BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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

To: The Commission

PETITION OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE TO DESIGNATE APPLICATION FOR HEARING

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TABLE OF CONTENTS

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	)	
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The National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby submits these Comments regarding the above-captioned application (Application) of The News Corporation Limited (News Corp), General Motors Corporation (GM) and Hughes Electronics Corporation (Hughes), a subsidiary of GM (collectively, the Applicants), to transfer control of their satellite, earth station and other related authorizations to News Corp (the Merger).[1] The proposed Merger raises substantial and material questions of fact regarding the impact of a

[1] Application of The News Corporation Limited, General Motors Corporation and Hughes Electronics Corporation, Transferor; and The News Corporation Limited, Transferee, For Authority to Transfer Control, File Number 03-124, (filed May 2, 2003). *See also* Media Bureau Action, *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 Corporation Limited*, MB Docket No. 03-124, DA 03-1725 (released May 16, 2003).

combination of News Corp and DIRECTV on millions of rural Americans who rely on satellite technology to receive multichannel video program distribution (MVPD) and broadband services.

None of these factual questions has been satisfactorily resolved by the Application. As a result, under applicable legal standards, the Application must be designated for an evidentiary hearing before an Administrative Law Judge on the following issues:

Issue 1: Whether the proposed transaction is likely to cause anticompetitive harm. In reaching a determination on this issue, the following should be considered:

(a) the geographic market (e.g., whether the relevant geographic markets should be aggregated into three categories – markets not served by any cable system; markets served by low-capacity cable systems; markets served by high-capacity cable systems; and the relative number of households in each of these categories) and the number of subscribers per market;

(b) the market participants, market shares and concentration, and the impact, if any, of the Commission's revised Media Ownership Rules;

(c) the timeliness, likelihood, and sufficiency of entry to offset any potential adverse competitive effects that may result from the proposed transaction;

(d) the effects of the proposed transaction on price, quality and innovation (considering the likelihood of coordinated behavior among competing firms and the ability of the Applicants to unilaterally take anticompetitive actions); and

(e) the efficacy of the Applicants' proposed Program Access commitments.

Issue 2: Whether the proposed transaction is likely to cause other public interest harms. In reaching a determination on this issue, the following should be considered:

(a) the proposed transaction's effect on viewpoint diversity;

(b) the proposed transaction's effect on program diversity and consumer choice; and

(c) the proposed transaction's effect on the deployment of local broadcast signals in: (1) Designated Market Areas (DMAs) served by Fox

Broadcasting; (2) DMAs served only by Fox affiliates; (3) DMAs served by neither Fox Broadcasting or Fox affiliates; and (4) DMAs currently not receiving local signals via DIRECTV.

Issue 3: Whether the proposed transaction is likely to yield any public interest benefits. In reaching a determination on this issue, as outlined above, the following should be considered:

(a) whether the cost savings and other benefits claimed by Applicants (e.g. HDTV, broadband, local service) are non-speculative, credible and transaction-specific and are likely to flow through to the public.

Issue 4: On balance, whether the public interest, convenience and necessity would be served by the grant of the above-captioned application.

I. SUMMARY

1. Just two weeks ago, the Commission completed its Biennial Regulatory Review of the Broadcast Ownership Rules (*Media Ownership Proceeding*).[2] In deciding to relax its various cross ownership restrictions, the Commission repeatedly relied on the success of the Direct Broadcast Satellite (DBS) industry as a check on dominance by media giants. However, the Commission did not consider the impact on the media landscape if one of only two DBS licensees were controlled by a major network owner with significant programming and newspaper interests.

2. According to its most recent Annual Report, News Corp owns properties in "the fields of filmed entertainment, newspapers, pay and free-to-air television, cable network programming, book publishing, magazines and consumer marketing."[3] Its assets include:

- Television stations, including 35 owned and operated broadcast television stations and two broadcast stations each in New York, Los Angeles, Dallas, Washington, DC, Houston, Minneapolis, Phoenix and Orlando.

[2] 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 Docket No. 02-277); Cross-Ownership of Broadcast Stations and Newspapers (MM Docket No. 01-235); Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets (MM Docket No. 01-317); and Definition of Radio Markets (MM Docket No. 00-244) (*Media Ownership Proceeding*).

[3] *See* News Corporation Limited 2002 Annual Report, p. 2 (*2002 News Corp Annual Report*).

- Film Studios such as 20th Century Fox Film Corp., Fox 2000 Pictures, Fox Searchlight Pictures, Fox Music, 20th Century Fox Home Entertainment, Fox Interactive, 20th Century Television, Regency Television and Blue Sky Studios.

- Cable Programming such as the number one rated Fox News Channel, Fox Kids Channel, FX, Fox Movie Channel, Fox Sports Network, Fox Regional Sports Networks, Fox Sports World, Speed Channel, Golf Channel, Fox Pan American Sports, National Geographic Channel and the Health Network.

- Publishing companies and newspapers such as the New York Post, the Weekly Standard, Harper Collins Publishers, Regan Books, Armistad Press, William Morrow & Co., Avon Books and Gemstar-TV Guide International.

- Sports team and interests such as the Los Angeles Dodgers and a partial interest in the New York Knicks, New York Rangers, Los Angeles Kings, Los Angeles Lakers, Dodger Stadium, Staples Center and Madison Square Garden as well as national sports programming including license agreements with the National Football League, Major League Baseball and NASCAR.

3. With the Merger, News Corp would acquire the capability to deliver its broadcast and programming content to every corner of the United States -- including those rural areas receiving MVPD and broadband service only by satellite. DIRECTV would become the first vertically integrated MVPD provider with nationwide coverage.

4. The Commission needs to determine the effect of the Merger on viewpoint and program diversity, consumer choice and the availability and price of programming, especially local programming, in rural America. The Commission also needs to scrutinize the stated benefits of the Merger to ensure that they will materialize in rural America. Last, the Commission needs to evaluate whether the Applicants' proposed conditions are adequate to protect rural Americans.

II. BACKGROUND.

5. NRTC is a not-for-profit cooperative comprised of 705 rural electric cooperatives, 128 rural telephone cooperatives and 189 independent rural telephone companies located

throughout 46 states. Since its founding in 1986, NRTC's mission has been to provide advanced telecommunications technologies and services to rural America. NRTC has long represented the views of rural Americans before the FCC, the National Telecommunications and Information Agency (NTIA), and the United States Congress.

6. In 1994, NRTC assisted in capitalizing the launch of the DIRECTV satellite business. Through a Distribution Agreement between NRTC and Hughes Communications Galaxy, Inc. (DIRECTV's predecessor-in-interest), NRTC received program distribution and other rights to market DIRECTV's DBS programming services to much of rural America. NRTC, its members and affiliates currently distribute DIRECTV programming to more than 1,600,000 rural households.[4]

7. Since its inception, NRTC has championed the rights of rural Americans to enjoy fair and nondiscriminatory access to the same programming that is available to consumers in more populated urban areas. As early as 1989, NRTC was active in Commission and Congressional efforts to prohibit discrimination against distributors of satellite programming to rural America.[5] In 1992, NRTC advocated passage of the Program Access provisions of the Cable Television Consumer Protection and Competition Act of 1992, which were designed in part to prevent discrimination against rural consumers.[6]

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[4] *See* **Exhibit A**, NRTC Territory Map With DMAs. Pegasus Communications Corporation (Pegasus) is the largest affiliate of NRTC, distributing DIRECTV programming to approximately 1.3 million households through NRTC.

[5] *See* Notice of Inquiry, *Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, 4 FCC Rcd 3833 (1989).

[6] 47 U.S.C. § 628. *See also* First Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 72 RR 2d 649, 8 FCC Rcd 3359 (1993).

8. In February 2002, NRTC petitioned to deny the transfer of control application filed by EchoStar, GM and Hughes (*EchoStar Merger*).[7] In that proceeding, NRTC maintained that in rural areas with no access to cable, consumers would face a satellite monopoly as a result of the proposed merger of DIRECTV and EchoStar. NRTC demonstrated that the *EchoStar Merger* would result in higher prices, lower quality services, reduced innovation and a loss of competition in rural areas. NRTC showed that the *EchoStar Merger* would reduce the choices in MVPD competitors from two to one -- and raise prices by up to $700 million per year -- for up to 22 million households in areas unserved by cable.[8]

9. On October 10, 2002, the FCC agreed with NRTC's assessment and declined to approve without a hearing EchoStar's proposed multibillion-dollar merger with DIRECTV, concluding that the combination of the nation's two top DBS television providers would deal a "staggering" blow to consumer welfare.[9] Chairman Powell stated that the *EchoStar Merger* would "turn our national communications policy back . . . many years," and that the case against approving the merger was "particularly compelling with respect to residents of rural America who are not served by any cable operator."[10]

10. Although clearly different from the *EchoStar Merger*, the proposed Merger of DIRECTV and News Corp also raises substantial and material questions of fact never before

[7] Hearing Designation Order, *In the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation and EchoStar Communications Corporation*, 17 FCC Rcd. 20559 (released October 18, 2002) (*HDO*). *See also Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor; and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control*, File Number 01-348, p. 6 (filed December 3, 2001). *See also* Cable Service Bureau Action, *EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control*, CS Docket No. 01-348, DA 01-3005 (released December 21, 2001) (*EchoStar Merger*).

[8] *HDO*, ¶158.

[9] Communications Daily, *FCC Shoots Down EchoStar Acquisition of Hughes and DIRECTV*, October 13, 2003 (quoting Media Bureau Chief Kenneth Ferree as stating that "Our calculation of consumer welfare losses were staggering."); *See also*, HDO, ¶3.

[10] Statement Of Chairman Michael K. Powell, *EchoStar Merger*, p. 1, (released October 10, 2002).

considered by the Commission. Likewise, it raises concerns about the impact of the Merger on rural Americans.

III. PETITION

A. A Hearing Is Necessary To Resolve Factual Questions Regarding The Impact Of The Proposed Merger On Rural America.

11. Pursuant to Sections 214(a) and 310(d) of the Communications Act of 1934, as amended (the Act), the Commission must determine whether the proposed Merger will be consistent with the public interest, convenience and necessity.[11] In making this determination, the Commission will weigh the potential public interest harms of the proposed transaction against the public interest benefits.

12. Under Section 309(d) of the Act, if a single, substantial and material question of fact is presented or if the Commission is otherwise unable to find that grant of the Application would be consistent with the public interest, it must designate the Application for hearing.[12]

13. Based on the Application, there is no doubt that *numerous* substantial and material questions of fact remain unresolved. The Application raises factual issues regarding the impact of the Merger on viewpoint and program diversity, consumer choice and the availability and price of programming in rural America -- especially under the Commission's new Media Ownership rules. Accordingly, under applicable legal standards, the Application should be designated for hearing.

1. The Commission's New Media Ownership Rules.

14. DBS has evolved from a platform capable of only broad nationwide delivery, to one capable of localized coverage. In just five years, DIRECTV alone has expanded its local

[11] 47 U.S.C. §§214(a), 310(d).
[12] 47 U.S.C.§ 309(d).

coverage to almost 70% of television households in the United States. By the end of this year, it expects to extend its local coverage to approximately 83% of television households.[13] In effect, DBS licensees are beginning to look more and more like local broadcast licensees.

15. In justifying its recent changes to the Media Ownership rules, the Commission repeatedly characterized DBS as a critical source of ongoing competition to broadcast licensees.[14] But neither the Commission's revised Media Ownership rules nor its other regulations impose any specific cross-ownership restrictions on DBS. None of the Commission's rules address the combination of a DBS company with a broadcast network holding significant programming and newspaper interests. Questions regarding the implications of such a combination, especially in light of the *Media Ownership Proceeding*, are unresolved.

16. For example, in the *Media Ownership Proceeding*, the Commission increased the national television ownership limit from 35% to 45%. As a result, the Commission found that a company can "own TV stations reaching no more than a 45% share of U.S. TV households." By definition, however, DBS "reaches" the entire country. As the two existing nationwide DBS providers increase their capabilities to serve local markets, what meaning does "45 % reach" have in the context of a vertically integrated program provider with local capabilities serving the entire continental United States?

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[13] Information concerning DIRECTV's current and projected offering of local markets can be obtained from DIRECTV's website at <http://www.directv.com/DTVAPP/LocalChannelsAction.do> (visited June 12, 2003).

[14] *See e.g.* FCC Press Release, *Media Ownership Proceeding*, p. 4 (June 2, 2003) (*FCC Press Release*) (addressing the "significant competition now faced by local broadcasters from cable and satellite TV services."); *The 2002 Broadcast Ownership Biennial Regulatory Review*: *Before the Committee on Commerce, Science, and Transportation United States Senate*, 108th Cong. (June 4, 2003) (written statement of Kathleen Q. Abernathy, Commissioner, Federal Communications Commission) (*Abernathy Statement*) (stating that the Commission's decision in the *Media Ownership Proceeding* "tailors our ownership restrictions to the competitive realities of today's media marketplace, which includes not only more broadcast stations than ever before, but also cable operators, direct broadcast satellite providers, and other outlets."); Press Statement Of Commissioner Kevin J. Martin, *Media Ownership Proceeding*, p. 4, dated June 2, 2003 (stating that "over 85% of households receive their video programming via satellite or cable.").

17. Additionally, the Commission has never addressed the issue of a major broadcast licensee holding a DBS license. With advances in spot-beam technology, such a licensee could shift its broadcast transmissions from over-the-air (*i.e.,* via its broadcast licenses), to DBS. By doing so, it could: 1) avoid the 45% national television ownership cap (since it would not be broadcasting over a television station); 2) avoid the Commission's cable must-carry requirements (since they apply only to broadcast transmissions); 3) offer "one-size-fits-all" local programming on a nationwide basis; and 4) bypass any terrestrial affiliates via satellite. The Commission's goals in the *Media Ownership Proceeding* -- localism, competition and diversity -- could be compromised.

2. The Vertical Integration Of Distribution And Program Production.

18. The Commission has stated that its merger analysis is informed by, but not limited to, traditional antitrust principles, noting that while antitrust analysis focuses solely on whether a proposed merger's effect may be substantially to limit competition, the Act requires the Commission to evaluate independently a merger's public interest benefits or harms and the merger's likely effect on future competition.[15] Within this framework, the Commission has analyzed the impact of vertical integration as part of its merger review process, both in terms of competitive impact generally and the public interest aims of the program access rules.[16]

19. The relationship between Fox (and its parent News Corp) and Hughes (and therefore DIRECTV) is a classic example of the vertical combination of a programming content supplier and a distributor of that content that raises concerns about the harms of vertical foreclosure.[17] In

[15] See Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee,* 16 FCC Rcd 6547 (2001) (*AOL/TW MO&O*).

[16] *See. e.g., AOL/TW MO&O,* at ¶¶284 – 312.

[17] The non-horizontal merger guidelines of the Department of Justice (DOJ) focus on a search for horizontal effects from non-horizontal mergers. *See* United States Department of Justice Antitrust Division and Federal Trade Commission, (continued . . .)

the context of the *EchoStar Merger*, the Commission recognized that serious harms can result from vertical integration. The potential costs to consumers comes from the fact that large MVPDs receive programming discounts, and those discounts may discourage or preclude competitive entry and result in higher prices or reduced service quality.[18] That concern is particularly acute in rural America, where programming choices are more limited.

20. The potential negative impact to rural Americans as a result of the Merger's vertical integration of distribution and program production -- including the impact on viewpoint and program diversity, consumer choice and local programming -- should be considered by the Commission in evaluating the Application at hearing.

a. Viewpoint Diversity.

21. The national policy of promoting the public's access to a diversity of viewpoints from a multiplicity of sources finds expression in statutory law as well as in previous decisions of the Commission.[19] The Commission believes that the public will be exposed to a wide variety of

Non-Horizontal Merger Guidelines (1984) (available at <http://www.justice.gov/atr/public/guidelines/2614.htm> (*Non-Horizontal Merger Guidelines*).

Issues that require special scrutiny under the DOJ and FTC guidelines include:

1) Is one of the parties to the merger a potential entrant into a market in which the other is a significant competitor?
(2) Are barriers to entry increased by the merger? In particular, will this create a need for new entrants to enter at both levels of the affected market simultaneously?
(3) Will the vertical integration facilitate collusion in one of the affected markets?
(4) Does the vertical integration eliminate a disruptive buyer?
(5) Will the vertical integration allow one of the parties to evade price regulation?

See Non-Horizontal Merger Guidelines.

[18] *HDO*, ¶255.

[19] *See, e.g.*, 47 U.S.C. § 257(b) (noting that one of the "policies and purposes" of the Communications Act is to "favor[ ] diversity of media voices"); *id*. § 521 (codifying findings and policy underlying Cable Television Consumer Protection and Competition Act of 1992) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."); Memorandum Opinion And Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from; MediaOne Group, Inc., Transferor, To AT&T Corp. Transferee*, 15 FCC Rcd 9816, ¶¶ 3-5 (released June 6, 2000) (*AT&T MediaOne*) (considering proposed merger's effects on "diversity and competition" in video programming and its effects on "openness and diversity of broadband Internet content").

viewpoints if ownership of media outlets is diffused among more, rather than fewer, firms -- a rationale that has been sustained in court.[20]

22. It is unclear how the proposed Merger could impact viewpoint diversity. The Application is silent on the issue.[21] Although the merger of a DBS licensee with a broadcast licensee and programmer has never before been considered by the Commission, some guidance can be found in the *EchoStar Merger*.

23. For many years, the Commission had declined to count DBS as a "voice" for purposes of its TV-Radio rule.[22] In the *EchoStar Merger*, however, the Commission concluded that because DBS now carries local broadcast signals -- including local news and public affairs programming -- it should in fact be considered a voice for purposes of viewpoint diversity.[23] The Commission concluded that because DBS operators contribute to viewpoint diversity, "the loss of one such provider would diminish the diversity available to American consumers."[24]

24. If DIRECTV and Fox merge, consumers will lose one of the voices contributing to viewpoint diversity in all markets where DIRECTV provides DBS service and Fox provides over-the-air broadcast service. Although the Commission's revised Media Ownership Rules acknowledge "the significant competition now faced by local broadcasters from cable and

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[20] *See, e.g., F.C.C. v. N.C.C.B.*, 436 U.S. 775 (1978) (upholding the FCC's prohibition on the common ownership of broadcast stations and daily newspapers in the same market).

[21] The only issue regarding diversity addressed by the Applicants relates to employment and program diversity.

[22] The Commission's ownership limit varied depending on the number of media "voices" in a particular market. The Commission determined that television stations, radio stations, daily newspapers, and the incumbent cable operator in the market would each count as one voice for purposes of its TV-Radio Ownership rule. *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903, 12953 (1999).

[23] *HDO*, ¶¶49-52.

[24] *HDO*, ¶50.

satellite TV services,"[25] the Merger could potentially eliminate this competition by replicating the Fox voice via satellite.

25. The effect of the Merger on viewpoint diversity is of greatest concern in smaller markets, with fewer disparate voices.[26] NRTC demonstrated in the *Echostar Merger* that there are numerous local markets in rural America which contain contiguous census blocks that are not passed by cable and where consumers rely solely on satellite services for the delivery of MVPD services. NRTC retained the services of Dr. Paul W. MacAvoy who concluded that the local market is different for each consumer. He identified 14 large regions of the country representing nearly 20 million homes, where DIRECTV and EchoStar are the only choice for MVPD services.[27] It is in these areas in particular that DIRECTV, if owned by News Corp, could leverage its market power to disadvantage the public.

26. The Commission concluded in the *EchoStar Merger* that the number of homes with (and, conversely, without) access to cable was a question of fact to be determined at hearing.[28] The Commission stated that it was

> "not clear what data should be used to develop an estimate of "total homes" [passed by cable]. Depending on the data set used to estimate total homes, the number of homes not passed by cable may vary from the 4% claimed by the Applicants to 21.28%.[29] Thus, the issue of the number of households not passed by cable will have to be determined at hearing."[30]

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[25] *FCC Press Release*, p. 4.

[26] The issue becomes all the more compelling since DIRECTV is free to determine which markets receive local service and which do not.

[27] *See* **Exhibit B** (Maps Reflecting Regional Clusters Not Served By Cable).

[28] *HDO*, ¶289.

[29] As NAB and NRTC pointed out in the *EchoStar Merger*, there are three different measures that could be used in developing an estimate of the total number of U.S. homes: (1) housing units (as defined by the Census); (2) occupied housing units (or households) (again as defined by the Census); and (3) television households (as defined by the A.C. Nielsen Company). Unfortunately, these three measures yield widely different estimates for the number of homes that do not have access to cable. The differences in resulting estimates can be seen as follows. Warren Communications News' TELEVISION AND CABLE FACTBOOK reports that, as of year-end 2001, cable systems passed (continued . . .)

27. The correct number of homes passed by cable is necessary for the Commission to determine as a factual matter the impact of the proposed Merger on viewpoint diversity. The Commission's "Diversity Index," which was established in the *Media Ownership Proceeding* to "measure the availability of key media outlets in markets of various sizes," is not useful without an accurate count of the number of homes passed by cable.[31]

28. News Corp will have significant power even in cabled areas of the country. It could leverage control over distribution to reduce or eliminate programming competition, thereby driving up prices for its content, potentially tying cable carriage of Fox broadcast stations to carriage of other Fox programming services. In instances where Fox has unique control over content, such as sports events or teams for which it may have exclusive contracts, it could choose to increase prices just enough to raise the costs for other MVPDs to compete with DIRECTV but not drop Fox programming, resulting in higher prices for consumers and reduced MVPD competition. If, for example, a cable system refused to pay the increased price, then News Corp

approximately 90,772,025 homes. According to Census 2000 data, there were approximately 115,904,641 *housing units* in the United States in the year 2000, and approximately 105,480,101 *occupied housing units*, or households, *see* U.S. CENSUS BUREAU, U.S. SUMMARY 2000 2 (July 2002). When measured against the Warren data on homes passed, the Commission found that approximately 24,668,135 *housing units*, or 21.28%, are not passed by cable, and approximately 13,789,834 *occupied housing units*, or 13.07%, are not passed by cable. Finally, A.C. Nielsen Company reported that there were approximately 102,184,810 *television households* as of year-end 2001. Compared to cable homes passed, approximately 10,075,153 television households, or 9.86%, are not passed by cable. Thus, by these measures, the number of homes not passed by cable could vary from 9.86% to 21.28% depending on the data used in the comparison.

[30] *HDO*, ¶124. During the *EchoStar Merger*, NRTC's Economic Expert, Dr. Paul W. MacAvoy identified 14 large regions of the country containing contiguous Census Blocks that were not passed by cable. In these large, primarily rural "clusters," DBS does not compete with cable and is not interchangeable with any other MVPD service. *See* **Exhibit B**.

[31] *FCC Press Release*, p. 7. During the *Media Ownership Proceeding*, the Commission was particularly concerned that "[i]n the tier of smallest markets (3 or fewer TV stations), . . . key outlets were sufficiently limited such that *any* cross-ownership among the three leading outlets for local news -- broadcast TV, radio, and newspapers -- would harm viewpoint diversity." *Id*. In medium sized markets (*i.e.*, 4-8 TV stations), the Commission was concerned that certain combinations could in fact threaten viewpoint diversity. *Id*. Despite the stated goal of the proposed Diversity Index in measuring the availability of media resources, the Commission already has recognized that in many of these markets, it is unable to determine the number of homes that are actually passed by cable. *See HDO*, ¶¶117-125.

could threaten the cable operator by using its newly acquired satellite system to capture market share from cable in those communities.

b. Program Diversity and Consumer Choice.

29. As one of only two MVPD distributors in uncabled areas -- and the only one with programming interests -- News Corp could have significant control over content targeted to rural America. Particularly where population is sparse, competing content developers may need access to the DIRECTV platform to reach enough people to make distribution of the programming economically feasible. In these instances, DIRECTV might become an essential facility without which the content developer cannot sustain its efforts.

30. By denying distribution on affordable terms to competitors, News Corp could gain the equivalent of monopoly power over content. Given the extensive media holdings of News Corp and the limited capacity available on satellite platforms, News Corp could be positioned to determine what new programming comes to market in rural America.

31. Similar issues are raised in regard to backhaul facilities. Pursuant to this Merger, News Corp will gain control of PanAmSat. PanAmSat is a leading provider of satellite-based backhaul for video transmission services, high-speed Internet backbone providers and business communications networks. News Corp could manipulate the prices paid by broadcasters, cable programmers and many others who rely on PanAmSat for video distribution backhaul, raising their costs to compete and ultimately, the price consumers are charged for their services.[32]

32. There also is a potential vertical foreclosure issue in connection with News Corp's ownership in Gemstar. News Corp holds a 42.9% interest in Gemstar, a producer of electronic

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[32] News Corp also asserts that the transaction promotes the efficient use of backhaul facilities that are currently duplicated by DIRECTV and Fox. This raises a question about whether the transaction may lessen competition in the marketplace for backhaul feeds.

program guides (EPGs). EPGs are on-screen directories of programming delivered through advanced set-top boxes that take viewers to video programming listed on the screen.[33]

c. Local Programming.

33. According to an analysis of information available on News Corp's website, 39 DMAs (18% of the total) representing more than 4 million TV Households (slightly more than 4%), are not served by either Fox-owned stations or Fox affiliates.[34] The majority of these DMAs are beyond Market 100. News Corp presumably will have less economic incentive to deliver local signals in these markets, since its own broadcast signal will not be retransmitted via satellite along with those of its terrestrial competitors.

34. An additional local broadcasting concern relates to the growing trend of broadcasters to provide local content through so-called "central-casting."[35] A recent article in the Washington Post discussed the efforts of Sinclair Broadcast Group's News Central, whose 40-person production crew working from Baltimore, Maryland, collects and distributes a nightly package of news and sports to stations in Flint, Michigan; Rochester, New York; Raleigh, North Carolina; and Oklahoma City, Oklahoma. Recipient local stations then "mix in a few unique local elements of their own," with the result of "a late-evening newscast that's a hybrid of news from around the corner and news from nowhere in particular."[36]

[33] News Corp points out that in the AT&T/Media One merger, the FCC considered three types of potential harm that could arise from an EPG/MVPD affiliation. *Application*, pp. 65-66. First, subscribers could be steered to affiliated content providers; second, the MVPD could harm unaffiliated EPG providers by selecting its own EPG for use on the system; or third, an MVPD could lock the EPG into an exclusive contract and thereby prevent the EPG from dealing with other MVPDs. News Corp concludes that these harms are not present in this Merger because it does not have market power. It cites the fact that it has less than half the share of the market that AT&T has, and that the FCC acted favorably with respect to the AT&T/Media One merger because AT&T is limited to serving less than 30% of the market by force of FCC rules. There is, however, no such national cap on market share for DIRECTV.

[34] *See* **Exhibit C**. Information obtained from the News Corp website at <http://www.fox.com/links/affiliates.htm> (visited June 12, 2003).

[35] Paul Farhi, *TV's News Central: One Source Fits All*, The Washington Post, A-1 (May 31, 2003) (*News Central*).

[36] *News Central*.

35. News Corp could adopt a similar tactic for DBS distribution of re-purposed Fox broadcasting. The result may be a local broadcast hybrid that is capable of transmitting "local" content from a non-local spot beam satellite. Such a system could be used to bypass Fox affiliates as well as other local broadcasters, thereby effectively limiting other voices in the viewpoint diversity market. [37]

3. The Proposed Benefits Of The Merger.

36. According to the Commission, claimed efficiencies "must be merger specific and therefore, efficiencies that could be achieved through means less harmful to the public interest than the proposed merger cannot be considered true benefits of the merger."[38] The *Merger Guidelines* also make clear that the Applicants are required to demonstrate that the efficiencies it claims are merger specific.[39] As the Commission has held, "efficiencies that are vague, speculative and unverifiable will not be considered in evaluating the competitive effects of the proposed transaction."[40]

37. News Corp states in its Application that it will advance DIRECTV's competitive position by: (1) dramatically increasing the number of DMAs in which local broadcast signals are available to subscribers;[41] (2) increasing the amount of HDTV programming available

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[37] *News Central*. Since a spot-beam delivered Fox signal would enable the insertion of local advertising, News Corp could overcome many of the recent problems cited in its Annual Report -- including lower overall ratings, increased programming costs and the "soft ad market" -- as "seriously hinder[ing]" News Corp's bottom-line results. *2002 News Corp Annual Report*, p. 8.

[38] Memorandum Opinion and Order, *GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, ¶240 (released June 16, 2000).

[39] *See* United States Department of Justice Antitrust Division and Federal Trade Commission, 1992 Horizontal Merger Guidelines, 57 FR 41552, § 4 (1992).

[40] *See* Order, *In the matter of Application of Air Virginia, Inc. (Assignor) and Clear Channel Radio Licensee, Inc. (Assignee) for Consent to the Assignment of the License of WUMX (FM), Charlottesville, VA*, 17 FCC Rcd. 5423, ¶30 (released March 19, 2002).

[41] *Application*, p. 27.

nationwide;[42] and (3) developing a number of options for consumer broadband services.[43] All of these claims are either vague, speculative and unverifiable or are not merger specific. There has been no demonstration that any of these benefits will materialize in rural America.

a. Local Service.

38. News Corp states that it will "dramatically" increase DIRECTV's local-into-local service into as many of the 210 DMAs as possible and doing so as "economically and technologically feasible."[44] The Application contains no specific information, however, explaining how the expansion of local service will be accomplished. The Applicants state only that they have "begun to consider a number of alternative strategies for using satellites, new technologies, new ventures or combination of these approaches."[45] This commitment is inadequate. Given that the new entity will be vertically integrated, it should be required to provide local service to all 210 DMA's on a specific timetable.

39. At a minimum, absent extensive information about how many markets DIRECTV plans to serve -- and when -- it is difficult to evaluate the Applicants' promise of additional local television service. Considering how critical it is for rural America to receive local service in a timely manner, NRTC is particularly interested in determining at hearing what additional local service is technically and economically feasible as a result of the Merger.

b. HDTV.

40. News Corp states that it will investigate new technologies that promise to improve spectrum efficiency or otherwise increase available capacity so that it can expand the amount of

[42] *Id*.
[43] *Id*.
[44] *Application*, pp. 27-31.
[45] *Id*., p. 29.

HDTV content available on DIRECTV.[46] It states it will do so by using higher order modulation schemes and through improvements in compression technology. News Corp also states that it intends to explore these and other technology and business solutions in an effort to drive the transition to digital television.

41. The Applicants are not clear, however, about their specific plans to carry HDTV programs, and they do not address how this benefit is merger specific. In addition, since HDTV and local-into-local both consume high amounts of bandwidth, the Applicants do not state how they intend to accomplish both at the same time.

42. The Commission currently is evaluating an enforcement action against DIRECTV regarding its provision of service (or lack thereof) to the State of Hawaii.[47] In the context of that proceeding, DIRECTV has filed a Request for Special Temporary Authority (STA), dated June 11, 2003, to move its DIRECTV 6 DBS satellite from 119° WL to 110° WL and its DIRECTV 1 satellite from 110° WL to 101° WL.[48] DIRECTV states in its STA Request that it "currently uses its capacity at 110° WL to provide high-definition television (HDTV) programming channels to its DBS subscribers,"[49] and that "[o]nce DIRECTV 6 is positioned at 110° WL, the programming carried on DIRECTV 1 can be transferred to DIRECTV 6…"[50]

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[46] *Id*., p. 30.

[47] Petition for Administrative Sanctions of the State of Hawaii, MB Docket No. 03-82, February 6, 2003.

[48] DIRECTV states that "the primary purpose of the requested STA is to enhance promptly DIRECTV's DBS service to Hawaii." STA, p.1. In fact, the primary purpose of the proposed relocation is to advance DIRECTV's litigation agenda against NRTC. If DIRECTV were actually interested in "promptly" enhancing DBS service to Hawaii -- a proposition it has fought tooth and nail for almost four years -- it could easily do so by using DIRECTV 1-R at 101° WL without the delay and uncertainty involved in launching a new satellite (DIRECTV 7-S) and relocating two others. But it refuses to do so due for fear of jeopardizing its litigation position against NRTC.

[49] STA, p.1.

[50] *Id*.

43. DIRECTV recently stated in a financing document, however, that DIRECTV 6 has operational problems that make it "uninsurable."[51] The proposed relocation of DIRECTV 6 to 110 ° WL for purposes of providing HDTV raises numerous questions. Why is DIRECTV 6, an uninsurable satellite with known operational problems, slated for use by DIRECTV as a primary source to provide HDTV from 110° WL? What effect will the operational problems of DIRECTV 6 have upon DIRECTV's future provision of HDTV? Why would DIRECTV use a satellite with known operational problems to provide HDTV service, when consumers may be purchasing expensive HDTV equipment in reliance on that satellite for the delivery of service? And most importantly, does News Corp intend to take the same approach as DIRECTV in regard to the use of DIRECTV 6 for the provision of HDTV?

c. Broadband.

44. News Corp says it will "work aggressively to ensure that broadband services are available to as many American consumers as possible."[52] It offers among the possibilities, partnering with other satellite providers, DSL, new potential broadband providers using WiFi, power lines or other emerging technologies. These statements lack a firm commitment, however, as to how and when broadband will be implemented.

45. Moreover, there is no discussion regarding the availability of broadband services in rural America -- a region of the country starved for high speed Internet access. News Corp should be required to indicate its intentions with regard to existing Hughes broadband satellite services such as DirecWay and SPACEWAY. Will News Corp follow through with these services and provide new broadband services for rural America? Or will spectrum capacity now

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[51] *DIRECTV Holdings LLC, DIRECTV Financing Co, Inc., Offering Memorandum*, pp., 12, 52, 55 (February 25, 2003).

[52] *Application*, p. 31.

reserved for these services be converted to some other purposes? News Corp should be required to provide stand-by promises as to what it will do with precious satellite resources it will control for use in delivering broadband services to rural America.

B. The Applicants' Proposed Conditions Are Inadequate.

46. News Corp proposes a number of conditions to mitigate any adverse effects resulting from vertical integration, including compliance with Program Access rules and use of an Audit Committee.[53] NRTC is concerned that these conditions are inadequate.

47. First, the commitment to Program Access would end with the sunset of similar rules to which vertically integrated cable companies are subject -- even though the merged entity may have broader reach, more market power in certain areas and stronger programming arms than cable.[54]

48. According to the Commission's Ninth Cable Competition Report (*Ninth Report*), DIRECTV is the nation's third largest purchaser of video programming.[55] News Corp's programming interests are significant. Despite the creation of such a powerful media combination, the Applicants have stated that they will agree to adhere to their Program Access commitments only for as long as the Commission's rules are in place (unless the DOJ, FTC or FCC specify a longer term in a consent decree or other order). The Program Access rules are scheduled to expire on October 5, 2007, or within three years of the Applicants' scheduled closing on their transaction.[56]

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[53] *Application*, pp. 13-14, 59, 46-62.

[54] *Application* at Attachment G.

[55] *See* Ninth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd. 26901, Table B-3, p. 78 (released December 31, 2002).

[56] *See News Corp, Hughes File at SEC*, SkyReport, June 6, 2003, viewed at <www.skyreport.com/viewskyreport.cfm?ReleaseID=1138#Story3> (visited June 12, 2003). *See also* Report And Order, *Implementation of the Cable Television Consumer Protection And Competition Act of 1992 Development of*
(continued . . .)

49. In light of News Corp's programming interests and DIRECTV's power over content through its control of the DBS delivery platform, the Applicants' commitments to Program Access are far too tentative. News Corp should be obligated to make its programming available for as long as it controls both critical programming and one of only two nationwide distribution platforms.

50. Even if the Program Access rules were applicable to the new merged entity, however, they were not designed in the context of a nationwide distributor combined with a programmer. The merged entity would be in a position to abuse those rules.

51. For example, the Program Access rules require entities to provide access to programming on a "non-discriminatory" basis.[57] By inflating charges for any programming which it owns and controls -- albeit on a non-discriminatory basis -- News Corp could effectively "discriminate equally" and undermine MVPD competitors. Similarly, News Corp could extract programming and price concessions by refusing to carry non-affiliated programmers on its DBS platform unless its demands were met.

52. Similarly, the Applicants' pledge to have an independent Audit Committee review related party transactions is limited. The Audit Committee will tend to assure fairness only in transactions between News Corp and Hughes. It offers no oversight of potential harm to others.

53. Last, it is unclear what enforcement mechanisms would be put in place for the FCC to monitor compliance with the proposed conditions. Nor is it by any means certain that the proposed conditions will be effective.

Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, 17 FCC Rcd 12124, ¶80 (released June 28, 2002).

[57] 47 C.F.R. §76.1002.

IV. CONCLUSION.

The proposed Merger raises substantial and material questions of fact regarding the impact of a combination of News Corp and DIRECTV on millions of rural Americans who rely on satellite technology to receive MVPD and broadband services.

The Commission needs to determine what effect the Merger will have on viewpoint and program diversity, consumer choice and the availability and price of programming, particularly local programming, in rural America. The Commission also needs to scrutinize the claimed benefits of the Merger to ensure that they will materialize in rural America. Last, the Commission needs to evaluate whether the Applicants' proposed conditions are adequate to protect the interests of rural Americans.

None of these substantial and material factual questions regarding the impact of the Merger on rural Americans has been answered by the Application. Since these issues of fact remain unresolved, the Commission is obliged under applicable legal standards to designate the matter for resolution at hearing.

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June 16, 2003

Certificate of Service

I HEREBY CERTIFY that on this 16th day of June, 2003, a true and correct copy of the foregoing Petition of the National Rural Telecommunications Cooperative to Designate Application for Hearing (MB Docket No. 03-124), was submitted electronically to the Federal Communications Commission and served via First Class Mail, except as noted, upon the following:

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