BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Application of	)	
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	)	
General Motors Corporation,	)	
Hughes Electronics Corporation,	)	
	)	
Transferors	)	MB Dkt. No. 03-124
	)	
and	)	
	)	
The News Corporation Limited,	)	
	)	
Transferee,	)	
	)	
For Authority to Transfer Control	)	

Comments of the National Association of Broadcasters

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EXECUTIVE SUMMARY

The News Corp. acquisition of a controlling interest in Hughes Electronics Corp. will create a distribution and content company with extraordinary power. The proposed transaction combines the assets of DIRECTV Holdings, LLC, the leading satellite provider of multichannel video programming distribution ("MVPD"), and Fox Entertainment Group, one of the world's principal owners of television broadcast properties and cable programming networks. This merging of interests has the potential to drastically exacerbate the shift in power away from local, non-network-owned Fox affiliates to News Corp.

Congress and the Commission have created structural mechanisms designed to promote a network/affiliate economic model that is based primarily on advertising revenues for both local and national compensation. This economic model requires a careful balance of power to ensure that networks are properly compensated for national programming, while at the same time preserving the viability of local broadcast stations. This balance of power serves the public interest by advancing two of the foundational tenets of the Commission's media policy – localism and diversity.

As a result of the merger, News Corp. will have a strong economic incentive to bypass local Fox broadcasting affiliates, substituting a national Fox programming feed for all DIRECTV subscribers. By bypassing local affiliates, News Corp. would (1) realize immediate cost savings by reducing or eliminating retransmission consent payments and (2) gain advertising revenue that would otherwise have gone to local stations. This change in economic incentive will naturally give DIRECTV substantially increased leverage over local affiliates, endangering their ability to adequately serve local interests or provide diversity.

In addition, the proposed acquisition combines, for the first time, a leading television broadcaster with one of the world's largest MVPD gatekeepers. This creates the potential and incentive for News Corp. to use the DIRECTV platform to discriminate against local broadcasters.

These potential disadvantages to local television stations would pose a serious threat to localism and diversity unless the acquisition is made subject to appropriate conditions. The Commission should approve the transfer of licenses only if: (1) DIRECTV is prohibited from transmitting a Fox network feed in any market currently served by a non-Fox-owned local affiliate; (2) News Corp. and DIRECTV agree to apply to all local television broadcast stations the same types of non-discrimination provisions they proposed to apply to non-Fox-owned satellite cable programming services in Appendix G of their Application for Authority to Transfer Control (to ensure non-discrimination, News Corp. and DIRECTV should also be required to employ an information "firewall" in any dealings with local television stations); and (3) DIRECTV agrees to provide local-into-local service to all 210 DMAs by January 1, 2006.

TABLE OF CONTENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Application of	)	
	)	
	)	
General Motors Corporation,	)	
Hughes Electronics Corporation,	)	
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	)	
For Authority to Transfer Control	)	

Comments of the National Association of Broadcasters

The National Association of Broadcasters ("NAB"), pursuant to the Public Notice released by the Federal Communications Commission (the "Commission" or "FCC") on May 16, 2003,[1] respectfully asks the Commission to protect the "public interest, convenience and necessity" by imposing certain safeguards in conjunction with any transfer of control by the applicants in this proceeding.

I. INTRODUCTION

News Corp.'s acquisition of control over DIRECTV will create a distribution and content company with extraordinary power. This vertically integrated gatekeeper will have the ability

[1] *General Motors Corporation, Hughes Electronics Corporation, and the News Corporation Limited Seek Approval to Transfer Control of FCC Authorizations and Licenses Held by Hughes Electronics Corporation to the News Corporporation Limited*, Public Notice, MB Docket No. 03-124 (May 16, 2003).

and incentive to disadvantage local television stations, with resultant damage to diversity and localism, unless the acquisition is made subject to appropriate conditions.

The success and viability of the U.S. television broadcasting system is a result of the partnership between national networks, program syndicators, and local television stations. Under this system, local TV stations in markets large and small provide a combination of national TV programming, syndicated programs, and local news, weather, and public affairs programming. The continued vitality of this system depends on local stations enjoying a substantial degree of exclusivity in providing network and syndicated programming to local viewers. Local stations make most of their revenues by selling advertising time during popular network and syndicated programs. During these same programs, local stations also run promotional spots designed to attract viewers to local news programs. These spots are a key way that stations build audiences for their news programs. This economic model requires a delicate balance of power to ensure that networks are appropriately compensated for national programming, while at the same time their affiliates remain economically viable.

Multichannel video programming distributors ("MVPDs"), such as DIRECTV, must typically purchase content from local broadcast stations and cable programming networks, which serve as suppliers of content for distribution through satellite systems. To obtain the right to rebroadcast local television signals, satellite broadcasters often pay retransmission consent fees to local stations. Combined with the incremental revenue from increased exposure of local advertisements, these retransmission consent fees form the basis of local station revenue derived from direct broadcast satellites.

DBS subscribership has grown significantly and now represents 20.3% of all MVPD subscribers.[2] Since DIRECTV's launch in 1994, consumers have adopted DBS at an incredible

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[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report*, 17 FCC Rcd 26,901, 26,903-04 ¶ 7 (2002) ("*2002 Annual Report*").

rate, and DBS has advanced substantially as a viable MVPD competitor to cable.[3] Currently there are two major DBS operators offering service to consumers: DIRECTV, owned by Hughes Corp., and EchoStar Corp. In less than 2 years from the launch of DIRECTV, more than 2.2 million consumers subscribed to these services; by year-end 1997, there were more than 6.4 million DBS subscribers; as of year-end 2000, DBS providers had nearly 14.8 million subscribers; and as of June 2002, DIRECTV was providing service to more than 10 million subscribers, and EchoStar had approximately 7.5 million subscribers.[4] Today, DIRECTV boasts a subscribership of over 11 million and growing (for a total DBS subscriber base of almost 20 million).[5]

Though broadcast stations continue to offer a high-value product to the increasingly fractured television viewing audience, absent appropriate safeguards, the vertical integration between News Corp. (Fox) and Hughes (DIRECTV) could undermine the network-affiliate relationship. Were the Commission to grant the instant application to transfer authority, the Fox Entertainment Group, through its new DIRECTV subsidiary, would have both the incentive and the means to completely bypass local affiliates, or at least dramatically drive down the fees that are currently charged for retransmission consent. The transaction would also provide News Corp. with the means and the motivation to discriminate against local television stations in order to advance Fox programming interests.

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[3] Jonathan Levy *et al.*, *OPP Working Paper Series 37 - Broadcast Television: Survivor in a Sea of Competition*, Sep. 2002, at 54-56 ("*OPP Working Paper Series 37*"). DirecTV and United States Satellite Broadcasting Co. ("USSB") began providing high-power DBS service on June 17, 1994. EchoStar Communications Corp. initiated service in March 1996.

[4] *Id.*at 55.

[5] Press Release, Hughes Electronics Corp., *Hughes Reports First Quarter 2003 Results; Increases Full-Year Hughes and DirecTV U.S. Revenue, EBITDA and Operating Profit Guidance Due to Strong DirecTV U.S. Financial Performance* (Apr. 14, 2003) *available at* http://www.Hughes.com/ir/pr/03_04_14_earnings.asp; Press Release, EchoStar Communications Corp., *EchoStar Reports First Quarter 2003 Financial Results; EchoStar's DISH Network Adds 350,000 Net New Subcribers* (May 6, 2003) *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=408904.

This shift in power from local stations to Fox at the national level will almost certainly result in harm to local interests, with a parallel reduction in the quantity and quality of diversity in the market. The Commission should grant transfer only under conditions that would preserve the economic viability of local affiliates.

II. THE TRANSFER APPLICANTS MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE TRANSFER OF CONTROL WILL SERVE THE "PUBLIC INTEREST, CONVENIENCE AND NECESSITY."

In order to approve the application for authority to transfer control, the Commission must find, pursuant to Section 310(d) of the Communications Act of 1934, as amended (the "Communications Act"), that the proposed transfer of control would serve the public interest.[6] In making this determination, the Commission must first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules. The Commission then "weigh[s] the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that the Applicants have demonstrated that, on balance, the merger serves the public interest and convenience."[7] ***"The Applicants bear the burden of proving by a preponderance of the evidence that, on balance, the proposed transaction serves the public interest***."[8]

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[6] *See* 47 U.S.C. 310(d) (2002).

[7] *In re Applications of Time Warner Inc., America Online, Inc. and AOL Time Warner Inc.,* Memorandum Opinion and Order, 16 FCC Rcd 6547, 6554 ¶ 19 (2001) (*"AOL-Time Warner Order"*) (citing *In re Applications of Ameritech Corp. and SBC Communications Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 14,712, 14,736 ¶ 46 (1999), *rev'd in part on other grounds sub nom. Ass'n of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001)).

[8] *In re Application of GTE Corp. and Bell Atlantic Corp.,* Memorandum Opinion and Order, 15 FCC Rcd 14,032, 14,046 ¶ 22 (2000) (emphasis added) (citations omitted). *See also AOL-Time Warner Order,* 16 FCC Rcd at 6554 ¶ 19 (citing *In re Applications of Tele-Communications, Inc. and AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3169-70 ¶ 15 (1999)); *In reapplication of WorldCom, Inc. and MCI Communications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 18,025, 18,031 ¶ 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant)).

The public interest standard of section 310(d) therefore involves a balancing process that weighs the potential harms and benefits of the proposed transaction.[9] The public interest evaluation necessarily encompasses, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services.[10] The Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: "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.'"[11]

III. THE PROPOSED ACQUISITION WILL CREATE AN ENTITY WITH EXTRAORDINARY BREADTH AND POWER.

The proposed transaction will result in the marriage of the second largest MVPD gatekeeper with one of the nation's leading broadcast television networks – which also owns 35 local broadcast stations, a popular slate of cable programming, and a vibrant filmed entertainment division. The resulting combination is a media conglomerate with extraordinary reach, and its power will only expand with the rapid penetration of DBS service to consumers nationwide.

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[9] *See In re EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd 20,559, 20,574-76 (2002) ("*EchoStar Hearing Designation Order*"); *see also e.g., In re VoiceStream Wireless Corp., Powertel, Inc. and Deutsche Telekom AG,* Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789 (2001); *In re AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC and TNV [Bahamas] Limited,* Memorandum Opinion and Order, 14 FCC Rcd 19,140 (1999).

[10] *See* 47 U.S.C. §§ 157, 332(c)(7) (2002), Telecommunication Act of 1996, Preamble; *EchoStar Hearing Designation Order*, 17 FCC Rcd at 20,574-76; *In re MediaOne Group, Inc. and AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9821 ¶ 11 (2000); *cf.* 47 U.S.C. §§ 521(4), 532(a) (2002).

[11] *EchoStar Hearing Designation Order*, 17 FCC Rcd at 20,575 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994)).

A. Hughes Electronics' DIRECTV Is the Leading DBS Provider and One of Only Three MVPDs in Virtually All Local Markets.

Hughes Electronic Corporation is a world-leading provider of digital television entertainment, satellite-based private business networks, and global video and data broadcasting. Comprised of four main units, its 2002 revenues were $8.9 billion.[12] Hughes' Direct-to-Home Broadcast business segment consists of the operations of DIRECTV Holdings, LLC in the United States, DIRECTV Latin America, LLC in Latin America and the Caribbean Basin, and DIRECTV Broadband, Inc. (formerly Telocity Delaware, Inc.).[13] Through its wholly-owned subsidiaries, DIRECTV holds DBS authorizations to operate 32 frequencies at the 101° W.L. orbital location, three frequencies at the 110° W.L. orbital location,[14] and, 11 frequencies at the 119° W.L. orbital location.[15] Through its wholly-owned subsidiaries, DirecTV also holds authorizations for numerous transmit/receive, receive-only, and transmit-only earth stations which are licensed to transmit and/or receive frequencies in the C, Ku, and DBS-bands.[16]

In the United States, DIRECTV distributes over 800 digital channels of programming, and at the end of 2002, provided service to over eleven million customers.[17] DIRECTV Latin America is the largest digital multi-channel service provider in Latin America. At the end of

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[12] Hughes Electronics Corp., General Information: Company Overview, *available at* http://www.hughes.com/ir/general/default.asp.

[13] *See* Hughes Electronics Corp., Form *10-K 2002 Annual Report* at 3-4, *available at* http://www.Hughes.com/ir/annual_reports.asp.

[14] *EchoStar Hearing Designation Order*, 17 FCC Rcd at 20,567 ¶ 11; *see also In re United States Satellite Broadcasting Co. and DirecTV Enterprises, Inc.*, Order and Authorization, 14 FCC Rcd 4585 (Int'l Bur. 1999); *In re Hughes Communications Galaxy, Inc.*, Memorandum Opinion and Order, 99 FCC 2d 1369, 1371, 1387, 1388 (1984).

[15] *EchoStar Hearing Designation Order*, 17 FCC Rcd at 20,567 ¶ 11; *see also In re Tempo Satellite Inc. and DirecTV Enterprises, Inc.*, Order and Authorization, 14 FCC Rcd 7946 (Int'l Bur. 1999); *see also In re DirecTV Enterprises, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2728 (Int'l Bur. 1992) and Memorandum Opinion and Order, 7 FCC Rcd 6597 (Int'l Bur. 1992).

[16] *EchoStar Hearing Designation Order*, 17 FCC Rcd at 20,567 ¶ 11.

[17] Hughes Electronics Corp., Company Overview, *supra* note 12.

2002, DIRECTV Latin America provided service to 1.6 million customers in twenty-eight markets.[18] Hughes owns 75% of DIRECTV Latin America.[19] PanAmSat Corporation is a leading provider of commercial satellite-based video and data broadcast services, operating a global fleet of twenty-one in-orbit satellites capable of reaching 98% of the world's population. Hughes owns 81% of PanAmSat.[20]

Consumers have adopted DBS service at one of the fastest rates of any consumer good in history. The presence of DBS in the market for the delivery of video programming has expanded the market such that now almost all television households have access to subscription video.[21]

B. News Corp., Through Its Fox Entertainment Group, Has Established Itself as One of the Nation's Leading Programmers.

There can be little doubt that News Corp. has become a giant in American mass media. As of March 31, 2003, its Fox businesses have total assets of approximately $23 billion and total annual revenues of approximately $11 billion.[22] In May 2003, the Fox Entertainment Group reported third quarter consolidated revenues of $2.7 billion, a 9% increase over the $2.5 billion in 2002; and EBITDA of $542 million, a 39% increase over the $391 million reported a year ago. The year-on-year growth was driven primarily by substantial increases in the filmed entertainment, television broadcast network, and cable network programming segments of the company.[23]

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *OPP Working Paper Series 37*, *supra* note 3, at 61.

[22] Fox Entertainment Group, Corporate Profile, *available at* http://www.newscorp.com/feg/index.html.

[23] Fox Entertainment Group, Earnings Release for the Quarter Ended Mar. 31, 2003, *available at* http://www.newscorp.com/investor/download/Feg3q03f.pdf.

1. Fox Entertainment Group's Broadcast Television Holdings Are Substantial.

Fox has 188 affiliated stations, including 35 full-power television stations that are owned and operated by the company.[24] Each week Fox regularly delivers to its affiliates fifteen hours of prime time programming, one hour of late-night programming on Saturday, and one hour of Sunday morning news programming. Fox's prime time programming features such series as *The Simpsons, King of the Hill, That 70's Show, Malcolm in the Middle, Boston Public, Bernie Mac, Grounded for Life* and various movies and specials. Fueled by the hit shows *24, American Idol 2*, and *Joe Millionaire*, Fox enjoyed a 32% ratings improvement in the first quarter of 2003 (compared to first quarter 2002) and earned its first-ever sweeps victory among Adults 18-49.[25]

In addition, a significant component of Fox's programming consists of sports programming, with Fox providing to its affiliates live coverage (including post-season) of the National Football Conference of the National Football League ("NFL"),[26] Major League Baseball ("MLB"), and live coverage of the premiere racing series (the Winston Cup and the Busch series) of the National Association of Stock Car Auto Racing ("NASCAR"). During the 2001-2002 broadcast season, Fox ranked second in prime time programming based on viewership of adults aged 18-49 (NBC had a 5.3 rating and 14 share, FOX had a 4.0 rating and a 11 share, CBS had a 3.9 rating and a 10 share and ABC had a 3.6 rating and 10 share).[27]

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[24] Consolidated Application for Authority to Transfer Control, *Application of General Motors Corp., Hughes Electronics Corp. and the News Corp.*, MB Dkt. 03-124, at 25 (filed May 15, 2003) ("*Application*"); Fox Entertainment Group, Form 10-K Annual Report 2002, at 11, *available at* http://www.newscorp.com/feg/fegreport2002/fox_annual 2002.pdf.

[25] Fox Entertainment Group, Earnings Release for the Quarter Ended Mar. 31, 2003, *supra* note 23, at 3.

[26] On June 5, 2003, News Corp. announced the receipt of a second request for information from the United States Department of Justice in conjunction with the proposed transaction. Press Release, News Corp., *News Corporation, General Motors and Hughes Electronics Announce Filing of Preliminary Materials with the SEC News Corporation and Hughes Also Announce Receipt of Second Request under HSR Act* (June 5, 2003) *available at* http://www.newscorp.com/news/news_193.html. FTC Watch has recently indicated that the proposed acquisition will likely raise significant competition concerns due to the overlap between Fox's NFL programming and DIRECTV's NFL Sunday Ticket. *Briefs: Merger Watch*, 610 FTC: WATCH 2 (May 26, 2003).

[27] *See* Fox Entertainment Group, Form 10-K Annual Report 2002, *supra* note 24, at 11.

Fox Television Stations currently owns and operates thirty-five full power stations located in nine of the top ten largest designated market areas ("DMAs"). Fox Television Stations owns and operates two stations in nine DMAs, including New York, Los Angeles and Chicago, the first, second and third largest DMAs, respectively. These owned and operated stations reach 44.7% of all U.S. Households.[28]

2. Fox Entertainment Group's Cable Programming Network Holdings Are Equally Impressive.

Fox Entertainment Group has launched a range of cable television offerings, covering general entertainment, news, sports, and documentary. These relative newcomers have made a dramatic impact on the cable lineup, with Fox News achieving the highest prime time ratings of any basic cable channel in the first quarter of 2003.[29]

a. Fox News

Fox News is a 24-hour all news cable channel which is currently available to approximately eighty million U.S. cable and DBS households. Fox News also produces a weekend political commentary show, *Fox News Sunday*, for broadcast on Fox. Fox News, through its Fox News Edge service, licenses news feeds to Fox Affiliates and other subscribers to use as part of local news broadcasts.[30]

In the words of News Corp. Chairman Rupert Murdoch, Fox News Channel has become "the undisputed number one cable news channel," ranking as the most watched cable news network for the second half of fiscal year 2002.[31] The trend continued into the first quarter of 2003, as Fox News achieved double-digit revenue growth and finished the quarter as the highest-rated basic cable channel in primetime, making it the first news channel to achieve that

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[28] *See id.* at 10.

[29] Fox Entertainment Group, Earnings Released for the Quarter Ended Mar. 31, 2003, *supra* note 23, at 4.

[30] Fox Entertainment Group, 10-K Annual Report, *supra* note 24, at 12.

[31] *Id.* at Chairman's Review.

distinction since 1991.[32] Viewership during the quarter increased 80% in primetime and 92% on a 24-hour basis compared to a year ago as Fox News achieved the highest 24-hour ratings growth among all cable news channels.[33]

b. FX

Launched in June 1994, FX Networks LLC currently reaches approximately 77.8 million U.S. cable and DBS households. FX is a general entertainment network that combines original programming with acquired television series and feature films. In addition, FX carries sports programming with live coverage of certain NASCAR events. FX's line-up for the Fall 2002 season included the following syndicated hits: *Ally McBeal*, *The Practice* and *Buffy the Vampire Slayer*; and original programming, including the Emmy nominated drama, *The Shield*, a new half-hour comedy, *Lucky, Son of the Beach* and *The Tough Man World Championship* series.[34]

c. Regional Sports

Fox Sports Net, Inc. is the largest regional sports network programmer in the United States, focusing on live professional and major collegiate home team sports events. Fox Sports Net owns an equity interest in, or is affiliated with, twenty-four regional sports networks. These regional sports networks reach approximately seventy-three million households and, together with Fox Sports Net, have rights to telecast live games of seventy professional sports teams in Major League Baseball, the National Basketball Association, and the National Hockey League and numerous collegiate conferences and sports teams.[35]

Fox Sports Net owns a 40% interest in Regional Programming Partners, a partnership with Rainbow which owns various interests in regional sports networks (including two in which

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[32] Fox Entertainment Group, Earnings Release for the Quarter Ended Mar. 31, 2003, *supra* note 23, at 4.

[33] *Id.* at 4.

[34] Fox Entertainment Group, 10-K Annual Report 2002, *supra* note 24, at 12.

[35] *Id.*

Fox Sports Net owns 50% interests), the New York Knickerbockers NBA franchise, the New York Rangers NHL franchise, the Madison Square Garden entertainment complex, and Radio City Music Hall.[36]

d. National Geographic Channel

In January 2001, Fox Entertainment Group launched the National Geographic Channel in the United States. The National Geographic Channel currently reaches approximately 33.2 million U.S. cable and DBS households. Fox holds a non-controlling 66.67% interest in NGC Network US, LLC, the producer of the U.S. channel. The National Geographic Channel airs documentary programming on such topics as natural history, adventure, science, exploration and culture.[37]

IV. ABSENT APPROPRIATE CONDITIONS, NEWS CORP.'S CONTROL OF DIRECTV WILL EXACERBATE THE SHIFT OF POWER AWAY FROM LOCAL AFFILIATES.

The proposed acquisition creates a powerful incentive for News Corp. to discriminate against the retransmission of local programming in favor of a unified national television feed. The resulting loss of affiliate bargaining power will likely lead to the reduction or elimination of retransmission consent fees and a marked reduction in the ability of local broadcast stations to provide local programming. Fox Entertainment's national feed will also siphon advertising away from local affiliates, as advertisers seeking to reach DBS subscribers shift resources to Fox's new national programming feed. Absent the imposition of certain conditions, communities across the nation will lose the public benefits that result from diverse local viewpoints.

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[36] *Id.*

[37] *Id.* at 13.

A. Localism and Diversity Are Core Objectives of Congress and the Commission.

The Commission readily and properly acknowledges that localism "remains an important attribute of the broadcast media industry."[38] Indeed, the roots of localism pre-date the inception of broadcasting and have long been reflected in fundamental policy choices made by Congress and the Commission. It is these roots and policy choices that illustrate the meaning of localism and the importance to the public of preserving this quality in the American broadcast system.

Localism necessarily involves serving the interests of a particular community not only by the airing of local content, but also by exercising independent decision making on the amount and timing of commercials made available for local advertisers and the mix of national programming (network and syndicated) and local programming that appeals to local tastes. In short, localism serves to ensure that America's mass media outlets are accountable to and integrated into the communities that they serve.

Intertwined with the concept of localism is the goal of diversity. The Commission has long maintained, and the courts have confirmed, that the promotion of diversity is a vital component of the Commission's mission to promote the public interest.[39] As a result, the Commission has recognized the importance of market structures that promote diversity.[40]

1. Congress Has Mandated Localism and Diversity as National Communications Policy.

Neither the Commission nor Congress has lessened its commitment towards a system of local stations focused on providing differentiated service to their communities of license. As recently as 1999, Congress, in considering the Satellite Home Viewer Improvement Act

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[38] *In re 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*, Notice of Proposed Rule Making, 17 FCC Rcd 18,503, 18,526 ¶ 71 (2002).

[39] *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002); *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 160 (D.C. Cir. 2002).

[40] *Turner Broad. Sys., Inc. v.* FCC, 512 U.S. 622, 663-64 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)); *EchoStar Hearing Designation Order*, 17 FCC Rcd at 20,575 ¶ 26.

("SHVIA"), reiterated its stance that communications policy is "intended to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources."[41] Congress accurately predicted the rise of DBS systems and the need to protect localism and diversity in the face of fast-paced technological innovation:

> The conferees expect that, by January 1, 2002, satellite carriers' market share will have increased and that the Congress' interest in maintaining free over-the-air television will be undermined if local broadcasters are prevented from reaching viewers by either cable or satellite distribution systems.[42]

Unchanged is the legislative and administrative objective, reflected in the physical structure of the broadcast system, that local stations are best suited to program for the diverse tastes and needs of local communities. As Congress explained when considering the Telecommunications Act of 1996: "Localism is an expensive value. We believe it is a vitally important value, however, and ... it is a principle of communications policy rooted in the Communications Act of 1934. It should be preserved and enhanced as we reform our laws for the next century."[43]

2. The Commission Has Followed Congress's Directive by Promoting Localism and Diversity.

Throughout its history, the Commission has upheld the public interest through its promotion of localism and diversity in media broadcasting. The result has been a robust and diverse array of local viewpoints.

The Commission upheld its commitment to localism in constructing the DTV Table of Allotments, which evidences a continued policy of overlapping and geographically dispersed

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[41] H.R. Conf. Rep. No. 106-464, at 101 (1999).

[42] *Id.*

[43] H.R. Rep. No. 104-204, at 221 (1995) *reprinted in* 1996 U.S.C.C.A.N. 10, 113.

station signals.[44] Stations are dispersed among various communities on the principle that local stations are better able to respond to local needs, and are more likely to reflect local tastes, than would stations centered outside of the locality.[45] The Commission announced in 1952 when it created the Table that dispersed allotments "protect[ ] the interests of the public residing in smaller cities and rural areas more adequately than any other system."[46] It rejected the construction of more powerful regional stations so that "as many communities as possible [would] have the advantages that derive from having local outlets that will be responsive to local needs."[47]

3. Localism and the Presence of Non-Network-Owned Affiliates Also Promotes Competition.

In television broadcast markets, localism serves to promote competition. For example, retransmission of local broadcasts increases competition between DBS and cable systems. A recent GAO study found that the provision of local broadcast channels by DBS companies is associated with non-price competition between cable and DBS.[48] In areas where DBS operators provide local channels, the GAO results indicate that cable companies offer subscribers approximately six percent more channels. According to GAO, this result indicates that cable companies are responding to DBS provision of local channels by improving their quality as reflected by the greater number of channels. Confirming this finding in comments to the

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[44] *See* 47 C.F.R. § 73.622(b) (2002).

[45] *See e.g.*, *NBC*, 319 U.S. at 203 ("Local program service is a vital part of community life. A station should be ready, able and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest."); David M. Silverman & David N. Tobenkin, *The FCC's Main Studio Rule: Achieving Little for Localism at a Great Cost to Broadcasters*, 53 Fed. Comm. L. J. 469, 474-76 (2001).

[46] *In re Amendments of Section 3.606 of the Commission's Rules and Regulations*, 41 F.C.C. 148 ¶ 13 (1952).

[47] *Id.*

[48] United States General Accounting Office, *Telecommunications: Issues in Providing Cable and Satellite Television Services*, at 9-10, GAO-03-130 (Oct. 15, 2002). *See also* United States General Accounting Office, *Telecommunications: The Effect of Competition From Satellite Providers on Cable Rates*, GAO/RCED-00-164 (July 2000).

Commission, EchoStar stated that "the addition of local channels has made DBS more competitive with incumbent cable providers and has led to an increase in DBS subscribership and a restraint on cable prices."[49]

B. Absent Appropriate Conditions, News Corp.'s Acquisition of Control Over DIRECTV Will Endanger Localism and Diversity.

As Gregory Sidak explains in his declaration, the proposed acquisition will give News Corp. the economic incentive and the ability to bypass local Fox affiliates, replacing local broadcasts with a national programming feed.[50] This shift will greatly increase the bargaining power of News Corp. over its Fox affiliates in the purchase of video programming. As a result, localism and diversity could be severely impacted in the absence of protective measures.

1. News Corp.'s Control of DIRECTV Will Give Fox Entertainment the Ability and Incentive to Bypass Local Affiliates with a National Network Feed.

Mr. Sidak explains that there are two ways in which DIRECTV would offer Fox network programming to DBS subscribers in areas where Fox is available over the air: (1) by retransmitting the programming of Fox's affiliate stations to households within the geographic areas served by those local stations, and (2) by bypassing Fox's affiliate stations and offering a single nationwide Fox network feed. Although the Satellite Home Viewer Improvement Act of 1999 prohibits DIRECTV from refusing to retransmit the signal of a local Fox affiliate in a market where it is carrying local signals,[51] DIRECTV can decline to pay for that signal. And even if local Fox affiliates were to demand carriage under SHVIA's "carry one, carry all" rules,

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[49] *2002 Annual Report*, 17 FCC Rcd at 26, 932 ¶ 61.

[50] Declaration of J. Gregory Sidak (June 16, 2003). A copy of the declaration appears as Exhibit 1 to these comments.

[51] 47 U.S.C. § 338(a)(1) (2002) (stating that "each satellite carrier providing, under section 122 of Title 17, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market").

nothing prohibits DIRECTV from bypassing the affiliates altogether by beaming down a national Fox feed covering the continental United States. Mr. Sidak concludes: "The acquisition of DIRECTV by NewsCorp will enhance DIRECTV's incentive and ability to bypass local Fox affiliates in this manner, regardless of whether those affiliates opt for mandatory carriage."[52]

a. The Acquisition Increases News Corp.'s Incentive to Bypass Local Network Affiliates.

As of May 15, 2003, there were 188 Fox affiliated stations, of which 35 were owned and operated (O&O) by News Corp. and 153 were independently owned.[53] DIRECTV currently offers local-into-local network programming in 61 local markets by retransmitting (by spot beam) the broadcasts of individual network affiliates.[54] For purposes of his analysis, Mr. Sidak assumes that DIRECTV pays retransmission consent fees to each Fox network affiliate for the ability to beam its local signal to DBS customers via satellite. This retransmission of the local network affiliate's signal is unaltered, which is to say that a DIRECTV customer sees the transmission exactly as it is broadcast terrestrially by the network affiliate. Though DIRECTV offers a substitute Fox affiliate feed to customers who live in "white areas" (where customers cannot receive a sufficiently strong over-the-air signal from a local affiliate), it does not currently bypass local Fox affiliates.

From a technical standpoint, it is feasible for DIRECTV to bypass local Fox network affiliates, and nothing would legally prevent DIRECTV from offering a national Fox feed. As Mr. Sidak notes, the fact that DIRECTV has chosen to retransmit, but not bypass, local Fox network affiliates necessarily implies that retransmission is currently economically rational for DIRECTV while bypass is not. He states the following two conditions that naturally follow from this observation:

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[52] Declaration of J. Gregory Sidak, *supra* note 50, ¶ 8.

[53] Application, *supra* note 24, at 25.

[54] DIRECTV, *Local Channels Availability*, *available at* http://www.directv.com/DTVAPP/LocalChannelServlet.

- **Condition 1**: DIRECTV's revenue from retransmitting a local station, $R_{R,D}$, outweighed DIRECTV's cost of retransmission, $C_{R,D}$: $R_{R,D} - C_{R,D} > 0$.

- **Condition 2**: DIRECTV's profit from bypassing a local affiliate, $R_{B,D} - C_{B,D}$, was less than its profit from retransmitting a local station, $R_{R,D} - C_{R,D}$: $R_{R,D} - C_{R,D} > R_{B,D} - C_{B,D}$.

Mr. Sidak further explains that while it is not currently profitable for DIRECTV unilaterally to bypass local Fox affiliates, it would be profitable for DIRECTV to do so after its acquisition by News Corp, provided that two additional conditions are met:

- **Condition 3**: The joint revenues of the merged entity from bypassing a Fox local affiliate, $R_{B,D} + R_{B,F}$, exceed the joint costs of bypassing a Fox local affiliate, $C_{B,D} + C_{B,F}$.

- **Condition 4**: The joint profits of the merged entity from bypassing a Fox local affiliate, $R_{B,D} + R_{B,F} - [C_{B,D} + C_{B,F}]$, exceed the joint profits of retransmitting that Fox local affiliate, $R_{R,D} + R_{R,F} - [C_{R,D} + C_{R,F}]$.

Mr. Sidak concludes that if all four conditions are satisfied, the merged entity will have an incentive to bypass Fox local affiliates.[55]

Bypassing local affiliates could yield significant benefits for News Corp. and its Fox Entertainment Group. Notably, Fox would be able to recover the 30-90 seconds per half hour that are dedicated to local advertising. "By capturing the local advertising time allotment … NewsCorp would increase Fox's advertising revenues without generating any corresponding increase in its programming costs. By migrating DIRECTV viewers from its network affiliates to a national Fox feed, NewsCorp can capture the advertising value of those viewers for 100 percent of its primetime programming."[56]

Through bypass, Fox would also avoid significant costs associated with the payment of retransmission consent fees. "If DIRECTV could offer, through bypass, much of the programming that the Fox affiliates currently provide on a local basis, then it could inform local

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[55] Declaration of J. Gregory Sidak, *supra* note 50, ¶¶ 11-12.

[56] *Id.* ¶ 17.

Fox affiliates that it would no longer pay retransmission consent fees for their broadcast signals on a going-forward basis."[57] Faced with the choice of completely withholding its signal from DIRECTV or opting for uncompensated carriage under SHVIA's must-carry rules, a Fox affiliate would likely opt for mandatory carriage as a way to maximize its audience share. By refusing to pay retransmission consent fees to local affiliates, DIRECTV would directly benefit by the amount previously paid for such consent.

The only foreseeable cost of bypassing local affiliates centers on the potential subscriber losses that may occur if local Fox affiliates refuse to submit to uncompensated retransmission of their broadcast signal. "In this event, some DIRECTV customers would be willing to switch to EchoStar or to their local cable provider to continue watching local Fox programming."[58] Though this cost must be weighed against the benefits of bypass, Mr. Sidak notes that the marginal effect of subscriber defection would likely be small because DIRECTV subscribers who were interested in local news and public affairs programming could still view the local programming of ABC, CBS, or NBC.

Based on these cost and revenue streams, it appears that after the proposed acquisition, the joint profits to News Corp. and DIRECTV from bypassing a local affiliate are likely to exceed the joint costs of bypassing that affiliate. Similarly, Mr. Sidak concludes that the profits to be gained from such a bypass may exceed the profits to be gained from retransmission. As a result, the combined entity will have an incentive to bypass local affiliates in favor of a national programming feed.

b. The Acquisition Provides News Corp. With the Ability to Bypass Local Network Affiliates.

To date, the economic incentives discussed in the preceding subsection have remained latent because Fox has not had the *ability* to engage in affiliate bypass while retaining the

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[57] *Id.* ¶ 20.

[58] *Id.* ¶ 23.

economic incentives of upstream incremental gains. For example, DIRECTV currently negotiates retransmission consent fees with local affiliates because DIRECTV, as an MVPD provider, cannot realistically threaten to end payments. "The loss of such hit programming as *American Idol* and *24*, as well as local Fox programming, would encourage DIRECTV subscribers to switch to alternate MVPD platforms."[59]

Following the proposed acquisition, however, News Corp. will have the ability to end retransmission consent payments because of its capacity to substitute a national programming feed for local programming. This ability marks a dramatic shift in the bargaining power of local affiliates, which will only increase with the continued expansion of DBS as a primary means of content delivery.

The shift in bargaining power also applies to local affiliation agreements. Because News Corp. will have the *ability* to offer Fox programming through DIRECTV without the consent of the local affiliates, News Corp. will have far "greater latitude and credibility to replace the current Fox affiliate in a given DMA with another local station."[60]

In short, when placed under the control of News Corp., DIRECTV will no longer be dependent on Fox affiliates for access to Fox network programming. At the same time, Fox Entertainment Group will no longer be dependent on affiliation for access to DBS subscribers. "NewsCorp could free DIRECTV from making retransmission payments and enable Fox to capture incremental advertising revenues from slots previously sold by its local affiliates."[61]

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[59] Declaration of J. Gregory Sidak, *supra* note 50, ¶ 24.

[60] *Id.* ¶ 25.

[61] *Id.*

2. News Corp.'s Control of DIRECTV Will Give Fox Entertainment the Ability and Incentive to Discriminate Against Local Broadcast Stations.

As discussed in Part III., *supra*, the proposed transaction will combine the leading DBS provider (and second largest MVPD in virtually every market) with one of the more powerful television broadcasters in America. Because the proposed transaction would result in a single entity with control over both content and distribution, the acquisition would also create the ability and incentive for News Corp. to exercise "gatekeeper" control through its distribution systems to the detriment of all content providers, specifically including local broadcast stations.

The market power created by News Corp.'s ownership of the DIRECTV distribution platform and Fox content, moreover, could be leveraged into the digital environment, creating competitive concerns for providers of interactive television or other emerging communications services. This discrimination could take many forms, including the simple denial of access to its DBS platform. But beyond such blatant discrimination, the newly merged 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 return path traffic.

Perhaps recognizing the potential for discrimination inherent in the proposed acquisition, News Corp. and DIRECTV have agreed to accept an "enforceable undertaking" as a condition of the Commission's grant of authority to transfer:

> 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.[62]

While this restriction may adequately deal with discrimination in cable programming, it fails to address the potential for News Corp. to discriminate against television broadcasters.

[62] Application, *supra* note 24, at 53; *see also* Application at Attachment G.

As Mr. Sidak explains in his declaration, "vertically integrated video programming distributors could employ discriminatory strategies against unaffiliated content providers."[63] The level of integration and potential for discrimination in the proposed acquisition is at least analogous to several other cases in which regulatory authorities have imposed conditions to alleviate discrimination concerns.[64] Logically, if the danger of discrimination against non-Fox-owned cable programming networks is so apparent, as it is, that News Corp. has voluntarily agreed to a condition to prevent such discrimination, a similar condition should be applied to its dealings with local broadcast stations.

3. NewsCorp.'s Increased Leverage Over Local Broadcasters May Harm Localism and Diversity.

News Corp. will be the first vertically integrated television broadcaster with the ability to bypass local television broadcast affiliates and discriminate against content providers. In the short term, the proposed acquisition will eliminate, or at the very least reduce, the retransmission consent fees that DIRECTV currently pays to Fox affiliates for the right to deliver Fox programming to DIRECTV subscribers. In the long term, the proposed acquisition threatens to undermine the viability of the network-affiliate relationship and its critical importance to the American broadcasting system.

Mr. Sidak's analysis demonstrates that the proposed acquisition could result in several potential harmful effects on local Fox affiliates: "Regardless of whether the Fox affiliates opt for mandatory carriage by DIRECTV, their spot advertising prices will drop, as presumably will their revenues and profits."[65] The affiliates will lose revenue from lost retransmission consent

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63 Declaration of J. Gregory Sidak, *supra* note 50, ¶ 13.

64 *AOL-Time Warner Order*, 16 FCC Rcd at 6554 ¶19; *In re Time Warner Inc.*, 123 F.T.C. 171 (1997); *In re Silicon Graphics*, No. 951-0064, 1995 FTC LEXIS 159 (F.T.C. June 13, 1995); *see also See, e.g.*, Declaration of J. Gregory Sidak & Hal J. Singer on behalf of The Walt Disney Company, *et al.*, *In re Nondiscrimination in the Distribution of Interactive Television Services over Cable*, Notice of Inquiry, CS Dkt. No. 01-7 (filed May 11, 2001).

65 Declaration of J. Gregory Sidak, *supra* note 50, ¶ 27.

fees and a reduction in market share from a diminished reach and a siphoning of advertising dollars away from local spots in favor of the new national programming feed.

Second, the devaluation of Fox affiliation will likely create a "ripple" effect, resulting in a loss of bargaining power across the broadcast landscape:

> This harm to the local Fox affiliate might extend to local affiliates of other major networks. For example, some local Fox affiliates might pursue inferior terms for affiliation with other major networks. All of the other local broadcasters in a market where a Fox affiliate takes such action would also lose bargaining power in their own affiliation negotiations with their respective networks, as now each network would be able to play off its current affiliate against at least one more unaffiliated broadcaster in the market who would be eager to get a new network affiliation.[66]

Finally, the proposed acquisition may also harm local broadcast stations because of News Corp.'s increased incentive to discriminate against rival content providers. This is particularly true for interactive television and other emerging communications services. By exercising its power over distribution, News Corp. may be able to vertically foreclose local broadcast stations from these innovative sub-markets. Though News Corp. has proposed a number of conditions to protect non-Fox-owned programmers and MVPD providers, it has not suggested any conditions that would protect broadcasters from the natural incentives stemming from vertical integration.

These potential harms to local broadcasters present a clear and cogent rationale for Commission intervention to protect localism and diversity. News Corp. "already can directly negotiate with MSOs for Fox network carriage over cable, and after the acquisition it will be able to beam a Fox network feed to DIRECTV's DBS customers over the entire continental United States."[67]

With weakened local affiliates, the American broadcast system of local news and local programming that the Commission has found to be vital to the "functioning of our democratic

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[66] *Id.* ¶ 28.

[67] *Id.* ¶ 26.

institutions" would be jeopardized.[68] As noted throughout these comments, "[L]ocal service ... is ***necessary*** if the public is to receive the maximum benefits from the television medium."[69] The viability of this system depends on a delicate balance of power – one that compensates networks while allowing local stations a substantial degree of exclusivity in providing network and syndicated programming to local viewers.

Without adequate protection, the proposed merger threatens to bypass over 150 local programming sources across the United States and discriminate against countless others. From Birmingham, Alabama to Beverly Hills, California, these local stations are as unique as the communities they serve. Each station represents an independent local voice – creating local content, editing for local tastes, and engaging in dialogue with national networks on behalf of local viewers. Undoubtedly, this vast array of independent voices involves some societal expense, but it remains "a principle of communications policy rooted in the Communications Act of 1934. It should be preserved and enhanced as we reform our laws for the next century."[70]

The threats to local affiliates described above are not merely imagined. In comments to the Commission, for example, Fox stated: "The Commission's preoccupation with localism is difficult to explain or to justify."[71] Fox's drive to create efficiencies at the possible expense of other values, as expressed in the following statement, is also of concern to local stations:

> The Commission's interest in promoting the welfare of listeners and viewers requires it to recognize that broadcast networks, stations, and cable systems should be encouraged to enter into efficient arrangements to provide service to consumers. The terms of the contractual arrangements, and especially the terms under which the profits earned by the joint

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68 *In re Cable Television Syndicated Programming Exclusivity Rules*, Report and Order, 79 FCC 2d 663, 673 (1980).

69 *Licensing of Community Antenna Television Systems*, S. Rep. No. 86-923, at 7 (1959) (emphasis added).

70 H.R. Rep. No. 104-204, at 221 (1995), *reprinted in* 1996 U.S.C.C.A.N. at 113.

71 *Statement on Media Ownership Rules of Dr. Bruce M. Owen*, at 10, attached as Exhibit 3 to Comments of Fox Entertainment Group *et al.*, *In re 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*, MB Dkt. 02-277 (filed Jan. 2, 2003).

> venture are divided among the parties need not concern the Commission, so long as they promote efficiency. Worse, attempting to regulate such terms is quite likely to reduce efficiency and thus harm the economy.[72]

The affiliates' specific concern with a possible national bypass signal is also not fanciful. Rupert Murdoch was recently quoted as saying: "I think HDTV is basically going to be done by networks. We won't need to repeat each HDTV 200 times." [73] As Multichannel News reported: "That comment suggested that during primetime — when HDTV is expected to see its most-intensive use —– a national network feed would replace the local signal, evidently cutting affiliates out from crucial advertising time during the key evening hours." [74]

The centralization of all local programming decisions in a national broadcasting network is plainly antithetical to the mandate of Congress, and the precedents set by the Commission.[75] In fact, Congress has plainly stated that "National feeds [are] ***counterproductive*** because they siphon potential viewers from local over-the-air affiliates."[76] The public interest requires that the American broadcast system be comprised of a broad range of diverse local viewpoints. As outlined above, the proposed acquisition presents a substantial threat to these principles.

V. <u>THE PROPOSED ACQUISITION WILL NOT SERVE THE PUBLIC INTEREST UNLESS CONDITIONS ARE IMPOSED TO COUNTER INCREASED NEWS CORP. POWER AGAINST LOCAL BROADCAST STATIONS.</u>

As demonstrated above, the proposed transaction creates clear economic incentives in favor of unified national programming to the detriment of diverse local interests. The

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[72] Bruce M. Owen, Michael G. Baumann & Kent W. Mikkelsen, *Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules*, at 1 (submitted on behalf of Fox Entertainment Group, *et al.*, Apr. 21, 2003).

[73] Ted Hearn, *Grilled Murdoch Drops HD Hints*, MULTICHANNEL NEWS, May 26, 2003, at 40.

[74] *Id.*

[75] *See* Part IV. A., *supra*.

[76] H.R. Conf. Rep. No. 106-464, at 102 (1999) (emphasis added).

Commission should exercise its power over license transfers by conditioning the proposed transaction on terms that preserve diversity and localism in the marketplace.

A. DIRECTV Should Be Prohibited From Transmitting a Fox Network Feed in Any Market Currently Served by a Fox Local Affiliate.

As the number of DBS subscribers continues to grow, the potential impact from a Fox network bypass becomes increasingly severe. Today, a bypass of local affiliates would immediately affect more than eleven million DIRECTV subscribers, who would collectively lose access to almost two hundred local programming viewpoints. While this outcome alone merits the Commission's concern, the long-term effects of the acquisition are perhaps even more important. As Mr. Sidak explained in his economic analysis, the power shift inherent to the acquisition could cause ripple effects that fundamentally alter the viability of the network-affiliate relationship.[77]

To counter the fundamental power shift resulting from increased vertical integration and relaxed ownership caps, the Commission should act decisively to protect localism and diversity, as it has successfully done for decades. News Corp.'s control over DIRECTV is significant largely because it can leverage that control to bypass local broadcasters in favor of national programming. Thus, as a condition of its license transfer, DIRECTV should be prohibited from transmitting an analog or digital Fox network feed in any market currently served by a Fox local affiliate. This condition will protect localism and diversity by preserving the balance of power between Fox and its local affiliates.

B. News Corp. and DIRECTV Should Also Be Prohibited From Discriminating Against Local Television Stations.

The potentially negative impacts of the proposed acquisition also stem from News Corp.'s incentive and ability to leverage DIRECTV to discriminate against local broadcasters.

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[77] *See* Part IV. B, *supra*.

Accordingly, the Commission should grant transfer of authority only upon certain conditions that protect the market from discrimination, preserving localism and diversity in the broadcast system.

1. News Corp. and DIRECTV Should Apply to Local Television Stations the Same Non-Discrimination Provisions Proposed for Satellite Cable Programming Services.

As noted, News Corp. and DIRECTV in their application for transfer have agreed not to discriminate against rival cable programmers:

> 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.[78]

As a result of this condition, News Corp. would be prohibited from leveraging the DIRECTV distribution platform to discriminate against any non-Fox-owned cable networks.

Because News Corp.'s promise does not protect local broadcasters, the Commission should impose an additional condition prohibiting News Corp. from blocking the access of any non-Fox-owned broadcast stations to consumers, or from discriminating against content owners, including broadcast stations, in any way.

2. News Corp. and DIRECTV Should Be Required to Abide By a Firewall Restriction in All Dealings With Local Broadcasters.

Exercising leverage through the combination of content and distribution companies will require the free exchange of information between News Corp. (Fox Entertainment) and DIRECTV. Through information exchange, Fox would be able to gain bargaining leverage in its affiliation agreements, while DIRECTV would gain considerable leverage in negotiating retransmission consent fees.

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[78] Application, *supra* note 24, at 53; *see also* Application at Attachment G.

To remedy the anticompetitive advantage gained by the parties to the proposed acquisition, the Commission should require News Corp. and DIRECTV to agree to an information "firewall" preventing the exchange of information between the two entities concerning any dealings with local broadcasters. This restriction will help preserve the delicate competitive balance that enables local broadcast stations to provide local service to their communities.

C. DIRECTV Should Be Required to Expand Local-Into-Local Service to Cover All 210 markets by January 1, 2006.

Of paramount importance to the survival of local broadcast television in an increasingly digital environment is carriage on all MVPD platforms. Through local-into-local service, television broadcasters are able to maintain viability by reaching the dramatic number of consumers who have switched to DBS services during the last decade. Though DIRECTV has already pledged to reach 100 DMAs with local-into-local service (by January 1, 2004), the Commission should act to ensure that the proposed acquisition does not hamper the rollout of local-into-local service.

To preserve diversity and localism in the 21st Century, the Commission should condition the proposed merger on DIRECTV's pledge to reach 150 DMAs by January 1, 2005, and all 210 DMAs by January 1, 2006. This condition, combined with the complementary conditions outlined above, will ensure that local broadcasters continue to provide diverse, local programming tailored to local interests.

VI. CONCLUSION

News Corp.'s acquisition of DIRECTV will create a vertically integrated media conglomerate with unquestioned power over the provision of information to an increasingly large segment of the American public. The proposed acquisition creates a clear incentive and ability for News Corp. to bypass local broadcasters in favor of national programming and discriminate against non-Fox-owned broadcast stations. The resulting shift in leverage will further marginalize local broadcast stations, limiting their ability to effectively negotiate for retransmission consent fees and ultimately harming their capacity to serve the welfare of the local community.

The News Corp. acquisition creates the potential to replace hundreds of diverse, local viewpoints with a single national programming choice for more than eleven million current subscribers to the rapidly expanding, second-largest MVPD in the nation. If this vertical integration is to be permitted, great care should be taken to ensure that the interests of localism and diversity are protected. News Corp. must be prohibited from using DIRECTV to distribute a national network feed in markets already served by Fox local affiliates. In dealing with local television broadcasters, both News Corp. and DIRECTV should be held to the same types of non-discrimination provisions proposed for non-Fox-owned satellite cable programming services. Finally, DIRECTV should be required to expand local-into-local service to cover all 210 markets by January 1, 2006.

Respectfully Submitted,

Henry L. Baumann
Jack N. Goodman
Benjamin F.P. Ivins
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5300

Date: June 16, 2003

EXHIBIT 1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Application of	)	
	)	
	)	
General Motors Corporation, Hughes Electronics Corporation,	)	
	)	
Transferors	)	MB Dkt. No. 03-124
	)	
and	)	
	)	
The News Corporation Limited,	)	
	)	
Transferee,	)	
	)	
For Authority to Transfer Control	)	

DECLARATION OF J. GREGORY SIDAK

INTRODUCTION

1. The acquisition of control of Hughes Electronics Corporation by News Corporation ("NewsCorp") will alter the structure of the communications industry. The acquisition will give NewsCorp the incentive and the ability to bypass its non-owned local network affiliates. With respect to its *incentive* to bypass local affiliates, DIRECTV will be able to avoid paying retransmission consent fees to Fox affiliates, and Fox will be able to capture local advertising dollars. With respect to its *ability* to bypass local affiliates, NewsCorp will increase its bargaining power vis-à-vis Fox local network affiliates as a result of the acquisition. Consequently, the acquisition will increase the bargaining power of NewsCorp (Fox) over its local affiliates in the purchase of video programming. This bypass, or the mere threat of bypass, will harm Fox affiliates. The proposed acquisition could also increase NewsCorp's incentive and ability to discriminate against non-Fox-affiliated stations in other ways, such as the interactive portion of network signals. The merger applicants' pledge not to discriminate against unaffiliated cable networks does not address this potential discrimination.

QUALIFICATIONS

2. My name is J. Gregory Sidak. I am the F.K. Weyerhaeuser Fellow in Law and Economics Emeritus at the American Enterprise Institute (AEI) and the president and chief executive officer of Criterion Economics, L.L.C. in Washington, D.C. I have been a consultant on regulatory and antitrust matters to the Antitrust Division of the U.S. Department of Justice and the Canadian Competition Bureau and to more than forty companies in the telecommunications, computer software, electric power, natural gas, mail and parcel delivery, broadcasting,

newspaper publishing, recorded music, and financial services industries in North America, Europe, Asia, and Australia.

3. My academic research concerns regulation of network industries, antitrust policy, the Internet and electronic commerce, intellectual property, and constitutional law issues concerning economic regulation. I have directed AEI's Studies in Telecommunications Deregulation since the project's inception in 1992.

4. I served as Deputy General Counsel of the FCC from 1987 to 1989, and as Senior Counsel and Economist to the Council of Economic Advisers in the Executive Office of the President from 1986 to 1987. As an attorney in private practice, I worked on numerous antitrust cases and federal administrative, legislative, and appellate matters concerning telecommunications and other regulated industries.

5. I am the author or co-author of five books concerning pricing, costing, competition, and investment in network industries,[1] and of approximately fifty scholarly articles in law reviews or economics journals, including the *American Economic Review Papers and Proceedings, California Law Review*, *Columbia Law Review*, *Journal of Network Industries*, *Journal of Political Economy*, *New York University Law Review*, *Review of Industrial Organization*, *Stanford Law Review*, *University of Chicago Law Review*, *Yale Law Journal*, and *Yale Journal on Regulation*. I have testified before committees of the U.S. Senate and House of Representatives on regulatory and constitutional law matters, and my writings have been cited by

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1. J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT (Cambridge University Press 1997); WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY (MIT Press 1994); WILLIAM J. BAUMOL & J. GREGORY SIDAK, TRANSMISSION PRICING AND STRANDED COSTS IN THE ELECTRIC POWER INDUSTRY (AEI Press 1995); J. GREGORY SIDAK & DANIEL F. SPULBER, PROTECTING COMPETITION FROM THE POSTAL MONOPOLY (AEI Press 1996); J. GREGORY SIDAK, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS (University of Chicago Press 1997).

the Supreme Court of the United States, the lower federal and state supreme courts, state and federal regulatory commissions, and the European Commission. From 1993 to 1999, I was a Senior Lecturer at the Yale School of Management, where I taught a course on telecommunications regulation with Dean Paul W. MacAvoy.

6. From Stanford University, I received A.B. (1977) and A.M. (1981) degrees in economics and a J.D. (1981). I was a member of the *Stanford Law Review*. Following law school, I served as a law clerk to Judge Richard A. Posner during his first term on the U.S. Court of Appeals for the Seventh Circuit.

7. I file this declaration in my individual capacity as a consultant to the National Association of Broadcasters and not on behalf of the American Enterprise Institute, which does not take institutional positions on specific regulatory, adjudicatory, legislative, or executive proceedings.

I. NEWSCORP'S INCENTIVE TO BYPASS FOX LOCAL NETWORK AFFILIATES

8. There are two basic ways in which DIRECTV can offer Fox network programming to its DBS subscribers in "non-white" areas (where customers are able to receive a sufficiently strong over-the-air signal): (1) by retransmitting the programming of Fox's affiliate stations to households within the geographic areas served by those local stations, and (2) by bypassing Fox's affiliate stations and offering a single nationwide Fox network feed. The Satellite Home Viewer Improvement Act of 1999 requires DIRECTV to carry the signal of a Fox local station in any local market in which DIRECTV retransmits any other local broadcast

station.[2] Although DIRECTV cannot refuse to retransmit the signal of a local Fox affiliate, DIRECTV can decline to pay for that signal. Furthermore, even if local Fox affiliates demand to be carried under "carry one, carry all" rules, nothing stops DIRECTV from bypassing the affiliates altogether in the sense of beaming down a national Fox feed covering the continental United States. The acquisition of DIRECTV by NewsCorp will enhance DIRECTV's incentive and ability to bypass local Fox affiliates in this manner, regardless of whether those affiliates opt for mandatory carriage.

9. As of June 2003, there were 188 Fox affiliated stations, of which 35 were owned and operated (O&O) by NewsCorp and 153 were not.[3] DIRECTV currently offers local-into-local network programming in 61 local markets by retransmitting (by spot beam) the broadcasts of individual network affiliates.[4] For purposes of discussion, I will assume that DIRECTV pays retransmission consent fees to each Fox network affiliate for the ability to beam its local signal to DBS customers via satellite. When DIRECTV retransmits a local network affiliate's signal, it does not alter the programming or advertisements shown. That is to say, a DIRECTV customer sees the transmission exactly as it is broadcast terrestrially by the network affiliate.

10. Bypass involves (1) the termination of retransmission consent payments to local affiliates and (2) the offering of a national feed. The offering of the national feed could occur in several ways. For example, after its acquisition of DIRECTV, NewsCorp could offer a national

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2. 47 U.S.C. § 338(a)(1) (2003) (stating that "each satellite carrier providing, under section 122 of Title 17, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market").

3. Consolidated Application for Authority to Transfer Control, Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and the News Corporation Limited, Transferee, For Authority to Transfer Control, MB Dkt. No. 03-124 at 25 (filed May 15, 2003).

feed with the identical content as the local Fox station save the local programming. Alternatively, NewsCorp could offer a national feed in high-definition television (HDTV) alongside the retransmitted local Fox station. In May 2003, Mr. Rupert Murdoch hinted at this form of bypass when he discussed capacity issues raised by HDTV transmissions: "I think HDTV is basically going to be done by networks. We won't need to repeat each HDTV [signal] 200 times."[5] A plausible interpretation of Mr. Murdoch's remark is that a national network feed would replace the local signal during primetime viewing hours, which would eliminate a lucrative advertising time slot for local affiliates during key evening hours.[6]

11. It is technically feasible for DIRECTV to bypass local Fox network affiliates, and nothing would legally prevent DIRECTV from offering a national Fox feed.[7] Therefore, the fact that DIRECTV has chosen to retransmit, but not bypass, local Fox network affiliates necessarily implies that retransmission is currently economically rational for DIRECTV and bypass is not. In particular, if DIRECTV unilaterally were to refuse to pay a local Fox affiliate a retransmission consent fee, then that local Fox affiliate might choose not to provide its transmission to DIRECTV. The consequence of that decision by the local Fox affiliate would be costly to DIRECTV to the extent that DIRECTV's customers value the carriage of the local Fox station. The following two conditions naturally follow:

> **Condition 1**: DIRECTV's revenue from retransmitting a local station, $R_{R,D}$, outweighed DIRECTV's cost of retransmission, $C_{R,D}$: $R_{R,D} - C_{R,D} > 0$.

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4. DIRECTV, *Local Channels Availability*, available at http://www.directv.com/DTVAPP/LocalChannelServlet.

5. Ted Hearn, *Grilled Murdoch Drops HD Hints*, MULTICHANNEL NEWS, May 26, 2003, at 40.

6. *Id.*

7. Assuming there is no exclusivity agreement between Fox and its affiliates, then DIRECTV would be free to offer a national feed of Fox. Based on my observations, Fox routinely rebroadcasts certain network programming, such as the show *24*, on its cable channel, FX.

Condition 2: DIRECTV's profit from bypassing a local affiliate, $R_{B,D} - C_{B,D}$, was less than its profit from retransmitting a local station, $R_{R,D} - C_{R,D}$: $R_{R,D} - C_{R,D} > R_{B,D} - C_{B,D}$.

12. Although it is not currently profitable for DIRECTV unilaterally to bypass local Fox affiliates, it would be profitable for DIRECTV to do so after its acquisition by NewsCorp, provided that two additional conditions are met. These conditions are listed below as conditions 3 and 4:

Condition 3: The joint revenues of the merged entity from bypassing a Fox local affiliate, $R_{B,D} + R_{B,F}$, exceed the joint costs of bypassing a Fox local affiliate, $C_{B,D} + C_{B,F}$.

Condition 4: The joint profits of the merged entity from bypassing a Fox local affiliate, $R_{B,D} + R_{B,F} - [C_{B,D} + C_{B,F}]$, exceed the joint profits of retransmitting that Fox local affiliate, $R_{R,D} + R_{R,F} - [C_{R,D} + C_{R,F}]$.

Writing all four conditions yields:

(1) $R_{R,D} - C_{R,D} > 0$;
(2) $R_{R,D} - C_{R,D} > R_{B,D} - C_{B,D}$;
(3) $R_{B,D} + R_{B,F} - [C_{B,D} + C_{B,F}] > 0$;
(4) $R_{B,D} + R_{B,F} - [C_{B,D} + C_{B,F}] > R_{R,D} + R_{R,F} - [C_{R,D} + C_{R,F}]$.

If all four conditions are satisfied, then the merged entity has an incentive to bypass Fox local affiliates. For purposes of argumentation, I will assume that this framework captures all of the relevant variables in the discrimination calculus.[8]

13. In the following pages, I attempt to quantify some of the costs and benefits associated with a specific form of discrimination—namely, bypass. Although the merger might also increase NewsCorp's incentive and ability to discriminate against non-Fox-affiliated local stations in other ways—for example, in the carriage of the interactive portion of their network

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8. For a more detailed analysis of the revenue and cost streams, see Marius Schwartz & Daniel R. Vincent, The Television National Ownership Cap and Localism (Jan. 2, 2003) (filed as Attachment 1 to Comments of the National Association of Broadcasters and the Network Affiliated Stations, 2002 Biennial Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Dkt. No. 02-277 (filed Jan. 2, 2003) (demonstrating theoretically that raising

signals—I do not explicitly consider the expected gains and losses associated with those forms of discrimination in this report. As I have argued before, vertically integrated video programming distributors could employ discriminatory strategies against unaffiliated content providers, including non-Fox-affiliated local broadcast stations.[9] An analogous question may arise concerning DIRECTV's carriage of the interactive portion of the non-Fox-affiliated local broadcast stations. NewsCorp proposes a number of conditions that it asserts would guarantee that NewsCorp could not discriminate against unaffiliated cable networks. Those conditions, however, would not protect the non-Fox-affiliated local broadcast stations from alternative discrimination strategies.

A. The Expected Benefits of Bypass

1. Fox's Capture of Local Advertising Slots During Network Programming and All Advertising During Local Programming

14. In addition to advertising purchased during the airing of network programming on local stations, NewsCorp's Fox network earns revenue on a given program in two ways: (1) the sale of advertising slots if the program is aired by another NewsCorp cable channel, such as FX, and (2) the receipt of syndication fees for the use of the program by other broadcasting and cable firms. NewsCorp can earn additional revenues for product placement in its programs, such as when the host of *American Idol* held a Nokia 3650 MMS-capable imaging phone to the camera

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the national ownership cap would decrease the amount of localism because a network's incentives are not the same as those of an independent affiliate).

9. *See, e.g.*, Declaration of J. Gregory Sidak and Hal J. Singer on behalf of The Walt Disney Company, *et al.*, In the Matter of Nondiscrimination in the Distribution of Interactive Television Services over Cable, Notice of Inquiry, Federal Communications Commission, CS Dkt. No. 01-7 (filed May 11, 2001).

and informed viewers that they could cast their votes using text messaging from AT&T Wireless.[10]

15. There are two new sources of advertising revenues that Fox network could capture if DIRECTV were to bypass the local affiliate. First, NewsCorp could reclaim and sell advertising slots currently reserved for use by local affiliates. When NewsCorp sells advertising time for primetime programming that airs on the Fox network, it currently provides local affiliates with 30 to 90 seconds per half hour for local advertising. This time represents between 6.25 and 18.75 percent of total advertising time, assuming eight minutes of commercials per half hour of primetime programming. Consequently, the value of these local advertising slots can be very significant, especially during popular primetime programming.

16. Second, with a bypass signal, NewsCorp could siphon advertising dollars away from Fox local affiliates by capitalizing on the viewer "inertia" generated by Fox network programming. For example, NewsCorp could air content in the 10:00 PM slot on its national feed that is directly based on its 9:00 PM network programming, thus maximizing the inertia generated by Fox's network programming by specifically targeting the audience that watches such programming. After the conclusion of *24* at 10:00 PM on Tuesday, when Fox's network affiliates cut to local news, NewsCorp could air ten minutes of behind-the-scenes footage, outtakes, interviews, or in-depth coverage of *24*. Such value-added programming would have the additional advantage of being extremely inexpensive to produce. NewsCorp could even run 10 minutes of value-added programming at 10:00 PM and then cut to a form of national news at

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10. *See* Glenn Letham, *Nokia 3650 Hits Prime Time...Will It Become the Next American Idol*, WIRELESS DEVELOPER NETWORK, May 7, 2003 (available at http://www.wirelessdevnet.com/newswire-less/may072003.html). Nonetheless, these revenues are usually structured as higher rates for advertising contracts with the companies that have their products placed in the show.

10:10 PM. Such a strategy would avoid program-overkill while still managing to disrupt viewer switchover to the Fox local affiliates' 10:00 PM broadcasts.

17. By capturing the local advertising time allotment during network programming, or all advertising currently purchased from the Fox affiliate during local programming or both, NewsCorp would increase Fox's advertising revenues without generating any corresponding increase in its programming costs. By migrating DIRECTV viewers from its network affiliates to a national Fox feed, NewsCorp can capture the advertising value of those viewers for 100 percent of its primetime programming.

18. The share of the local advertising revenues that NewsCorp could capture in this manner would depend on (1) the degree to which viewers of the local Fox station are reluctant to change channels after watching popular national programming and (2) the degree to which consumers perceive national news programming produced by the Fox network to be a substitute for local news programming produced by the Fox affiliate. Table 1 shows the Nielsen ratings for the 9:30 PM network programming aired by the local Fox affiliate in Washington, D.C. and the 10:00 PM local news aired by that affiliate during the February 2003 sweeps.

TABLE 1: FOX RATINGS FLOW AT 10:00 PM FOR WASHINGTON, D.C. DMA

Flow of Ratings	Monday				Tuesday				Wednesday				Thursday				Friday			
Week in Feb. 2003	*1*	*2*	*3*	*4*	*1*	*2*	*3*	*4*	*1*	*2*	*3*	*4*	*1*	*2*	*3*	*4*	*1*	*2*	*3*	*4*
9:30 PM Fox Local (Network Programming)	17	21	29	17	14	13	12	14	9	11	17	10	7	4	3	15	8	6	6	5
10:00 PM Fox Local (Local News)	12	12	17	12	10	10	12	14	10	13	16	17	8	10	9	15	7	7	9	7

Source: Nielsen Media Research, Washington, D.C. (Hagerstown, MD) Metered Market Service: February 2003.

As Table 1 shows, a high rating for the Fox network program at 9:30 PM "lifts" the rating of the Fox local news at 10:00 PM. For example, the season finale of *Joe Millionaire* on the third Monday of February scored a ranking of 29 percent of all television households, and the local news that followed that lead enjoyed a Nielsen rating of 17. A similar result occurred on the fourth Thursday of February following *The Pulse*. A regression of the Fox local news rating on the rating of the earlier Fox network program yields a (statistically significant) coefficient of 0.346 (t stat = 4.06), which suggests that a one-point increase in the rating of the Fox network program in the 9:30 PM slot results in a 0.346 increase in the rating of the Fox local news that night. With information on the rating of the preceding (national) Fox program alone, it is possible to explain nearly 50 percent of the variation in the rating of the local Fox news (R-squared = 0.479). This inertia among Fox viewers suggests that NewsCorp could capture a large share of the former local advertising dollars by bypassing the local affiliate—especially because 100 percent of the advertising dollars during this late-night time slot is currently captured by the local affiliate.

19. Fox also owns Fox News, a national cable news network, which is a partial substitute for local news. An analysis of the Nielsen ratings shows that Fox News' Nielsen falls

from 3 to 2 when the Fox local station airs the local news. Furthermore, the rating of Fox News falls from 2 to 1 at 11:00 PM, which coincides with the airing of three local news programs.[11] Unfortunately, Nielsen does not provide Fox News ratings by day and time slot. It is reasonable, however, to infer that Fox News loses a large share of its audience (roughly 33 percent) when viewers are presented with a choice of local news and national news. Presumably, under bypass NewsCorp would fill the 10:00 PM slot on the national Fox feed with a national news program. The more that viewers perceive national news programs to be a close substitute for local news programs, the better NewsCorp could prevent the defection of the Fox News audience to local news programming.

2. DIRECTV's Avoidance of Retransmission Consent Fees

20. DIRECTV currently pays retransmission consent fees to carry the broadcasts of local network affiliates in a number of markets around the United States. If DIRECTV could offer, through bypass, much of the programming that the Fox affiliates currently provide on a local basis, then it could inform local Fox affiliates that it would no longer pay retransmission consent fees for their broadcast signals on a going-forward basis. Each local Fox affiliate then would have to choose between demanding uncompensated must-carry or withholding its signal from DIRECTV.

21. By refusing to pay retransmission consent fees to a local Fox affiliate, DIRECTV would benefit by the amount of the previous retransmission consent fee. DIRECTV would

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11. Fox News' share of all households with television sets turned on also falls over this time period, demonstrating that the erosion of Fox News' Nielsen rating is not simply a result of households switching their television sets off. Fox News garners a 4 share in the 8:00PM – 10:00PM slot, a 3 share in the 10:00PM to 11:00PM slot, and a 2 share in the 11:00PM to 11:30PM slot. Nielsen Media Research, Washington, D.C. (Hagerstown, MD) Metered Market Service: February 2003.

realize this cost avoidance with respect to all local affiliates, including affiliates that opted to have DIRECTV carry their signals under must-carry. The value of advertising time on a local affiliate's station depends on the number of viewers who watch the station. It is therefore reasonable to expect that after the merger of NewsCorp and DIRECTV many local Fox affiliates would opt for mandatory (but uncompensated) carriage as a way to maximize their expected audience share.

B. The Expected Costs of Bypass: DIRECTV's Marginal Subscriber Losses

22. If the Fox local affiliate demanded carriage on DIRECTV's lineup despite DIRECTV's refusal to pay retransmission consent fees, then DIRECTV's program offerings would not deteriorate relative to the program offerings of EchoStar or the local cable provider. Hence, DIRECTV would not suffer any subscriber losses under this scenario.

23. However, the decision by NewsCorp to end DIRECTV's retransmission consent payments might drive Fox affiliate stations from its local DIRECTV lineup in certain markets. In this event, some DIRECTV customers would be willing to switch to EchoStar or to their local cable provider to continue watching local Fox programming. The marginal effect would likely be small because DIRECTV customers who were very interested in local news and public affairs programming could still view the local programming of the ABC, CBS, or NBC local affiliate.

II. NEWSCORP'S ABILITY TO BYPASS FOX LOCAL NETWORK AFFILIATES

24. NewsCorp's acquisition of DIRECTV will increase the latter's ability to bypass local Fox network affiliates. DIRECTV's ability to offer network stations is a critical factor in its attractiveness relative to cable television or other MVPDs, in part because of the primetime

programming of those network stations.[12] DIRECTV currently negotiates with local Fox affiliates and pays them retransmission consent fees for the use of their signals. As an independent MVPD provider, DIRECTV cannot realistically threaten to end payments to those affiliates. The loss of such hit programs as *American Idol* and *24*, as well as local Fox programming, would encourage DIRECTV subscribers to switch to alternate MVPD platforms.

25. NewsCorp has also sought to receive a percentage of the payments that its affiliate stations receive from retransmission agreements. Before the acquisition, NewsCorp only had bargaining power in the context of negotiations over the renewal of affiliation agreements. After the acquisition, NewsCorp will have far greater bargaining power because its DIRECTV distribution of NewsCorp's national Fox feed will give NewsCorp greater latitude and credibility to replace the current Fox affiliate in a given DMA with another local station. Furthermore, after its acquisition by NewsCorp, DIRECTV will be able to give its subscribers a national Fox feed. DIRECTV will not depend on the local Fox affiliates for access to Fox network programming. DIRECTV could thus tell the local Fox affiliates that it will no longer pay for the use of their signals. Through the acquisition of DIRECTV, NewsCorp could free DIRECTV from making retransmission payments and enable Fox to capture incremental advertising revenues from slots previously sold by its local affiliates.

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12. This is not to say that viewers necessarily value primetime network programming more than the local programming of their network affiliates, just that viewers derive more value from clearer sound and picture for entertainment programs (which often involve music and/or special effects) than for information programs, such as the local news.

III. THE HARM TO FOX LOCAL NETWORK AFFILIATES

26. In the short term, the acquisition could reduce or eliminate the retransmission consent fees that Fox affiliates receive from DIRECTV in return for the right to deliver Fox programs to DIRECTV's subscribers. Over the longer-term, the acquisition threatens the viability of the network-affiliate relationship. NewsCorp will be the first vertically integrated program originator with the ability to bypass local television broadcast affiliates: It already can directly negotiate with MSOs for Fox network carriage over cable, and after the acquisition it will be able to beam a Fox network feed to DIRECTV's DBS customers over the entire continental United States. In this scenario, local broadcast affiliates become unnecessary for the distribution of Fox network programming to DIRECTV subscribers.

27. One would expect that outcome to have at least the following harmful effect on local Fox affiliates. Regardless of whether the local Fox affiliates opt for mandatory carriage by DIRECTV, their spot advertising prices will drop, as presumably will their revenues and profits.[13] According to MediaWeek's *Marketer's Guide to Media*, in the first quarter of 2003, a local affiliate in Washington, D.C. earned on average $373 per DMA household rating for a 30-second commercial that aired during a local news program, and earned on average $800 per DMA household rating for a 30-second commercial that aired during a primetime program.[14] Using the Nielsen ratings from Table 1, on the third Monday of February 2003, the local Fox affiliate earned roughly $6,341 (equal to $373 x 17 rating) for a 30-second commercial that aired within the Washington, D.C. DMA during its local news program at 10:00 PM. It earned roughly

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13. Even if a local Fox affiliate demands mandatory carriage, it would still lose market share to the extent that NewsCorp is successful in diverting its viewers to the national Fox feed.

14. MEDIAWEEK, 2003MARKETER'S GUIDE TO MEDIA, at 28.

$23,200 (equal to $800 x 29 rating) for a 30-second commercial that aired within the Washington, D.C. DMA during *Joe Millionaire* at 9:00 PM. The share of those advertising revenues attributable to DIRECTV's carriage of the local Fox station would be lost to the extent that NewsCorp could steer viewers from the local Fox station to its national Fox feed.

28. This harm to the local Fox affiliate might extend to local affiliates of other major networks. For example, some local Fox affiliates might pursue inferior terms for affiliation with other major networks. All of the other local broadcasters in a market where a Fox affiliate takes such action would also lose bargaining power in their own affiliation negotiations with their respective networks, as now each network would be able to play off its current affiliate against at least one more unaffiliated broadcaster in the market who would be eager to get a new network affiliation.

29. In its application to transfer licenses, NewsCorp proposes a number of conditions that it asserts would guarantee that NewsCorp could not discriminate against unaffiliated cable networks. Those conditions, however, would not protect the local broadcast affiliates of NewsCorp's own Fox network from the harms described above. Nor would they protect the non-Fox-affiliated local broadcast stations from alternative discrimination strategies to which I referred in section I.

CONCLUSION

30. NewsCorp's acquisition of DIRECTV will increase the merged entity's incentive and ability to bypass local Fox affiliates. By bypassing local affiliates, the upstream programming division of Fox can capture sufficient incremental advertising revenues to compensate the downstream distribution division of DIRECTV for any losses associated with

customer substitution toward EchoStar or the local cable provider. Moreover, the acquisition will increase the bargaining position of NewsCorp and DIRECTV vis-à-vis Fox local affiliates. Consequently, the acquisition will harm local Fox affiliates by depriving them of retransmission consent fees and by siphoning away their local advertising revenues.

*   *   *

I declare under penalty of perjury that this declaration is true and correct. Executed this 16th day of June, 2003.

J. Gregory Sidak

CERTIFICATE OF SERVICE

I, Joan Dollarhite, do hereby certify that on the 16th day of June, 2003, I caused true and correct copies of the foregoing Comments of the National Association of Broadcasters to be served by first-class mail, postage prepaid,* or electronically upon the parties on the attached service list.

Joan Dollarhite

Joan Dollarhite

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