producers and actors from diverse backgrounds. For the 2002-2003 season, FOX has over 40 individuals from minority groups staffed as writers, producers and writer's assistants, with 19 of its 22 series having at least one writer of color. Diverse directors were employed on over 75 episodes of FOX series for the season, nearly doubling such hires from the previous year. Due to its diverse slate of programming featuring prominent ethnic cast members (*e.g., Bernie Mac, 24, Boston Public, Fastlane*, and *John Doe*), this season FOX has cast 70 series regulars or recurring parts from communities of color. Critically lauded, these series continue to be recognized by institutions such as The Academy of Motion Pictures Arts & Sciences, The Peabody, and various advocacy groups, for their contribution to diversity in modern television entertainment.

Another example of News Corp.'s commitment to diversity is the compelling slate of motion pictures produced or distributed by Fox film divisions. Continuing a tradition of diverse offerings, recent films include Denzel Washington's directorial debut in *Antwone Fisher*, Linda Medoza's *Chasing Papi*, Rick Famuyiwa's *Brown Sugar*, John Malkovich's Latin American thriller *The Dancer Upstairs*, Gurinder Chadha's East Indian film *Bend It Like Beckham*, and Charles Stone's African American marching band comedy *Drumline*.

Yet another is the minority apprentice program launched earlier this year by Fox News Channel, which is designed to seek out minority candidates with high potential, give them the opportunity to join Fox News Channel for a year, support their development with a mentoring system, and allow them to demonstrate their abilities as a step toward a permanent position.

Finally, the FOX.com web site has been designed to allow for prompt and easy dissemination of procurement and development opportunities for minority- and women-owned businesses. As a result of this program, the Fox group of companies has experienced gains in diversity supplier purchases totaling in the millions of dollars.

News Corp. intends to extend its diversity program to Hughes in several respects, taking into account the unique aspects of a national MVPD business.

First, as a consequence of News Corp.'s investment, Hughes will carry more programming targeted at culturally, ethnically, and linguistically diverse audiences. The nationwide coverage of DBS service provides unique advantages in aggregating and reaching audiences for niche programming.

Second, News Corp. will implement a program through Fox Cable Networks for mentoring women and minority entrepreneurs who have the financial backing, but not the "know how," to launch niche cable channels. This program will be modeled on an existing mentoring program at the Fox companies for minority entrepreneurs in the television and film businesses. With its in-house expertise in developing and launching niche cable channels, such as the Speed Channel, News Corp. can provide the expertise necessary for a successful mentoring program.

Third, News Corp. will assist Hughes in actively recruiting women and people of color for management positions at Hughes as these positions become available. In addition, News Corp. will assist Hughes in identifying and developing current employees who are female or persons of color for possible future advancement.

Fourth, News Corp. will assist Hughes in designing, developing and implementing an internship program at Hughes for diverse college and graduate students.

Over the past two years, the Fox companies have instituted several such internship programs with the primary purpose of adding people of color to all functions within the organization. A similar program at Hughes will involve the distribution of information, coordination of on-campus site visits to select internship candidates, coordination of an orientation session, and a process for tracking graduates of the program for purposes of future employment.

Fifth, News Corp. will assist Hughes in evaluating its procurement programs to ensure that they provide sufficient opportunities for minority-owned suppliers and contractors. News Corp. will assist Hughes in building a database of qualified women and minority vendors for Hughes' preferred vendor list.

Finally, News Corp. will assist Hughes in upgrading internal and external communications, including its web site, to help it more efficiently institute the above diversity initiatives. Among other things, this improved communications system will assist Hughes in advising the public of job opportunities and various programs that are available, in particular in the area of diversity development, and will provide businesses with information on Hughes' procurement policies.

By extending to Hughes the kinds of diversity initiatives already in place at News Corp.'s subsidiaries and tailoring them to Hughes' business, News Corp. will enhance equal opportunity and help stimulate diversity at every level of the entertainment business.

H. Additional News Corp.-Hughes Synergies

Affiliation with News Corp. will also provide strategic benefits for other Hughes subsidiaries. HNS will have greater access to the expertise of other technology companies, such as NDS. And as one of the world's largest users of satellite video services, News Corp. will be able to offer PanAmSat valuable insights from the customer's perspective. Since PanAmSat derives over 65% of its annual revenues from carrying video services, such feedback should prove an invaluable tool in devising strategies for developing new markets and new services around the world. Thus, the proposed transaction will create synergies throughout Hughes.

V. THE PROPOSED TRANSACTION WILL RESULT IN NO PUBLIC INTEREST HARMS.

In its public interest balancing of likely benefits and any harms potentially arising from a transaction, the Commission pays close attention to possible competition-related issues. As discussed below, economic forces are sufficient to ensure that the proposed transaction will have no anti-competitive effect in any relevant market. Moreover, the parties have agreed to go further and confirm their commitment to fair competition by undertaking enforceable program access commitments that go beyond the requirements imposed on any other vertically integrated programming vendor or DBS operator.

A. *Relevant Market Definition*

In order to conduct its analysis of the competitive effects of the proposed transaction, the Commission must first identify the relevant product and geographic markets. The Commission has previously found that DBS operators compete in a market composed of all MVPD operators.[62] Although the Commission has at times considered the possibility that the relevant product market may be more narrowly drawn, it has

62 *See, e.g., Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd. 11331, 11336 (2002) (noting that "DBS continues to represent the single largest competitor to cable in the MVPD market); *MCI Telecommunications Corp.,* 16 FCC Rcd. 21608, 21616 and n. 40 (1999) ("Competitors in the MVPD market include cable operators, DBS operators, [and others]") ("*MCIT*"); *Tempo Satellite*, 14 FCC Rcd. 7946, 7952 (1999) (noting that "DBS operators compete with each other and other MVPDs in the distribution of multiple channels of video programming to consumers (the 'MVPD market')").

continued to use the MVPD product market for its competition analysis in recent cases.[63] The United States Department of Justice and the Attorneys General of 23 states, Puerto Rico and the District of Columbia identified this same MVPD product market in their recent complaint against the proposed merger of EchoStar and DIRECTV.[64] Accordingly, for purposes of this Application, the parties will also use the MVPD market as the relevant product market.

The Commission has also consistently found that the geographic scope of the distribution market is local or regional, while the programming market is national and possibly international.[65] Those market definitions should serve for analyzing the instant transaction, as well.

B. *Potential Horizontal Issues*

The satellite assets of Hughes and its subsidiaries in the United States complement the non-U.S. satellite interests of News Corp., completing a global network for the distribution of programming. However, because this transaction does not involve the affiliation of two U.S. MVPD systems, it does not present the Commission with "horizontal" combination issues of the type that have been involved in other recent merger transactions.[66] The proposed transaction will increase neither Hughes' U.S.

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63 *See EchoStar/Hughes*, 17 FCC Rcd. at 20609; *AT&T/Comcast*, 17 FCC Rcd. at 23251. In addition, the Commission continues to take the view that the relevant product market in DBS cases is no broader than the MVPD market and specifically does *not* include broadcast television. *See EchoStar/Hughes*, 17 FCC Rcd. at 20609-10, 20616 n.371.

64 *See DOJ/EchoStar Complaint* at ¶ 24.

65 *Ninth Cable Competition Report,* 17 FCC Rcd. at 26852-55; *see also AT&T/Comcast*, 17 FCC Rcd. at 23282; *MCIT*, 16 FCC Rcd. at 21613-14.

66 *See, e.g., EchoStar/Hughes, supra.* The proposed transaction will involve DTH satellite services offered separately in Latin America by a non-wholly owned subsidiary of Hughes and affiliates of News Corp. However, the Commission's public interest analysis is confined to specific harms alleged in the U.S. market and does not consider competition issues that

MVPD assets[67] nor News Corp.'s programming assets, so there is no prospect that it could create or enhance market power in the relevant distribution or programming markets.

Specifically, with respect to video distribution, the proposed transaction with News Corp. will create no direct horizontal MVPD overlap. There is no effect on potential competition because News Corp. has no plans for independently entering the distribution market. And once the transaction is concluded, DIRECTV will continue to face intense competition from cable operators in most local markets, as well as continued rivalry from EchoStar in *every* local market.

Similarly, the proposed transaction creates no direct horizontal overlap in programming. 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. For its part, News Corp. will continue to face intense competition in regional, national and international programming markets from the same array of well-established and well-funded companies with which it currently competes.

C. *Potential Vertical Integration Issues*

Because the proposed transaction would create an affiliation between News Corp.'s programming assets and the DIRECTV distribution platform, the transaction

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may arise in other countries. *See GE/SES*, 16 FCC Rcd. at 17594; *Deutsche Telekom AG, VoiceStream Wireless Corporation, and PowerTel, Inc.*, 16 FCC Rcd. 9779, 9824 (2001).

[67] As previously noted, Liberty indirectly holds a controlling interest in one Ka-band satellite system licensed by the Commission and a substantial non-controlling interest in another. However, Liberty will not have control over any Commission license held by any Hughes subsidiary, including HNS' SPACEWAY licenses. After the proposed transaction is consummated, Liberty will hold no more than an approximately 19% interest in News Corp., and will also directly hold less than 1% of Hughes common stock. These interests fall well below any level that could raise a concern over concentration of licenses in the nascent Ka-band.

results in a "vertical" integration of assets. As the Commission has recognized, vertical relationships can have significant beneficial effects, particularly in increasing the diversity of programming by reducing the risks of launching a new programming product.[68] Nevertheless, some might reflexively argue that vertical integration in this case could raise concerns about anti-competitive effects. Such a criticism would be both unfounded and misguided.

In analyzing vertical issues in MVPD cases, 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").[69] It is extremely unlikely that anti-competitive discrimination could or would arise in either of these markets as a result of the proposed transaction, for at least two reasons.

First, neither News Corp. nor DIRECTV has sufficient power in any relevant market that would give it the ability (or the economic incentive) to pursue a vertical foreclosure strategy. This stands in stark contrast to the demonstrable market power exercised by cable operators in the nascent MVPD market of the early 1990s that led Congress and the Commission to adopt program access requirements.[70] Specifically, it is

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[68] *Ninth Cable Competition Report*, 17 FCC Rcd. at 26959 and n.440 (beneficial effects include efficiencies in the production, distribution, and marketing of video programming, and providing incentives to expand channel capacity and create new programming by lowering the risks associated with program production ventures).

[69] *See, e.g., Ninth Cable 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").

[70] *See, e.g., Exclusivity Sunset Order*, 17 FCC Rcd. at 12126 ("The lack of competition to cable in the delivery of multichannel programming enabled cable operators to engage in anti-competitive behavior to the detriment of subscribers, nascent competitors, and nonaffiliated programmers"); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd. 3105, 3123 (1994) ("The legislative history of Section

extremely unlikely, after consummation of the transaction, that News Corp. or DIRECTV could engage in the two primary types of anti-competitive behavior that theoretically can arise when an MVPD becomes integrated with a supplier of content, namely: (i) denying distribution to or discriminating against unaffiliated programmers, and (ii) refusing to supply or discriminating against competing distributors.

Second, in order to eliminate any possible concerns over the competitive effects of the resulting vertical integration, News Corp. and Hughes have agreed as a matter of contract to conduct themselves in accordance with a series of program access undertakings as an enforceable condition of approval of this Application.[71] In essence, these undertakings simply confirm the fair, open, and non-discriminatory access practices that each company has lived by in the past and that the parties in any event would have practiced in their own economic interest going forward.

Finally, the proposed transaction raises no vertical concerns with respect to News Corp.-controlled broadcast programming or electronic program guides ("EPGs"). All of these issues are addressed in greater detail below.

1. Programming Market: Discrimination Against Rival Programming Services

A competitive concern 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. In this case, however,

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628 specifically, and of the 1992 Cable Act in general, reveals that Congress was concerned with market power abuses exercised by cable operators and their affiliated programming suppliers that would deny programming to non-cable technologies . . . .").

[71] The full text of these undertakings can be found in Attachment G.

the ability and incentive of an integrated News Corp./DIRECTV entity to engage in this type of anti-competitive conduct is significantly constrained.

Simply put, DIRECTV has no market power in distribution, and the proposed transaction will not increase its share of the market. DIRECTV's share of the national MVPD market is modest, approximately 12%,[72] and because News Corp. holds no interest in any MVPD in the United States, the proposed transaction will not increase that market share. In fact, cable operators – with as much as 29% of the national MVPD market in the case of AT&T-Comcast – are the primary purchasers in the national market for the purchase of video programming.[73] In the overwhelming majority of local markets, the Commission has found that DIRECTV competes against a dominant terrestrial cable operator.[74] And in each of these markets, as well as in those comparatively few markets not served by any terrestrial operator, DIRECTV still faces competition from the other DBS operator, EchoStar, which has an approximately 8.5% share of the national MVPD market.[75] Each of these MVPDs strives to offer existing and potential customers the most attractive package of video offerings possible.

With so many entities vying for programming, it is not surprising that the Commission's analysis indicates that the nationwide video programming purchaser market is "unconcentrated" under the methodology employed by the Merger Guidelines

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72 *See Ninth Cable Competition Report*, 17 FCC Rcd. at 26930, 26975 Table B-1 (as of June 2002, DIRECTV had approximately 10.7 million subscribers out of approximately 89.9 million MVPD households).

73 *Id.* at 26957.

74 *See id.* at 26903.

75 *See id.* at 26931, 26975 Table B-1 (as of June 2002, EchoStar had approximately 7.6 million subscribers out of approximately 89.9 million MVPD households). Today, EchoStar has approximately 8.4 million subscribers.

developed by the Department of Justice and Federal Trade Commission.[76] Moreover, as the Commission has previously found, the data strongly suggest that DBS operators do not have enough subscribers to give them market power in the acquisition of video programming. In fact, in *EchoStar/Hughes*, the Commission found that even if both DBS operators merged, their combined 20% market share would be insufficient to gain monopsony power.[77]

In the cable context, the Commission has found that limiting national market share to no more than 30% would be sufficient to prevent any abuse of market power by cable operators against unaffiliated programmers.[78] In other words, the Commission has previously found that *even at 250% of DIRECTV's current market share,* an MVPD would have no ability to harm unaffiliated content providers, unaffiliated electronic programming guides, or other MVPDs. Upon review of that finding, the D.C. Circuit suggested that an even higher market share could be reached without anti-competitive consequences from vertical foreclosure.[79]

The Commission's recent findings in the *AT&T/Comcast* merger proceeding, in which it concluded that there was no potential for anti-competitive behavior in the

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[76] *Id.* at 26958.

[77] *See EchoStar/Hughes*, 17 FCC Rcd. at 20657 (even at a combined market share of 20%, merged DBS operator would not be able to exercise monopsony power over national and regional programmers).

[78] *Implementation of Section 11(c) of the Cable Television Consumer Protection & Competition Act of 1992 – Horizontal Ownership Limits*, 14 FCC Rcd. 19098 (1999)(establishing a 30% nationwide cap on cable subscribers)("*Horizontal Third R&O*"), *rev'd and remanded in part sub nom. Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir.), *cert. denied*, 534 U.S. 1054 (2001). On remand, the Commission is currently considering whether to raise the 30% horizontal cap. *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd. 17312 (2001).

[79] *See Time Warner*, 240 F.3d at 1136 ("While a 60% limit might be appropriate as necessary to ensure that programmers had an adequate 'open field' even in the face of rejection by the largest company, the present record supports no more").

purchase of either national or regional programming, bear directly on this point. In that proceeding, the Commission considered a case in which the merged entity – with a combined market share of 28.9% of U.S. MVPD subscribers – would hold an attributable interest in nine national video programming networks. The Commission found that, because the merged entity's subscriber reach would be less than 30% of the national MVPD market, "even with an attempted foreclosure strategy by the merged firm, more than 70% of the MVPD market would still be available to unaffiliated programmers," and that therefore, given "the limited number of programming services the merged firm would control," the merger would not enable the parties to successfully foreclose unaffiliated national programmers.[80] Since DIRECTV has a much smaller share of the national MVPD market and News Corp. has an interest in one fewer national video programming network than the merged entity in *AT&T/Comcast*, the same reasoning leads inescapably to the conclusion that the proposed transaction would have no anti-competitive effects on the buying side of the national programming market.

In addition, the Commission also considered the fact that the merged entity in *AT&T/Comcast* would hold an interest in nine regional video programming networks, including five regional sports networks. The Commission discussed the conditions that would be necessary for an MVPD to have the economic incentive and ability to foreclose unaffiliated regional programming:

> First, the MVPD must have affiliated regional programming from which it could benefit by the reduction in programming competition. Second it

[80] *AT&T/Comcast,* 17 FCC Rcd. at 23266. *See also MediaOne Group, Inc. and AT&T Corp.*, 15 FCC Rcd. 9816, 9844 (2000) ("*AT&T/MediaOne*") (the proposed merger of two cable companies that would result in a company with "attributable interests in a vast number of programming networks, including many of the networks with the largest number of subscribers nationwide" approved because "potential harms are sufficiently mitigated" by the 30% nationwide cap).

> must have the ability to foreclose. That is, it must have a large enough share of the relevant MVPD households that by choosing not to carry a competing programmer's offering, either a competing programmer would exit the market, or it would deter a potential entrant from entering. Finally the MVPD must have the economic incentive to do so. That is, any additional profits attained by the reduction of competition in the regional programming market must outweigh the lost earnings from carriage of the competing programming on the MVPD's own systems.[81]

The Commission concluded that the merger was unlikely to result in public interest harms arising from foreclosure of regional programming. It based its conclusion in large part on the fact that the merged entity's share would not exceed 25% of total subscribers in the only region served by affiliated programmers where more than a *de minimis* increase in subscriber share would result. At that level, the Commission could not conclude that profits from any reduction in competition likely would outweigh lost earnings or that a foreclosure strategy would materially impair unaffiliated programmers' ability to compete by selling to MVPDs serving the remaining 75% of the market.[82] In this case, because DIRECTV's highest share of any regional market served by one of the regional programming services in which News Corp. holds an interest is less than 13% and News Corp. will not add to that figure, there is even less basis for concern over foreclosure on the buying side of the regional programming market.

Thus, even if it wanted to do so, DIRECTV could not exert market power by demanding unreasonable terms as a condition of program carriage. Nor could DIRECTV drive unaffiliated programmers out of business by refusing to carry their programming,

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[81] *AT&T/Comcast,* 17 FCC Rcd. at 23266.

[82] *Id.* at 23268-69. For purposes of this analysis, the Commission defined the MVPD's relevant market share by its share of MVPD households in the geographic footprint where the programming is delivered.

since there are numerous other outlets available with access to the lion's share of aggregate regional and national MVPD subscribers.

Nor would it be economically rational for DIRECTV to refuse to carry attractive unaffiliated programming in favor of programming produced by its new affiliate, News Corp. If DIRECTV failed to carry desirable programming it would damage only itself by driving customers into the arms of other MVPDs. With over 200 national channels to offer, DIRECTV will need to draw from all programming sources available in order to supply a compelling service to its subscribers.[83] Simply put, DIRECTV's primary economic incentive is 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. It will have the same incentive even after News Corp. acquires a 34% ownership interest.

Nonetheless, if the Commission deems it necessary, News Corp. and Hughes have agreed to accept the following enforceable undertaking as a condition to grant of this Application:

> **Neither News Corp. nor DIRECTV will discriminate against unaffiliated programming vendors with respect to the selection, price, terms or conditions of carriage on the DIRECTV platform.**

Thus, there is no potential for a vertical foreclosure strategy in the programming market.

The bottom line is that DIRECTV has no market power on the buying side through which to distort the programming market, and this fact will not be changed by

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83 *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, 16 FCC Rcd. 17312, 17350 (2001) ("it appears that as capacity expands, vertically integrated systems need to fill their channels and thus tend to increase the carriage of all networks, including those of rival, unaffiliated networks").

the proposed transaction. Likewise, DIRECTV has every economic incentive to draw from the widest possible spectrum of attractive programming, and this fact also will not change if the proposed transaction is approved. Moreover, News Corp. and DIRECTV are willing to commit themselves to a policy of non-discrimination with respect to carriage of non-affiliated programmers. Under these circumstances, there is no basis for concluding that the transaction will have an adverse impact on the programming market.

2. The Distribution Market: Discrimination Against Rival MVPDs

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 a competitive advantage for its affiliated MVPD. Yet, once again, any such concern would be extremely attenuated in this case. First, News Corp. has no market power in the sale of video programming that would enable it to carry out such a strategy. Second, as a matter of economics, such a strategy would be commercially irrational for News Corp. and DIRECTV. Third, as a matter of regulation, News Corp. would be precluded from engaging in such discriminatory conduct because it is subject to the Commission's program access rules. And finally, 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.

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. The Commission has noted that the programming supply market is extremely competitive, with the growth rate of new programmers outpacing the growth of new channels on MVPD systems.[84] Of the

[84] *Cable Horizontal Limits Order*, 14 FCC Rcd. at 19104.

257 national video programming services listed in the *Ninth Cable Competition Report*, News Corp. holds an interest in only 10 (3.9%), including three non-controlling minority interests.[85] Of the total number of national and regional services listed, News Corp. holds an interest in only 32 of 339 (9.4%), and its interest in 12 of the 22 regional services is a non-controlling minority position.[86] While News Corp.'s subsidiaries produce a variety of desirable programming services in a number of different categories, they are but a few of the numerous and highly competitive programming sources available. In short, News Corp. does not have the *ability* to harm DIRECTV's MVPD rivals, pre- or post-transaction.

Nor does News Corp. have the incentive to do so. To the contrary, News Corp. has every economic incentive to secure the widest possible distribution of its programming in order to maximize the value of those assets – value that is based on its

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85 *Ninth Cable Competition Report*, 17 FCC Rcd. at 26959, 26980-88, Tables C-1 and C-2. Table C-1 incorrectly included "Fox Sports" as a National Video Programming Service. Fox Sports is not a separate programming service, but instead supplies programming to the Fox Sports Regional Networks and should be excluded from Table C-1. Fox Sports Latin America is a non-U.S. video programming service, and should also be excluded from Table C-1. Table C-2 incorrectly included TV Guide Interactive (in which News Corp. owns an interest through Gemstar) as a National Video Programming Service. TV Guide Interactive only provides programming guide applications and not video programming services, and should be excluded from Table C-2. In addition, TV Guide Sneak Preview and Sneak Prevue (in which News Corp. owned an interest through Gemstar) are no longer operational and should be excluded from Table C-2. Finally, Fox Sports Digital Networks, a new National Video Programming Service offered by News Corp., should be included in Table C-2. With these corrections, Tables C-1 and C-2 list a total of 257 national programming services. If pay-per-view services were included, the total would be 303 national services.

86 *See id.* at 26989-91, Table C-3; Attachment F. Fox Sports Net Cincinnati should be excluded from Table C-3 since it is not a separate programming service, but is part of Fox Sports Ohio which is already listed in Table C-3. Midwest Sports Channel should also be excluded from Table C-3 since it is now called Fox Sports Net North, which is already listed in Table C-3. Similarly, Sportschannel Florida should be excluded since it is now known as Fox Sports Net Florida, which is already listed in Table C-3. With these corrections, Table C-3 lists a total of 82 regional programming services.

ability to generate advertising revenue and per-subscriber fees. As the Commission has recognized,

> [p]rogramming networks seek to reach the widest range of subscribers for their type of programming on a regional or national basis, to increase the value of their programming to advertisers, and to build brand recognition that will spur other MVPDs to carry their programming. Because programmers incur high fixed costs associated with the development of programming, programming networks must have access to a critical number of viewers to avoid a financial loss.[87]

Consistent with these economic incentives, News Corp.'s record demonstrates that it has consistently sought expansive distribution for its programming.

Affiliation with DIRECTV would not change this fact, or give News Corp. an economic incentive to deny programming to unaffiliated MVPD rivals. DIRECTV has a national MVPD market share of approximately 12%, meaning that News Corp. would have to forego programming sales to the remaining 88% of the national market.[88] Similarly, given that DIRECTV's maximum share in any regional market served by one of the Fox Sports Regional Networks is less than 13%, it would also have to forego programming sales to at least 87% of the regional market. Such a strategy would ignore economic realities because News Corp. would have to sacrifice substantial profits from its programming interests that could not be offset through any additional profits it might hope to make as a minority owner of an MVPD with a relatively small market share. In addition, News Corp. owns less than 100% of many of its programming affiliates, and the other owners (who in some cases actually control the programming) would not tolerate

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87 *AT&T/Comcast*, 17 FCC Rcd. at 23248.

88 The Commission has found that a cable programming network needs to reach *at least* 15 million subscribers in order to attract sufficient national advertising revenue to ensure long-term viability – a level that DIRECTV alone does not provide. *See Horizontal Third R&O*, 14 FCC Rcd. at 19114-16.

such a strategy. 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 interest in Hughes) while it incurs most of the costs (through its 82% interest in FEG).[89]

Even if these economic realities were not sufficient, the Commission's program access rules foreclose any such strategy by directly prohibiting unfair and discriminatory practices by a satellite cable programming vendor ("SCPV") in which a cable operator holds an attributable interest.[90] All of the SCPVs in which News Corp. holds an interest are currently subject to the program access rules, due to (1) Liberty's approximately 17.6% interest in News Corp.,[91] and (2) in some cases, direct interests in those services held by Liberty or another cable operator. Nothing about the proposed transaction will change these facts, and thus the SCPVs in which News Corp. holds an interest will continue to be subject to these rules. Accordingly, all of these programming subsidiaries are required (1) not to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any MVPD from providing programming to subscribers, and (2) to make their programming available to all MVPDs on non-discriminatory prices, terms and conditions.[92]

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[89] *Compare EchoStar/Hughes*, 17 FCC Rcd. at 20658 (vertical foreclosure "highly unlikely to be profitable" for a programmer with a minority interest in a DBS operator).

[90] *See* 47 C.F.R. §§ 76.1000-76.1003.

[91] For purposes of these rules, the Commission defines an affiliate as a programmer in which a cable operator holds a 5% or greater interest. *Id.* at § 76.1000(b)(2). Liberty owns a cable system in Puerto Rico. *See Ninth Cable Competition Report*, 17 FCC Rcd. at 26959-60 and nn. 445 and 447.

[92] *See* 47 C.F.R. §§ 76.1001 and 76.1002(b). The Commission's program access rules and the precedent developed thereunder delineate those non-discriminatory ways in which an SCPV may nonetheless differentiate between MVPDs (*e.g.*, based on size of subscriber base, creditworthiness, or technical quality). *See id.* at § 76.1002(b)(1)-(3). News Corp. currently

It is possible, however, that Liberty could divest its interest in News Corp. or its cable system holdings, and that other cable operators could divest their interests in programming they own jointly with News Corp., thus rendering the program access rules inapplicable to News Corp.'s SCPV subsidiaries. While this possibility is remote, in order to allay any concerns,

> **News Corp. and DIRECTV will agree to be bound by the program access rules applicable to vertically integrated SCPVs, *whether or not a cable operator maintains an attributable interest in News Corp. or DIRECTV programming entities.***

In other words, even if the divestiture scenario described above comes to pass, News Corp., DIRECTV and their SCPV subsidiaries would remain subject to whatever program access requirements the Commission has in place for SCPVs that are vertically integrated with a cable company.[93]

Some might hypothesize that, in order to avoid a charge of discrimination, News Corp. could employ a strategy of raising the prices for its programming to supra-competitive levels for all MVPDs, and then force DIRECTV to accept those rates to set a "benchmark" that other MVPDs must either also accept or face the loss of News Corp. programming. Such a hypothesized strategy should not be a concern for at least three reasons. First, this hypothesis assumes that News Corp. has the ability to demand higher prices for its programming across MVPD platforms. For that to be true, News Corp. would either already have to have that power in the market (in which case there is no merger-specific effect) or it would have to gain that power by virtue of this transaction

abides by those guidelines and, pursuant to the undertakings outlined herein, would continue to do so.

[93] Like all of the other undertakings discussed herein, these restrictions would remain in place for so long as the Commission's program access rules remain in effect and News Corp. holds an attributable ownership interest in DIRECTV.

(which cannot happen because DIRECTV will add only negligibly to News Corp.'s existing programming interests). Neither is the case. And, absent such market power, it would be economically irrational for News Corp. to attempt to raise prices for reasons already set out above.[94] Second, although it has considered a number of other cases involving vertical issues in MVPD transactions, the Commission has consistently found that its program access rules are a sufficient protection against potential abuse.[95] And third, in this particular case, Hughes' post-transaction By-Laws will charge the Audit Committee, composed of independent members of the Hughes board of directors, with reviewing and approving transactions between Hughes and related parties such as News Corp. Accordingly, any programming contract between DIRECTV and a News Corp. programming affiliate would be subject to such review and approval as determined by the Audit Committee in accordance with its fiduciary duties to ensure that such contract is on arms' length terms. This corporate governance mechanism is intended to ensure that any pricing or other strategy will not benefit another party through an interested transaction at the expense of Hughes.

Thus, the economic incentives, regulatory requirements, and corporate governance provisions discussed above will ensure that News Corp. programming remains available to MVPDs that compete with DIRECTV at competitive and non-discriminatory rates, terms, and conditions. Moreover, if the Commission deems it necessary in order to satisfy competition-related concerns, the parties have agreed to

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94 *See* discussion at pp. 56-57, *supra*.

95 *See, e.g.*, *AT&T/Comcast*, 17 FCC Rcd. at 23286 ("the record contains little evidence that the program access rules will be insufficient to ensure that competing MVPDs have access to important programming that is affiliated with a cable operator"); *AT&T/TCI*, 14 FCC Rcd. at 3180 (declining to impose restrictions that are beyond the scope of the program access rules).

commit to further undertakings discussed below. In compiling this list of undertakings, the parties have been guided by the kinds of requirements placed upon cable operators, but have tailored those requirements to better fit the DBS context in general and the facts of the proposed transaction in particular. As discussed below, the proposed undertakings in some respects go further than the rules applicable to cable operators.[96]

The Commission's rules generally prohibit a cable operator from entering into exclusive contracts with cable-affiliated SCPVs, although such contracts may be permitted for areas served by cable upon an appropriate public interest showing.[97] Because a DBS satellite footprint affords nationwide coverage, the distinction between served and unserved areas is inapposite to DBS and a more simplified undertaking is appropriate. Accordingly, as a condition of the approval of the Application the parties will agree to abide by the following commitment:

> **News Corp. will continue to make all of the existing and future national and regional satellite cable programming services it controls available to all MVPDs on a non-exclusive basis and on non-discriminatory prices, terms and conditions.**

Unlike the Commission's rules, which limit the use of exclusive contracts by cable operators only, this undertaking applies to contracts between News Corp.-controlled programmers and *any* MVPD – including an exclusive arrangement with DIRECTV. This will ensure that all MVPDs have access to News Corp.'s programming services.

Some might be concerned that Liberty, as a significant News Corp. shareholder, might have an incentive to offer exclusive carriage agreements to DIRECTV once News

96 The parties anticipate that these undertakings would be enforced in a manner similar to and consistent with the Commission's program access rules.

97 *See* 47 C.F.R. § 76.1002(c).

Corp. has a significant interest in the company.[98] Such a strategy would be highly unlikely, since Liberty would bear all of the cost of refusing to sell to other MVPDs and would gain only a small percentage of any resulting advantage gained by DIRECTV (through a passive interest of no more than 19% in News Corp.'s 82% interest in FEG's 34% interest in Hughes). Nonetheless, in order to address such a hypothetical scenario, the parties have agreed to abide by the following commitment as a condition of the approval of the Application:

> **DIRECTV will not enter into an exclusive arrangement for the distribution of satellite cable programming with an "Affiliated Program Rights Holder."**

For purposes of this undertaking, an "Affiliated Program Rights Holder" is defined as either (1) an SCPV in which News Corp. or DIRECTV holds a non-controlling attributable (*i.e.,* 5% or greater) interest, or (2) an SCPV in which an entity that holds a non-controlling attributable interest in either News Corp. or DIRECTV has an attributable interest (provided that News Corp. or DIRECTV has actual knowledge of such entity's attributable interest). Accordingly, this undertaking covers not only agreements with SCPVs in which DIRECTV or News Corp. has an interest, but also SCPVs owned by a third party (such as Liberty) that has an attributable interest in either DIRECTV or News Corp. Although News Corp. holds no interest in and exercises no control over Liberty, this undertaking would bind DIRECTV not to enter into an

[98] While the program access rules generally preclude a cable operator from entering into an exclusive arrangement with an SCPV, they do not preclude exclusive arrangements between a non-cable MVPD (such as DIRECTV) and a cable-affiliated SCPV.

exclusive arrangement with Liberty or any of its SCPV subsidiaries as long as Liberty continues to hold an attributable interest in News Corp.[99]

The Commission's rules also prohibit a cable operator from unduly or improperly influencing the decision of an affiliated SCPV in its dealings with other MVPDs.[100] As a condition to approval of this Application, the parties have agreed to accept the following commitment:

> **Neither News Corp. nor DIRECTV will unduly or improperly influence the decision of an Affiliated Program Rights Holder to sell satellite cable programming to other MVPDs or the prices, terms and conditions of such sale.**

This undertaking would apply not only to SCPVs in which News Corp. or DIRECTV holds an interest, but also to programming vendors that hold an interest in either DIRECTV or News Corp. – such as Liberty. As such, it is more extensive than the analogous restriction placed on cable operators.

The undertakings discussed above are designed to allay any potential concern that News Corp. and DIRECTV will engage in discriminatory or self-dealing conduct to the detriment of unaffiliated MVPDs. The parties therefore request that the Commission adopt the undertakings discussed above and set forth in Attachment G as a condition of the approval of this Application.

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[99] The parties' undertaking in the transactional documents originally anticipated an exception to this commitment, such that DIRECTV would not be precluded from bidding on a satellite-only exclusive arrangement offered by an Affiliated Program Rights Holder. The parties have subsequently amended their contract to remove this exception, as reflected in Attachment G, and thus have not included it in their discussion of potential conditions for approval of this Application.

[100] *See* 47 C.F.R. § 76.1002(a).

3. Broadcast Programming

In addition to satellite cable programming, News Corp. (through FTS) also owns and operates 35 full power broadcast television stations (the "O&Os") – 25 affiliated with the FOX network, nine affiliated with the United Paramount Network, and one independent. News Corp.'s acquisition of an interest in Hughes will create no incentive for News Corp. to withhold the broadcast signals of its O&Os from other MVPDs.

In every market where News Corp. has an O&O station, the local cable operator currently carries the O&O broadcast signal on its system pursuant to a negotiated, mutually agreeable retransmission consent agreement. In addition, DIRECTV and EchoStar carry the FTS O&O in every DMA where they provide local-into-local coverage pursuant to a retransmission consent agreement. FTS has either executed a retransmission consent agreement or reached an agreement in principle with each of the more than 300 cable operators that sought carriage of FTS' O&Os for the 2003-2005 retransmission consent cycle.[101] Although negotiations have sometimes been challenging, FTS has never failed to reach a retransmission consent agreement with any MVPD on mutually acceptable terms.

FTS's O&Os are a critical component of the distribution system for News Corp.'s FOX Network. The FOX-affiliated O&Os reach approximately 37.3% of the nationwide audience over-the-air.[102] The FOX Network relies on affiliated stations to provide the remainder of the national over-the-air reach. As was true for the cable programming

[101] FTS simply granted retransmission consent to any cable operator in this group with fewer than 1,000 subscribers.

[102] This figure takes into account the impact of the Commission's "UHF discount;" otherwise, nationwide reach of the FOX O&Os would be approximately 43.5%.

networks discussed above,[103] FOX Network is compelled to reach as many viewers as possible, whether over-the-air, on cable systems, via satellite, or better yet, all three. In the network broadcasting business, moreover, where advertising is the sole means of revenue, audience reach is even more critical than it is for a cable programmer, which can rely in part on subscription revenue. Broadcast networks, like FOX, must reach as nearly as possible 100% of the national audience to gain the advertising of national marketers of consumer goods. Without close to 100% reach, advertisers will defect to other video program packagers. The inability to reach nearly 100% of the national audience can also have serious consequences in terms of competition with other broadcast networks.

It is no less important for each O&O to reach as close to 100% of its local audience as possible to maximize its attractiveness to local and regional advertisers. News Corp. will always choose to distribute its O&Os and the FOX Network to the largest segment of the American population as possible,[104] and acquisition of an interest in Hughes will do nothing to change these incentives.[105] Undermining the FOX Network and the O&Os in the hopes of gaining subscribers for DIRECTV – in which will indirectly hold only a minority interest – would be economically irrational.

Not only does News Corp. face an overwhelming economic incentive to distribute the signal of its stations and the FOX Network over as many platforms as possible, the

[103] *See* discussion, *supra,* at pp. 55-57.

[104] Indeed, in 1989, FOX Network broke with broadcast tradition by developing a special channel called FOXNET, tailored for and offered to cable operators in DMAs where FOX had not yet affiliated with a local station, to increase the reach of FOX Network programming. This innovative and bold act, now copied by other broadcast networks, demonstrates News Corp.'s commitment to providing its programming to as much of the viewing public as possible.

[105] Moreover, because 15 of 35 O&Os are UHF stations (a higher percentage than ABC, CBS, or NBC) that have less favorable over-the-air coverage, distribution on all MVPD platforms is particularly important to FTS and FOX Network.

Commission's retransmission consent rules place an affirmative obligation on FTS to negotiate in good faith with MVPDs seeking to retransmit the signal of these FTS stations.[106] These rules prohibit, among other things, exclusive retransmission consent agreements between FTS and any MVPD or simple refusals by FTS to negotiate with MVPDs for carriage of the broadcast signal.[107] The Commission's retransmission consent rules further provide detailed complaint procedures designed to protect an MVPD in the event it encounters bad faith negotiating tactics or other violations of the Commission's retransmission consent rules by a broadcaster.[108] These rules will continue to serve as a regulatory backstop to ensure good faith bargaining by FTS in a market already characterized by overwhelming economic forces that compel FTS to distribute its programming as widely as possible.

4. Electronic Program Guides

News Corp. holds a 42.9% interest in Gemstar, a producer of electronic program guides ("EPGs"). EPGs are on-screen directories of programming delivered through advanced set-top boxes. These programming guides are interactive, with searching and sorting capabilities that take viewers directly to video programming listed on the screen. In *AT&T/Media One*, the Commission considered three types of potential harm that commenters argued could arise from an EPG/MVPD affiliation. First, the MVPD could use the EPG to steer subscribers toward affiliated content providers and away from unaffiliated content providers. Second, the MVPD could harm unaffiliated EPG providers by selecting its own EPG for use on its system. And third, an MVPD could

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[106] *See* 47 C.F.R. §§ 76.64, 76.65.

[107] 47 C.F.R. § 76.65(b).

[108] 47 C.F.R. §§ 76.65(c)-(e).

lock the EPG into an exclusive contract and thereby prevent the EPG from dealing with other MVPDs.[109]

In *AT&T/MediaOne*, the Commission considered these arguments – and found no basis for concern because AT&T would serve no more than 30% of the MVPD subscribers nationwide even after the merger. First, even if AT&T steered its own subscribers away from unaffiliated content, other MVPDs would provide sufficient alternative outlets for their distribution. Second, even with a 30% nationwide market share, AT&T would not be able to exercise any undue influence in any purported EPG marketplace since unaffiliated EPGs would have access to the 70% of subscribers nationwide who are not served by AT&T cable systems. Third, there was no evidence that AT&T would attempt to lock EPG providers into exclusive contracts.[110]

The situation in *AT&T/MediaOne* involved significantly more concentration than that involved in the transaction proposed here. In that case, AT&T held a 44% interest in TV Guide, Inc. (a corporate predecessor of Gemstar), which is roughly comparable to the 42.9% interest News Corp. holds in Gemstar. But the Commission based its analysis on the fact that AT&T would be limited to serving no more than 30% of the MVPD subscribers nationwide even after the merger, and therefore concluded that AT&T would not have sufficient market power to use the EPG to disadvantage other MVPDs, other programmers, or other EPG providers.[111] Here, DIRECTV has a much smaller share of the MVPD market (in fact, less than half as large). Accordingly, there is even less basis

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109 *See AT&T/MediaOne*, 15 FCC Rcd. at 9856-58.

110 *Id.*

111 *Id.* at 9857 ("we note that the divestiture requirement limits AT&T's size and ensures that other MVPDs will provide sufficient alternative outlets for unaffiliated content providers").