a Director, officer, employee or agent. The provisions of this Section 4 shall not be deemed to be exclusive or to limit in any way the circumstances in which a

person may be deemed to have met the applicable standard of conduct set forth in Sections 1 or 2 of this Article VIII, as the case may be.

Section 5. Indemnification by a Court.

Notwithstanding any contrary determination in the specific case under Section 3 of this Article VIII, and notwithstanding the absence of any determination thereunder, any Director or officer may apply to the Court of Chancery in the State of Delaware for indemnification to the extent otherwise permissible under Sections 1 and 2 of this Article VIII. The basis of such indemnification by a court shall be a determination by such court that indemnification of the Director or officer is proper in the circumstances because such person has met the applicable standards of conduct set forth in Section 1 or 2 of this Article VIII, as the case may be. Neither a contrary determination in the specific case under Section 3 of this Article VIII nor the absence of any determination thereunder shall be a defense to such application or create a presumption that the Director or officer seeking indemnification has not met any applicable standard of conduct. Notice of any application for indemnification pursuant to this Section 5 shall be given to the Corporation promptly upon the filing of such application. If successful, in whole or in part, the Director or officer seeking indemnification shall also be entitled to be paid the expense of prosecuting such application.

Section 6. Expenses Payable in Advance.

Expenses incurred by a Director or officer in defending any civil, criminal, administrative or investigative action, suit or proceeding shall be paid by the Corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such Director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the Corporation as authorized in this Article VIII.

Section 7. Nonexclusively of Indemnification and Advancement of Expenses.

The indemnification and advancement of expenses provided by or granted pursuant to this Article VIII shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under the Certificate of Incorporation, any By-Law, agreement, vote of stockholders or disinterested Directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office, it being the policy of the Corporation that indemnification of the persons specified in Sections 1 and 2 of this Article VIII shall be made to the fullest extent permitted by law. The provisions of this Article VIII shall not be deemed to preclude the indemnification of any person who is not specified in Section 1 or 2 of this Article VIII but whom the Corporation has the power to or obligation to indemnify under the provisions of the General Corporation Law of the State of Delaware, or otherwise.

Section 8. Insurance.

The Corporation may purchase and maintain insurance on behalf of any person who is or was a Director or officer of the Corporation, or is or was a Director or officer of the Corporation serving at the request of the Corporation as a Director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the Corporation would have the power or the obligation to indemnify such person against such liability under the provisions of this Article VIII.

Section 9. Certain Definitions.

For purposes of this Article VIII, references to “the Corporation” shall include, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its Directors or officers, so that any person who is or was a Director or officer of such constituent corporation, or is or was a Director or officer of such constituent corporation serving at the request of such constituent corporation as a Director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, shall stand in the same position under the provisions of this Article VIII with respect to the resulting or surviving corporation as such person would have with respect to such constituent corporation if its separate existence had continued. For purposes of this Article VIII, references to “fines” shall include any excise taxes assessed on a person with respect to an employee benefit plan; and references to “serving at the request of the Corporation” shall include any service as a Director, officer, employee or agent of the Corporation which imposes duties on, or involves services by, such Director or officer with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner such person reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner “not opposed to the best interests of the Corporation” as referred to in this Article VIII.

Section 10. Survival of Indemnification and Advancement of Expenses.

The indemnification and advancement of expenses provided by, or granted pursuant to, this Article VIII shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a Director or officer and shall inure to the benefit of the heirs, executors and administrators of such a person.

Section 11. Limitation on Indemnification.

Notwithstanding anything contained in this Article VIII to the contrary, except for proceedings to enforce rights to indemnification (which shall be governed by Section 5 hereof), the Corporation shall not be obligated to indemnify any Director or officer in connection with a proceeding (or part thereof) initiated by such person unless such proceeding (or part thereof) was authorized or consented to by the Board of the Corporation.

Section 12. Indemnification of Employees and Agents.

The Corporation may, to the extent authorized from time to time by the Board, provide rights to indemnification and to the advancement of expenses to employees and agents of the Corporation similar to those conferred in this Article VIII to Directors and officers of the Corporation.

AMENDMENTS

(a) Subject to paragraph (b) of this Article IX below, and in furtherance and not in limitation of the powers conferred by law, in addition to any affirmative vote of the holders of any particular class or series of the capital stock of the Corporation required by law, the Certificate of Incorporation or these By-Laws, the affirmative vote of the holders of at least a majority of the voting power of all of the then-outstanding shares entitled to vote generally on matters requiring approval of stockholders, voting together as a single class, shall be authorized to adopt, alter, amend or repeal any provision of these By-Laws, and, subject to the power of the holders of capital stock of the Corporation to adopt, alter, amend or repeal the By-Laws under the DGCL, the Board is also expressly authorized to adopt, alter, amend or repeal any provision of these By-Laws.

(b) Notwithstanding any of the foregoing, (i) Article II, Sections 1, 2, 3, 12, 13, (ii) Article III, Sections 1, 3, 4, 5, (iii) Article IV, and (iv) this Article IX of these By-Laws, may only be amended, altered or repealed (x) by the affirmative vote of at least a majority of the Directors, including at least a majority of Independent Directors then serving on the Board, or (y) by the affirmative vote of the holders of at least a majority of the voting power of all of the then-outstanding shares entitled to vote generally on matters requiring approval of stockholders, voting together as a single class, but excluding such shares Beneficially Owned by Purchaser, or (z) in the event any person, together with its Affiliates, shall have acquired ownership of sixty-five percent (65%) or more of the Corporation's Voting Securities then outstanding, pursuant to paragraph (a) of this Article IX above.

EXHIBIT 2

**Proposed Resolutions of the Board of Directors of
The News Corporation Limited (the "Corporation")**

WHEREAS, the Board of Directors has previously approved a series of transactions (the "*Transactions*") pursuant to which the Corporation's subsidiary, Fox Entertainment Group, Inc., a Delaware corporation ("*FEG*") will acquire 34% of the outstanding common stock of Hughes Electronics Corporation ("*Hughes*");

WHEREAS, the United States Department of Justice, United States Department of Homeland Security and Federal Bureau of Investigation (together, the "*Executive Agencies*") have sought assurances that the Corporation, as a non-U.S. entity, will not be able to influence Hughes's compliance with lawful requests relating to issues of U.S. national security and law enforcement; and

WHEREAS, in response to the Executive Agencies' requests, it is proposed that the Corporation and Hughes take certain necessary actions to amend the By-laws that will be in effect upon consummation of the Transactions so as to read as set forth in the form of amended and restated by-laws of Hughes attached hereto as Exhibit A (the "*Hughes By-law Amendment*"), which amendment provides, among other things and subject to the terms thereof, that the Hughes' Audit Committee shall be comprised exclusively of U.S. citizens and shall have exclusive jurisdiction over the establishment, oversight and evolution of policies related to U.S. national security and law enforcement concerns;

IT IS THEREFORE RESOLVED, that the Board of Directors recognizes, understands and accepts the Hughes By-law Amendment and hereby determines that it is advisable, desirable and in the best interests of the Corporation and its stockholders to, in order to implement the Hughes By-law Amendment, amend (i) the Stock Purchase Agreement, dated as of April 9, 2003, as amended, by and among the Corporation, Hughes and General Motors Corporation and (ii) the Agreement and Plan of Merger, dated as of April 9, 2003, as amended, by and among the Corporation, Hughes and GMH Merger Sub, Inc., in each case in the manner contemplated by the form of letter agreement attached hereto as Exhibit B (the "*Letter Agreement*"); and it is further

RESOLVED, that the Board of Directors accepts and acknowledges that, subject to the terms of the Hughes By-law Amendment, each member of the Hughes Audit Committee shall be a U.S. citizen; and it is further

RESOLVED, that the Board of Directors understands the national security and law enforcement bases of the Hughes By-law Amendment and that the adoption of the Hughes By-law Amendment is a condition of the Executive Agencies' consent to the U.S. Federal Communications Commission's approval of the transfer of certain licenses and assets associated with the acquisition of Hughes shares by FEG.

EXHIBIT 3

HUGHESTMDIRECTV
PanAmSat
DIRECTV Latin America
Hughes Network Systems

November 6, 2003

United States Department of Justice
Assistant Attorney General
Criminal Division
Main Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530Federal Bureau of Investigation
General Counsel
935 Pennsylvania Avenue, N.W.
Washington, DC 20535United States Department of Homeland Security
General Counsel
Washington, DC 20528

Re: Audit Committee Certification

Reference is made to the form of Amended and Restated By-Laws of Hughes Electronics Corporation ("Hughes") in the form attached hereto as Exhibit 1 (the "By-Laws"), that Hughes intends to adopt in connection with the closing of the transactions contemplated by the Stock Purchase Agreement, dated as of April 9, 2003, as amended from time to time, by and among Hughes, General Motors Corporation and The News Corporation Limited. Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the By-Laws.

Hughes hereby agrees that, commencing upon the adoption of the By-Laws in connection with the contemplated transactions, on or before the last business day of each January following a calendar year in which the provisions of ~~Section 3(g)~~ ^{ARTICLE III} of the By-Laws applied to Hughes, the Chairman of the Audit Committee shall submit to the United States Department of Justice, Federal Bureau of Investigation, and the United States Department of Homeland Security a certification regarding compliance during the prior calendar year with ~~Section 3(g)~~ ^{ARTICLE III} of the By-Laws. Such certification shall provide a summary of any significant matters brought before the Audit Committee pursuant to ~~Section 3(g)~~ ^{ARTICLE III} during such calendar year and a description of any actions taken by Hughes with respect to such matters.

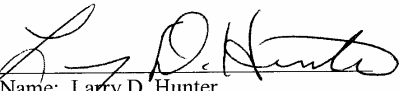
This letter agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

P.O. Box 956 2250 E Imperial Hwy El Segundo, CA 90245-0956

This letter agreement shall be governed and construed in accordance with the laws of the State of Delaware without regard to principles of conflicts of law.

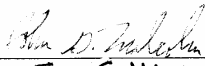
Very truly yours,

HUGHES ELECTRONICS CORPORATION

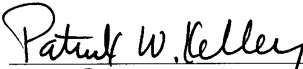
By: 
Name: Larry D. Hunter
Title: Senior Vice President
and General Counsel

Accepted and agreed as of the date first written above:

UNITED STATES DEPARTMENT OF JUSTICE

By: 
Name: JOHN G. MALCOLM
Title: DEPUTY ASSISTANT ATTORNEY GENERAL

FEDERAL BUREAU OF INVESTIGATION

By: 
Name: PATRICK W. KELLEY
Title: DEPUTY GENERAL COUNSEL

UNITED STATES DEPARTMENT OF HOMELAND SECURITY

By: _____
Name:
Title:

/Attachment

APPENDIX F
CONDITIONS

I. PROGRAM CARRIAGE CONDITION TO PREVENT DISCRIMINATION AGAINST ALL FORMS OF UNAFFILIATED VIDEO PROGRAMMING

- Neither News Corp. nor DirecTV will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage.

II. PROGRAM ACCESS CONDITIONS TO ENSURE NON-DISCRIMINATORY ACCESS TO ALL SATELLITE CABLE PROGRAMMING

- News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions.
- DirecTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.¹
- As long as Liberty Media holds an Attributable Interest in News Corp., DirecTV will deal with Liberty Media with respect to programming services it controls as a vertically integrated programmer subject to the program access rules.
- DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (*e.g.*, NFL Sunday Ticket).
- Neither News Corp. nor DirecTV (including any entity over which either exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.
- These commitments will apply to News Corp. and DirecTV for as long as the FCC deems News Corp. to have an Attributable Interest in DirecTV and the FCC's program access rules applicable to satellite cable programming vendors affiliated with cable operators remain in effect (provided that if the program access rules are modified these commitments shall be modified to conform to any revised rules adopted by the FCC).²

¹ "Affiliated Program Rights Holder" includes (i) a program rights holder in which News Corp. or DirecTV holds a non-controlling "Attributable Interest" (as determined by the FCC's program access attribution rules); and (ii) a program rights holder in which an entity holding an non-controlling Attributable Interest in News Corp. or DirecTV holds an Attributable Interest, provided that News Corp. or DirecTV has actual knowledge of such entity's Attributable Interest in such program rights holder. At the present time Liberty Media is the only entity covered by this definition. Nonetheless this commitment goes beyond the program access rules as DBS operators are not included within the exclusivity prohibition. *See* 47 C.F.R. § 1002(c).

² Although *most* of the program access rules will remain applicable unless terminated by Congress, Section 76.1002(c), the prohibition on exclusive contracts, sunsets in October 2007 unless the Commission finds that the prohibition continues to be necessary to protect competition in the distribution of video programming. *See* 47 (continued....)

- For enforcement purposes, aggrieved MVPDs may bring program access complaints against Applicants using the procedures found at Section 76.1003, 47 U.S.C. § 76.1003, of the Commission's rules.

III. ADDITIONAL CONDITIONS CONCERNING ACCESS TO REGIONAL SPORTS CABLE PROGRAMMING NETWORKS

When negotiations fail to produce a mutually acceptable set of price, terms and conditions for carriage of a regional sports network ("RSN"), an MVPD may choose to submit a dispute to commercial arbitration in accordance with the following procedures:

Commercial Arbitration Remedy

- An aggrieved MVPD may submit a dispute with News Corp. over the terms and conditions of carriage of RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN.
- Following the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify News Corp. within five business days that it intends to request commercial arbitration to determine the terms of the new affiliation agreement.
- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued carriage of the network under the same terms and conditions of the expired affiliation agreement as long as the MVPD continues to meet the obligations set forth in this condition.
- Carriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage.
- "*Cooling Off Period.*" The period following News Corp.'s receipt of timely notice of the MVPD's intent to arbitrate and before the MVPD's filing for formal arbitration with the American Arbitration Association ("AAA") shall constitute a "cooling-off" period during which time negotiations are to continue.
- *Formal Filing with the AAA.* The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the RSN contract and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, News Corp. must participate in the arbitration proceeding.
- The AAA will notify News Corp. and the MVPD upon receiving the MVPD's formal filing.
- News Corp. will file a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.
- The MVPD's final offer may not be disclosed until the AAA has received the final offer from News Corp.
- The final offers shall be in the form of a contract for the carriage of the programming for a period of at least three years. The final offers may not include any provision to carry any video programming networks or any other service other than the RSN.

Rules of Arbitration

(Continued from previous page) _____

C.F.R. § 76.1002(c)(2). In the year prior to the sunset, the Commission will conduct a proceeding to evaluate the circumstances in the video programming marketplace.

- The arbitration will be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules, then in effect, of the AAA (the “Rules”), excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in Appendix B.
- The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- The arbitrator is directed to choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- Under no circumstances will the arbitrator choose a final offer that does not permit News Corp. to recover a reasonable share of the costs of acquiring the programming at issue.
- To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession),³ including, but not limited to:
 - current or previous contracts between MVPDs and RSNs in which News Corp. does not have an interest as well as offers made in such negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
 - evidence of the relative value of such programming compared to the RSN programming at issue (*e.g.*, advertising rates, ratings);
 - contracts between MVPDs and RSNs on whose behalf News Corp. has negotiated before News Corp. acquired control of DirecTV;
 - offers made in such negotiations;
 - internal studies or discussions of the imputed value of RSN programming in bundled agreements;
 - other evidence (including internal discussions) of the value of RSN programming;
 - changes in the value of non-News Corp. RSN programming agreements;
 - changes in the value or costs of News Corp. RSN programming, or in other prices relevant to the relative value of News Corp. RSN programming (*e.g.*, advertising rates).
- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.
- If the arbitrator finds that one party’s conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party’s costs and expenses (including attorney fees) against the offending party.
- Following resolution of the dispute by the arbitrator, to the extent practicable, the terms of the new affiliation agreement will become retroactive to the expiration date of the previous affiliation agreement. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator’s award and the amount actually paid under the terms of the expired contract during the period of arbitration.

³ We clarify that, by “possession,” we mean actual possession or control.

- Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission, and does so in a timely manner.

Review of Award by the Commission

- A party aggrieved by the arbitrator's award may file with the Commission a petition seeking de novo review of the award. The petition must be filed within 30 days of the date the award is published.
- The MVPD may elect to carry the programming at issue pending the FCC decision, subject to the terms and conditions of the arbitrator's award.
- In reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- The Commission may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorneys' fees) of the arbitration.

Provisions Applicable to Small MVPDs

- An MVPD meeting the definition of a "small cable company" may appoint a bargaining agent to bargain collectively on its behalf in negotiating carriage of RSNs with News Corp. and News Corp. may not refuse to negotiate carriage of RSN programming with such an entity.⁴ The designated collective bargaining entity will have all the rights and responsibilities granted by these conditions.

Additional Provisions Concerning Arbitration

- No later than 20 business days prior to the expiration of an affiliation agreement with an MVPD for video programming subject to this condition, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order. News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for affiliation.
- This condition will expire six years after the release of the Order.
- The Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the conditions have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

IV. CONDITIONS CONCERNING ACCESS TO LOCAL BROADCAST TELEVISION STATION SIGNALS

⁴ The Commission has previously defined small cable companies as those with 400,000 or fewer subscribers. We adopt that definition for the purposes of this condition. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 7393 (1995) ("Sixth Report and Order").

When negotiations fail to produce a mutually acceptable set of price, terms and conditions for a retransmission consent agreement with a local broadcast television station that News Corp. owns and operators or on whose behalf it negotiates retransmission consent, an MVPD may choose to submit a dispute to commercial arbitration in accordance with the following procedures:

Commercial Arbitration Remedy

- The commercial arbitration condition commences following the expiration of any existing retransmission consent agreement.
- Following such expiration, or 90 days after a first time request for retransmission consent, a MVPD may notify News Corp. within five business days that it intends to request arbitration over the terms and conditions of retransmission consent.
- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued retransmission of the broadcast signal under the same terms and conditions of the expired retransmission consent agreement as long as the MVPD continues to meet the obligations set forth in this condition.
- Retransmission of the broadcast signal during the period of arbitration is not required in the case of first time requests for carriage.
- *"Cooling Off Period."* Following the MVPD's notice of intent to submit the dispute to arbitration, but prior to filing for formal arbitration with the American Arbitration Association ("AAA"), the MVPD and News Corp. will enter a "cooling-off" period during which negotiations will continue.
- *Formal Filing with the AAA.* The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the retransmission consent agreement and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, News Corp. must participate in the arbitration proceeding.
- The AAA will notify News Corp. and the MVPD upon receiving the MVPD's formal filing.
- News Corp. will file a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.
- The MVPD's final offer may not be disclosed until the AAA has received the final offer from News Corp.
- The final offers shall be in the form of a contract for the retransmission of the broadcast signal for a period of three years. The final offers may not include any provision to carry any video programming networks or any other service other than the broadcast signal.

Rules of Arbitration

- The arbitration will be decided by a single arbitrator under the expedited procedures of the Rules, excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in Appendix C.
- The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- The arbitrator is directed to choose the "final offer" of the party which most closely approximates the fair market value of the programming carriage rights at issue.

- To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession),⁵ including, but not limited to:
 - current contracts between MVPDs and Fox-affiliated stations on whose behalf News Corp. does not negotiate;
 - current contracts between MVPDs and non-Fox network stations;
 - offers made in the preceding negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
 - evidence of the relative value of Fox programming compared to other network programming (*e.g.*, advertising rates, ratings);
 - contracts between MVPDs and stations on whose behalf News Corp. has negotiated made before News Corp. acquired control of DirecTV as well as offers made in such negotiations;
 - internal studies of the imputed value of retransmission consent agreements in bundled agreements;
 - changes in the value of non-Fox retransmission consent agreements;
 - changes in the value or costs of Fox programming or broadcast stations, or in other prices relevant to the relative value of Fox broadcast programming (*e.g.*, advertising rates).
- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.
- If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party.
- Following the decision of the arbitrator, and to the extent practicable, the terms of the new retransmission consent agreement, including payment terms, if any, will become retroactive to the expiration date of the previous retransmission consent agreement. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.
- Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission, and does so in a timely manner.

Review of Award by the Commission

- A party aggrieved by the arbitrator's award may file with the Commission a petition seeking *de novo* review of the award. The petition must be filed within 30 days of the date the award is published.
- The MVPD may elect to continue to retransmit the broadcast signal pending the FCC decision, subject to the terms and conditions of the arbitrator's award.
- In reviewing the award, the Commission will examine the same evidence that was presented to the Arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.

⁵ We clarify that, by "possession," we mean actual possession or control.

- The Commission may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorney fees) of the arbitration.

Provisions Applicable to Small MVPDs

- An MVPD meeting the Commission's definition of "small cable company" may appoint a bargaining agent to bargain collectively on its behalf in negotiating with News Corp. for carriage of the programming subject to this condition and News Corp. may not refuse to negotiate with such an entity.⁶ The designated collective bargaining entity will have all the rights and responsibilities granted by these conditions.
- When dealing with MVPDs with fewer than 5,000 total subscribers, we require News Corp. to either elect "must-carry" status or negotiate retransmission consent for its owned and operated stations and any affiliated station on whose behalf it negotiates retransmission consent without any requirements for cash compensation or carriage of programming other than the broadcast signal.

Additional Provisions Concerning Arbitration

- No later than 20 business days prior to the expiration of a must-carry election or retransmission consent agreement with an MVPD, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order. News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for retransmission consent.
- This condition will expire six years after the release of the Order.
- The Commission will consider a petition for modification of this condition if it can be demonstrated 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.

Non-discriminatory Access to Local Broadcast Television Station Signals

- The non-discrimination commitments that News Corp. has proposed and we have imposed as conditions regarding non-discriminatory access to satellite cable programming networks are extended to any broadcast station that News Corp. owns and operates or on whose behalf it negotiates retransmission consent.

Good Faith and Exclusivity Requirements of SHVIA

- The good faith and exclusivity requirements of SHVIA, in effect by their terms until January 1, 2006, are extended to apply to retransmission consent negotiations undertaken by News Corp. for carriage of its local broadcast station signals so long as the program access rules are in effect.

⁶ See *Sixth Report and Order*, 10 FCC Rcd 7393 (1995).

VI. CONDITION TO INCREASE LOCAL-INTO-LOCAL BROADCAST TELEVISION SERVICE OFFERINGS

- By year end 2004, DirecTV must provide local broadcast channels to subscribers in an additional 30 designated market areas (“DMAs”) beyond what had been previously funded, projected or planned by Hughes/DirecTV.
- In the event that circumstances beyond DirecTV’s control limit its ability to fulfill this license condition, DirecTV may petition the Commission for waiver pursuant to Section 1.3 of the Commission rules, 47 C.F.R. § 1.3.

VII. CONDITIONS TO MITIGATE NATIONAL SECURITY, LAW ENFORCEMENT, FOREIGN POLICY AND TRADE POLICY CONCERNS

Pursuant to the request of the U.S. Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”), with the concurrence of the Department of Homeland Security (“DHS”),⁷ the transfer of control is conditioned on:

- GM causing Hughes to adopt, and Hughes adopting, prior to the closing of the subject transaction, the Hughes By-law Amendment;
- The adoption by the Board of Directors of News Corp. of the Proposed Resolutions; and
- Compliance by Hughes and News Corp., respectively, with the commitments set forth in the Hughes By-laws Amendment, the Proposed Resolutions, and the Letter Agreement.

⁷ See Petition to Adopt Conditions to Authorizations and Licenses (filed Nov. 25, 2003) (“Petition to Adopt Conditions”); Appendix E.

APPENDIX G

LICENSES AND AUTHORIZATIONS TO BE TRANSFERRED

File No. SAT-T/C-20030502-00083 is the Lead File number for the space station series of applications. The complete list of File Numbers follows:

Satellite Space Stations:

File Number	Licensee/Call Signs
SAT-T/C-20030502-00083	DIRECTV Enterprises, LLC <i>Call Sign(s):</i> DBS8402; S2369; DBS8402; DBS8402; S2430; S2417; DBS8804
SAT-T/C-20030505-00084	Hughes Network Systems, Inc. <i>Call Sign(s):</i> S2132; S2133; S2185; S2187; S2188; S2190; S2191
SAT-T/C-20030502-00085	PanAmSat Licensee Corporation <i>Call Sign(s):</i> S2368; PAS-2R; PAS-4; CS91004; PAS-6; PAS-8; S2359; PAS-9; S2229; S2380; S2382; S2131; S2128; S2381; S2377; GAL V; GAL VIII(i); S2146; S2378; S2253; S2422; SBS-6; KS39
SAT-T/C-20030502-00086	USSB II, Inc. <i>Call Sign(s):</i> DBS8107; DBS8107

File No. SES-T/C-20030502-00582 is the Lead File number for the earth station series of applications. The complete list of File Numbers follows (*see also* Public Notice, Report No. SES 00565, December 31, 2003):

Satellite Earth Stations:

File Number	Licensee/Call Signs
SES-T/C-20030502-00582	Hughes Network Systems, Inc. <i>Call Sign(s):</i> E000166; E030007; E880787; E880788; E880789; E881110; E881111; E881112; E890426; E890427; E890428; E890628; E890629; E890630; E891001; E891002; E900192; E900682; E940455; E940460; E950471; E950472; E950473; E970067; E990170 (VSAT Transmit/Receive)
SES-T/C-20030502-00583	Hughes Network Systems Limited <i>Call Sign(s):</i> E000362; E010187; E020195; E020205; E020206; E020207; E020208 (Transmit/Receive)
SES-T/C-20030502-00584	Hughes Network Systems, Inc. <i>Call Sign(s):</i> E020241; E020242; E030004; E030005; E030006; E880970; E881109; E890627; E900013; E910612; E940478; SES-STA-20021101-01942 (Transmit/Receive)
SES-T/C-20030502-00585	USSB II, Inc. <i>Call Sign(s):</i> E930437 (Receive Only)
SES-T/C-20030502-00586	USSB II, Inc. <i>Call Sign(s):</i> E930485 (Transmit Only)
SES-T/C-20030502-00587	California Broadcast Center, LLC <i>Call Sign(s):</i> E010237; E020091 (Transmit/Receive)

SES-T/C-20030502-00588 PanAmSat Licensee Corporation
Call Sign(s): E010334; E970080 (Receive Only)

SES-T/C-20030502-00589 PanAmSat Licensee Corporation
Call Sign(s): E950067; E970051 (Transmit Only)

SES-T/C-20030502-00590 PanAmSat Licensee Corporation
Call Sign(s): E000048; E000049; E000063; E000274; E000363; E000364; E000488; E010019; E010112; E010113; E010131; E010133; E020309; E030012; E4132; E7465; E881286; E881304; E890530; E900089; E920340; E920377; E930088; E940333; E940368; E940532; E950267; E950307; E950502; E950508; E970352; E970391; E970392; E980460; E980467; E980501; E980502; E980503; E990024; E990091; E990092; E990093; E990214; E990223; E990224; E990323; E990334; E990363; E990364; E990365; E990433; KA244; KA245; KA391; KA450; KA71 (Transmit/Receive)

SES-T/C-20030502-00591 PanAmSat Licensee Corporation
Call Sign(s): E010118; E010280; E990055 (Temporary Transmit/Receive)

SES-T/C-20030502-00592 PanAmSat Licensee Corporation
Call Sign(s): E2178; E3943; E860175; E900621; E900757; KL92 (Common Carrier Transmit/Receive)

SES-T/C-20030505-00601 DIRECTV Enterprises, LLC
Call Sign(s): E950423; E950424; E980170; E980341 (Receive Only)

SES-T/C-20030505-00602 DIRECTV Enterprises, LLC
Call Sign(s): E930229; E930304 (Transmit Only)

SES-T/C-20030505-00603 DIRECTV Enterprises, LLC
Call Sign(s): E010129; E010130; E020172; E930191; E950349; E980285; E980338; E980340; E980473; E990159 (Transmit/Receive)

SES-T/C-20030505-00604 DIRECTV Enterprises, LLC
Call Sign(s): E990545 (Temporary Transmit/Receive)

SES-T/C-20030505-00605 DIRECTV Latin America, LLC (D-I-P)
Call Sign(s): E990232 (Transmit/Receive)

SES-T/C-20030505-00606 Hughes Communications Satellite Services, Inc.
Call Sign(s): E960001; E970079; E970094 (Receive Only)

SES-T/C-20030505-00607 Hughes Network Systems, Inc.
Call Sign(s): E861092; E873438 (Temporary Transmit/Receive)

File No. 0001293908 is the Lead File number for the wireless radio series of applications. The complete list of File Numbers follows:

Wireless Licenses:

File Number	Licensee/File Nos.
0001293908	DIRECTV, Inc. <i>Call Sign(s)</i> : WPTZ691 (IG)

0001293894	Hughes Electronics Corporation <i>Call Sign(s)</i> : WNEU9099 (MG)
0001293921	Hughes Network Systems, Inc. <i>Call Sign(s)</i> : WPVW320 (IG)

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

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

The Commission has now completed a multi-year review, involving two separate transfer applications, to transfer control of Commission licenses involving nationwide DBS provider DirecTV. Unlike the transfer application involving Echostar Communications—which ultimately became the first major transaction blocked by this Commission in decades because it would have harmed the public interest by combining the only two nationwide DBS providers in the country¹—this transaction, as conditioned, involving General Motors, Hughes Electronics Corporation and The News Corporation (“News Corp.”) will bring significant benefits to the American public.

As a result of this transaction, DirecTV will be a stronger competitor in the pay-television space, especially against market-leading cable operators. This increased competition to cable will spur new innovative services and programming, lower prices and increased service quality not just to current and future DirecTV subscribers, but to all pay-television subscribers as cable operators throughout the country will be forced to respond to this new nationwide competitive threat.

This transaction, as proposed, did raise concerns about use and abuse of market power. Our strict and narrowly tailored conditions, however, will prevent the realization of these harms to the public. For example, we were concerned that the merged entity would discriminate against unaffiliated programmers, preventing DirecTV subscribers from accessing compelling programming from a multiplicity of diverse sources. To address this concern, we condition this transaction to ensure that unaffiliated programmers have access to the DirecTV platform on nondiscriminatory terms and conditions.

We were concerned that the merged entity would force across-the-board MVPD price increases by using its increased incentive and ability to threaten to or actually withhold highly valued programming by consumers—namely local broadcast signals and regional sports networks²—to extract excessive rents or unfair carriage concessions from MVPDs—programming costs almost certain to be passed on to subscribers. We addressed this concern by setting up a commercial arbitration remedy that will help reign in excessive programming price increases and ensure that the public will not lose access to the valued

¹ See *Application of EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferees)*, 17 FCC Rcd 20559 (2002).

² One should not view our conditions regarding retransmission agreements or regional sports networks as anything other than a condition to mitigate a merger-specific harm identified in the record of this proceeding. It, especially, should not be interpreted as an industry-wide declaration of the Commission concerning the ongoing commercial disputes between MVPDs and broadcasters or regional and national sports programming networks. The broadcast industry and the sports programming market continue to evolve on all fronts. In the case of sports, for instance, increased channel capacity on MVPD systems and advances in broadband Internet access are providing leagues, teams, MVPD providers and sports programming networks with new opportunities for sports distribution. In addition, there are signs in the marketplace to suggest that the extraordinary increases in license fees paid by sports networks to teams over the past year—which then get passed on to MVPDs, then on to consumers—is stabilizing. I continue to believe these issues are best resolved in the marketplace.

programming during negotiations and arbitration. In addition, we ensure that News Corp.'s other affiliated programming will be offered to all MVPDs on a non-discriminatory basis.

Finally, this transaction will result in more local programming being carried by DirecTV in more local markets. In fact, as a condition of this license transfer, we mandate that the merged entity provide, by year end 2004, local channel service in an additional 30 DMAs beyond what had been previously funded, projected or planned by Hughes/DirecTV. As DBS providers continue to carry local broadcasting services to more and more Americans and in the process become a more effective competitor against cable, both of our collective localism and competition goals are enhanced. I share the desires of my colleagues to see more DBS providers carry local broadcast signals and local programming into more local markets—especially to rural America.³

In short, facilities-based competition among satellite and cable providers has led to more innovation, more programming and more subscribers. As a result of this transaction those trends, along with competitive prices and better quality of service will continue for the American public. I, therefore, approve this transaction, as conditioned, as I believe it serves the public interest.

³ With regard to APTS/PBS's proposed condition to restrict DirecTV from segregating local broadcast stations to wing satellites, I do not believe there is sufficient record evidence to suggest that there was a merger-specific public interest harm that called for the proposed condition. To the extent APTS/PBS advocated a further clarification of an interpretation of the nondiscriminatory local broadcast carriage provisions of SHVIA, I do not believe this question is best resolved in this license-transfer proceeding, but is better suited for a separate Commission review. As noted by APTS/PBS in their comments to this proceeding, the Commission will have this opportunity in considering the APTS/PBS Application for Review (*see* Application for Review of the Association of Public Television Stations and the Public Broadcasting Service, CSR-5865-Z (May 6, 2002)) of a previous Media Bureau interpretation of SHVIA. *See National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, Declaratory Ruling and Order, DA 02-765 (Apr. 4, 2002). Until that time, DBS providers using a two-dish solution must do so consistent with Section 76.66 of our rules and Section 338(d) of the Communications Act.

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control, MB Docket No. 03-124

I write separately to clarify my rationale for not supporting the imposition of a proposed condition to restrict DirecTV from segregating some, but not all, local broadcast stations to wing satellites. As the Order specifically states, “[w]ith regard to APTS/PBS’s proposed condition to restrict DirecTV from segregating local broadcast stations to wing satellites, we recognize that the proposed transaction may give DirecTV greater incentive to favor News Corp.’s Fox broadcast network programming and therefore to move other broadcasters onto other satellites. There is not a majority to decide whether this increased incentive results in a merger specific harm.”

I do not believe the issue is merger specific because any incentive to use wing satellites for some, but not all, broadcast stations is applicable to all DBS providers, not just News Corp. In fact, the National Association of Broadcasters and the Association of Local Television Stations filed a petition asking for modification or clarification of the Commission’s rules regarding carriage of television broadcast stations by DBS providers in a manner that requires subscribers to obtain a second satellite dish antenna.¹ Since the Bureau’s decision in that matter is subject to an application for review by the full Commission, I believe that this issue is best addressed in the context of that proceeding. In the interim, the Bureau’s decision provides that if any DBS provider chooses to carry local stations using a second dish to receive some those stations, it must do so in a manner that does not violate Section 76.66 of our rules and Section 338(d) of the Communications Act.²

¹ See *National Association of Broadcasters and Association of Local Television Stations, Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, 17 FCC Rcd 6065 (MD, 2002).

² “[T]he satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the station’s local market on contiguous channels and provide access to such station’s signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide or menu. 47 U.S.C. Section 338(d).

**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 Espanol, 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.

**SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: *General Motors Corporation and Hughes Electronics Corporation (Transferors) and News Corporation Limited (Transferee) for Authority to Transfer Control, Order, MB Docket No. 03-124)*

I support the Commission's decision to approve this transaction. While the merger of News Corp. and DirecTV presents potential harms and benefits, I believe that, on balance, the merger as conditioned will benefit consumers, competition, and the public interest.

I write separately to express my disappointment that a majority of my colleagues is unwilling to grant the public television community's request to clarify the requirements under the Satellite Home Viewer Improvement Act ("SHVIA") and specifically require that, in providing local-into-local service pursuant to SHVIA, DirecTV could not place certain local broadcast stations on wing satellites.¹

As I have stated before, I believe Congress provided that DBS operators would have the opportunity to carry local broadcast stations, but if they choose to do so, they would have to provide consumers with *all* the local broadcast stations.² These "carry one, carry all" provisions of SHVIA include a prohibition against discriminatory treatment of the broadcast signals.³ As I have explained in detail previously, I believe Congress's non-discrimination provision prevents DBS providers from placing "preferred" broadcasters on a main satellite and relegating certain "disfavored" broadcasters to a second satellite.⁴ Non-discrimination requires that all broadcast stations be placed on the same dish. The Association of Public Television Stations and the Public Broadcasting Service, therefore, are asking no more than to require the merged entity to comply with the governing statute and our rules when rolling out "local-into-local" service to consumers across America. Licensees must *always* comply with the statute and our rules, and I am disappointed that only one of my colleagues was willing to make this clear.

This is an unfortunate day for public television stations, religious broadcasters and Spanish language broadcasters—the stations most often relegated to the second dish. Indeed, over 31 public broadcast stations in 20 markets have been denied carriage on the same dish as other broadcasters. Local religious broadcast stations are almost uniformly placed on the second dish, if they are carried at all. Similarly, numerous Spanish language station owners have all documented to the Commission the discriminatory treatment that their stations receive; most are carried on the

¹ See Comments of the Association of Public Television Stations and the Public Broadcasting Service at 1 (June 16, 2003).

² See, e.g., Statement of Commissioner Kevin J. Martin and Commissioner Michael J. Copps Re: National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order, April 10, 2002 ("*Two-Dish Statement*"). See also 47 U.S.C. § 338(a)(1).

³ See 47 U.S.C. § 338(d).

⁴ See *Two-Dish Statement*. To the extent any Media Bureau decisions have been inconsistent with this interpretation of the statute, they have not been affirmed by the Commission and I believe they are in error.

second dish, unless they are willing to *pay* for placement on the main satellite. Recent reports have shown that very few consumers bother to acquire the second dish, which has meant that very few consumers can access these stations. Consumers and broadcasters deserve better, and the statute requires it.

It is important to emphasize that a DBS operator's roll-out of local-into-local stations need not be at the expense of public television, religious and Spanish language broadcasters. SHVIA does not hinder a DBS provider from expanding the markets – including rural markets – in which it carries local broadcast signals. The use of a second dish is a spectrum allocation issue. If DBS providers choose to use a “two-dish” solution to provide local broadcast service to more communities, compliance with the non-discrimination provision simply requires that all the local stations be treated similarly, whether they are placed on the main or wing satellite.

I, along with my colleague Commissioner Copps, continue to believe that this is a vital issue to all public, religious and Spanish-language broadcasters. I am disappointed that we were the only Commissioners willing to vote to clarify that DBS operators must place all broadcasters – or at least all public broadcasters – on the same dish. I also am disappointed that not one other Commissioner was even willing to address this fundamentally unfair policy and to clarify that these broadcasters are entitled to equal treatment under the law.

As my colleagues in the majority point out, this issue is the subject of an Application for Review that has been pending for over a year and a half, in which the Association of Public Television Stations challenges a Bureau decision that allows a DBS provider to place certain broadcasters on a second dish.⁵ Given the current legal status and the continued, prolonged absence of Commission action in that docket, and in the face of a direct request from the public broadcast community in this proceeding, I am uncomfortable avoiding this issue any longer. Moreover, the Order recognizes that this is a merger-specific issue: “We recognize that the proposed transaction may give DirecTV greater incentive to favor News Corp.’s Fox broadcast network programming and therefore to move other broadcasters onto other satellites.”⁶ I agree that this issue does raise merger-specific concerns.

Finally, I note that a clarification of the legal requirements of SHVIA's non-discrimination provision here would be the industry-wide solution that some have called for. I fail to see why any Commissioner supportive of such a solution would not vote for that resolution when presented with that opportunity here.

⁵ See Association of Public Television Stations and the Public Broadcasting Service, *Application for Review*, CSR 5865-Z (May 2002); *National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order*, 17 FCC Rcd 6065 (MB 2002).

⁶ Order at para. 273.

**DISSENTING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, MB Docket No. 03-124

Deciding whether a fox should guard a hen house is a far more serious exercise than this Order reflects. Granted, the birds in this case are not hens but valuable satellites with a national footprint from which nearly 12 million people receive video programming through DirecTV. And the Fox in this case is already one of the world's largest media conglomerates, with a vast array of global content and distribution assets. The acquisition of Hughes Electronics Corporation by News Corporation (News Corp.) will result in unprecedented control over local and national media properties in one global media empire. Its shockwaves will undoubtedly recast our entire media landscape.

Never before has a single corporation been armed with a national video distribution platform; a major broadcast network; television stations in nearly every major media market – reaching more than 44 percent of the country – with guaranteed carriage rights on other distribution platforms; multiple cable networks (11 national and 22 regional, including sports networks with exclusive rights); a major film and television studio; newspaper, magazine and book publishing operations; significant video programming and broadcasting satellite backhaul capacity; and the leading program guide and programming-related technologies to facilitate a consumer's viewing experience. With this unprecedented combination, News Corp. could be in a position to raise programming prices for consumers, harm competition in video programming and distribution markets nationwide, and decrease the diversity of media voices. I wish the full dangers of this combination would have been more thoroughly examined and confronted.

This Order makes a mockery of the Commission's public interest test. Consumers have absolutely no assurance of benefiting in any way from the merger's claimed synergies, yet they potentially suffer great harm. From the onset, I have had grave concerns about this transaction, yet I have sought to impose meaningful conditions to make the Order better than it otherwise would have been. Unfortunately, not all of those conditions were imposed, and I do not believe that any supposed public interest benefits of this transaction outweigh its very real harms.

It has long been a goal of mine, and many other policymakers, to ensure that every community in America can get all of their local television signals directly from their satellite provider. That is why I am so disappointed that this Order does nothing to even hold News Corp. to the shallow promises they made to the Commission to provide local channels to consumers in all 210 television markets across the country. Instead, it limply adopts the requirement that DirecTV provide service to the top 130 markets by the end of 2004, leaving the smaller markets in Rural America high and dry.

I felt strongly that the Commission should require DirecTV to provide real local-into-local service, meaning every local broadcast television signal, over satellite to all 210 television markets across the country by 2006. It is especially critical to have required a firm date by which DirecTV must uplink and offer local broadcast signals for every television market in America, from the largest to the smallest. Consumers living in rural areas deserve the same benefits as their more urban counterparts.

Instead, I learned in the process of reviewing this matter that News Corp. has no intention of ever providing real local-into-local satellite service to every market in the country. A close examination of

their commitments revealed them to mean that they consider it enough to offer some reasonably close local station as part of an undefined “local channel package”, or simply add a digital tuner in the box in smaller markets and hope the customer can receive a signal. For those who live in outlying rural areas, tough luck. What could have been the most important public interest benefit of this merger turns out to be nothing more than a sham, and the Commission is going along with it, no questions asked.

It is especially demoralizing to know that my home town of Rapid City, South Dakota, television market #175, may never get its own local broadcasters beamed down from space. The loss to the citizens of Rapid City is emblematic of the problems so many communities will face for the foreseeable future. They may never receive high-quality satellite signals of their local news, weather, sports and other locally-based programming. Most importantly, people living in outlying areas like Kadoka, South Dakota, who cannot otherwise receive Rapid City broadcasts, will never receive them by satellite, and slapping an antenna on their dishes will offer them nothing.

We hear a lot of talk about localism. Here, we had the opportunity to do something about it. Instead, we let News Corp. gain all the benefits of this merger while asking them to do nothing in return for Rural America, or anyone else, for that matter. We abandoned Rural Americans to the fickle exigencies of the marketplace, with every assurance that it will fail to provide them the same quality of service enjoyed by their more urban counterparts.

By today’s action, the FCC allows the ever-expanding tide of vertical and horizontal media concentration to intensify. It signals, yet again, the FCC’s unwillingness to take a hard look at media consolidation. It vests more control of our nation’s media in the hands of an already powerful media conglomerate. And it raises the compulsion for other companies to follow suit, to, so-to-speak, “keep up with the Murdochs.”

This unprecedented combination could dramatically impact News Corp.’s programming and distribution rivals. It fundamentally alters the relationship of News Corp. to its rivals, as it now becomes a vertically integrated competitor to all other MVPDs in every single MVPD market, and the first of only two nationwide programming platforms to have its own programming. It increases the incentive and ability to act anticompetitively with respect to all rivals.

News Corp. is now in a position to distribute programs or sporting events either on its broadcast network, cable networks, regional networks, television stations, or even over pay-per-view. Imagine the increased bargaining power of News Corp. as it sits at various negotiating tables in these interconnected industries, finding itself on all sides at once, and with an increased arsenal of weapons against rival programmers or distributors. News Corp. will be in a position to demand higher programming fees or demand concessions without fear of losing distribution.

The Order does contain some useful protections. When a nationwide distributor merges with such a large programmer, there rightly should be consumer protections to prevent the vertically integrated company from withholding programming from rivals or offering it on discriminatory prices, terms or conditions. The parties’ commitments, including abiding by our program access rules and other nondiscrimination safeguards, are positive steps which I am pleased are included as express conditions of approval.

The Order properly finds public interest harm involving even temporary foreclosure of retransmission consent of News Corp.’s broadcast television properties or contractual rights to carry Fox-controlled regional sports networks. The addition of DirecTV’s nationwide platform increases the

likelihood that News Corp. can capitalize on a strategy of withholding consent to carry these programs, even temporarily. Small and medium sized cable operators and other distributors are particularly vulnerable to News Corp.'s enhanced bargaining power.

News Corp.'s bargaining clout is even more heightened for its regional sports networks, for which few, if any, competitive alternatives exist. In both the U.K. and Australia, News Corp. employs a strategy of seizing key sporting rights and using them to secure favorable carriage terms. Indeed, as early as 1996, Rupert Murdoch made clear his intention to use his company's formidable sports programming assets as a "battering ram" to squeeze out concessions from his rivals.

For this reason, the Order appropriately adopts a fair and neutral mechanism to resolve disputes, requiring News Corp. to agree to undertake binding arbitration with its distribution rivals. Any mitigation of harm that this arbitration condition brings, however, would be thwarted if News Corp. has the ability during the pendency of the arbitration to deny its rival the right to carry the disputed programming. So it is absolutely critical that the Order prevents News Corp. from yanking sports programming during the arbitration process. This may save consumers not only their viewing of popular programming, but the cost and other savings from what News Corp. could have otherwise battered out of its rivals and their customers. Empirical evidence in the record shows that dropping such programming harms viewers, leads to higher prices and results in significant losses to the competing multichannel video programming distributor.

Yet, the benefits of these conditions disappear without a trace after six years. I would have explicitly left room to extend these protections for up to six additional years, for a total of twelve years, and required the Commission to undertake a full review of the continued need for these conditions through a notice and comment proceeding. Given the duration of some of today's contracts, and the possibility that the identified harms of capitalizing on DirecTV's status persist, a mere six-year term does not suffice. The requirement for the Commission to undertake a full notice and comment proceeding would have provided the Commission valuable information to assess any harms of this merger, and would have kept a check on News Corp.'s incentive to use its new leverage to harm consumers.

In addition, to account for possible overall rate increases, I would have established a benchmarking process or pricing index mechanism to evaluate whether the merging parties are raising prices at a more accelerated pace than their historic pattern. Such a mechanism has been implemented in the past for vertical relationships between programmers and distributors. This benchmarking process would have ensured that rates not rise too quickly for all distributors, and would have been a better way to address the merger-specific harms identified in the Order.

I am deeply worried that with this extraordinary combination, News Corp. will be in a position to raise rates for all of its programming, thus driving up MVPD prices around the country and harming consumers. At the same time that it is competing with cable and other distributors for subscribers, it could raise the costs to those distributors for the underlying programming, or could pressure the companies for other benefits such as favorable channel placement. None of the merger's protections addresses the likelihood that News Corp. engages in profit maximizing behavior and raises programming prices for all distributors. In fact, in some ways, the merger conditions could be used to send valuable signals to other MVPDs about the prices, terms and conditions of programming carriage or the consequences of resisting News Corp.'s demands. Without quantifiable benchmarks or pricing standards, there is insufficient assurance to the public that this transaction will not result in increased prices for all.

I have many other concerns with this transaction. The merger furthers concentration in local media markets by consolidating ownership over local media outlets under one global media conglomerate. In major media markets across the country, it combines one, sometimes two, local television stations, with one of typically three major multichannel video programming distributors. In New York, for example, it combines a television duopoly, a newspaper, and a DBS operator. In Puerto Rico, some cable subscribers are served by a system owned by Liberty Media, a significant investor in News Corp. who stands to benefit from DirecTV's gains. The Commission should have conducted a specific market-by-market review of the effects of consolidation on competition, localism and diversity in particular local media markets. Moreover, under the Commission's relaxed media ownership rules, News Corp. would be free to acquire additional duopolies, radio stations and newspapers in those same local media markets, furthering their control over what local viewers see, hear and read.

This merger also threatens disruptive effects for competing programmers, particularly independent programmers and producers. Even without the merger, through the use of retransmission consent, News Corp. has been able to expand its cable networks faster than any other cable programmer. I will continue to monitor closely whether News Corp. provides opportunities for both established and new networks, particularly new entrants, to negotiate carriage on fair and reasonable terms on DirecTV. New Spanish-language networks, for example, have reached agreement with cable providers and are attempting to negotiate carriage on DirecTV. Given DirecTV's history of promoting a diversity of programming, I would be concerned if its acquisition by News Corp. resulted in a loss of diverse, independent or minority-owned programming to an eager public in order to favor networks it owns.

I am also concerned with News Corp.'s ability to leverage its program guide and interactive holdings. Gemstar-TV Guide, with a leading position in electronic and interactive program guides, recently gave DirecTV use of its intellectual property, technology and brand. I expect this same flexible licensing approach to continue to be made available to others on a timely and fair basis.

News Corp. has a history of taking risks, and the Applicants have committed to launching several new interactive services on the DirecTV platform in 2004, using a new DirecTV user interface and middleware licensed or provided by News Corp. subsidiaries. Provided this "enhanced viewing experience" moves beyond the more rudimentary interactive gaming services offered today, this promises to benefit consumers in significant ways. With the prospect of interactive services more imminent, the Commission must be cognizant of the ways in which a distributor or particular middleware or program guide vendor could favor affiliated programming to the detriment of non-affiliated programmers. I would be concerned if News Corp. stood as a gatekeeper to interactive services and features or demanded from rival distributors exclusive use of particular EPG, IPG, interactive middleware or security software or systems during its carriage negotiations. While the software solutions for interactivity are still emerging, DirecTV gives News Corp.'s subsidiaries an increased incentive and ability to discriminate in software and applications, or to endure losses in one business unit for the greater good of the corporate whole. Should problems emerge, they could be addressed through general rulemakings or through recourse to the nation's antitrust authorities.

I sympathize with my colleagues who seek to resolve the placement of local broadcast stations on second satellite dishes under the Satellite Home Viewer Improvement Act. I believe this can be accomplished through a general rulemaking, and I have been assured by the Chairman that the Commission will resolve this issue early next year.

I caution that as a large and prominent global media conglomerate, it is incumbent on News Corp. to lead in serving the overall public interest and modeling appropriate behavior for the industry. "Take it

or leave it” bargaining tactics would not convince me of a corporate commitment to good faith negotiation. With respect to diversity opportunities within its business units and in its programming, I urge continued efforts to promote diversity within the Fox Entertainment Group’s employment, management and executive ranks. I am pleased to see a commitment by the companies to increase the amount of programming on DirecTV targeted at culturally, ethnically, and linguistically diverse audiences. Given the increased concentration in local media markets, I also expect to see such diversity reflected in the coverage of issues of concern to local communities or minority groups across the country. Diversity in viewpoints should be encouraged everywhere in our media.

I am troubled by reports that Fox’s independent affiliates are having difficulty maintaining their independence in decisions involving programming or the use of their digital spectrum. Local control over programming is required by law and vital to our system of American broadcasting. It is the local stations, after all, that are accountable to the FCC for their community’s standards of broadcasting.

These many concerns call for a more serious examination of the concentration resulting from the merger, or other more comprehensive structural or behavioral conditions. While this Order does contain some important protections, not all the effects on consumers and competition have been fully analyzed or remedied to assure fair competition and protection of consumer interests. I dissent.