Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Application of GENERAL MOTORS CORPORATION and HUGHES ELECTRONIC CORPORATION, *Transferors,* and THE NEWS CORPORATION LIMITED, *Transferee,* For Authority to Transfer Control.	MB Docket No. 03-124

COMMENTS OF CABLEVISION SYSTEMS CORP.

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The combination of News Corp.'s content assets, including its television broadcast affiliates, with DirecTV's national distribution platform will create a media giant of unprecedented power. Merging local broadcast stations, must-have content incubated under a government-issued license, and a near-universally available alternative MVPD distribution outlet threatens to undermine competition in the marketplace for content and distribution. Specifically and most damaging, local Fox broadcasting stations, armed with guaranteed distribution through DirecTV, will gain leverage in retransmission consent negotiations that enables them to harm competition by imposing significant costs on competitors and their subscribers and potentially deprive the public of its right to receive local broadcast signals.

Vertical integration of content and distribution is not *per se* a threat to competition. But a merger of these specific assets -- multiple content services and specifically local broadcast stations with the nation's largest DBS distribution network -- so threatens competition and consumers that it demands safeguards be imposed to ensure consistency with the "public interest, convenience, and necessity." The Commission should impose conditions on the merger that will restrain this anticompetitive outcome by:

- requiring News Corp. to waive its right to elect retransmission consent for Fox broadcasting stations;
- imposing meaningful program access commitments on News Corp. that prevent it from entering into "sweetheart deals" with DirecTV and using the result as an inflated benchmark price for the industry; and
- ensuring that DirecTV does not use the merger to gain an advantage over other DBS competitors in offering local-into-local service.

<u>INTRODUCTION AND SUMMARY</u>

The News Corp.-DirecTV merger will combine News Corp.'s significant programming interests, including the highly rated Fox broadcast network, and the nation's most successful DBS operator. This strategic combination will enable local Fox broadcasters to dictate unilaterally the terms of their carriage by cable operators and other multichannel video program distributors ("MVPDs"), to the detriment of multichannel video competition. The only means of protecting against this harm and eliminating the potential for broadcasters to impose anticompetitive costs for carriage is to require Fox broadcasters to waive their rights to elect retransmission consent on MVPD platforms. Must-carry would be available to ensure carriage of their analog broadcast signals.

The Commission has long held that the Communications Act requires an evaluation of a proposed transaction under the broad public interest standard. Under this standard, the Commission regularly has imposed conditions in addition to generally applicable rules in order to ensure that the transaction does not substantially frustrate or impair the "broad aims of the Communications Act." The imposition of the conditions proposed herein are necessary to meet the Commission's standard that it neither "impede competition" nor "undermine the quality of existing services or the provision of new or additional services to consumers."

Fox broadcasters already have significant leverage when negotiating with cable operators over retransmission because both know that MVPD subscribers demand access to Fox's successful broadcast network programming. They have used the network's popularity to tie carriage of their signal to carriage of affiliated cable networks. Up until now, however, their demands have been somewhat tempered by the need to reach the audience that only comes with widescale MVPD distribution via agreements with cable or DBS operators.

The merger fundamentally disrupts the intended balance of retransmission consent negotiations by guaranteeing a carriage outlet for News Corp.'s local broadcast stations. If cable operators will not agree to carry Fox cable programming services or agree to use Gemstar's electronic program guide ("EPG") as a condition of getting access to Fox broadcasting, News Corp. will still have guaranteed access to the MVPD platform that has been growing the fastest for nearly ten years. With its vast array of other content, including Twentieth Century Fox Studios (movie production), Twentieth Century Fox Television (television program producer), Harper Collins (book publishing), and the *New York Post*, News Corp. can also shift other content to its DirecTV platform if necessary to bring viewers along with it.

News Corp. built the audience for Fox programming by using government-granted broadcast licenses and government-mandated cable carriage rights. Now the Fox network is widely understood to have "must have" programming, commanding far more viewers than even the most successful cable programming services. Fox should not be permitted to use DirecTV to leverage this public resource into higher cable rates or diminished subscriber choice on cable.

Significantly, the enhanced retransmission consent leverage conferred by this merger also presents serious danger to the growth of DBS competition. Rainbow DBS is poised to begin service later this year as the third national DBS operator, but it has significantly less spectrum than DirecTV to put to the use of local broadcast service. With its limited spectrum, Rainbow DBS would not be able to agree to Fox Broadcasting's demands for carriage of numerous other Fox services as the "price" for Fox television. And News Corp. would suffer almost no harm from refusing to grant retransmission consent to Rainbow DBS because Rainbow DBS will have virtually no subscriber base. DirecTV will have the further advantage of easy access to retransmission consent both from Fox and other broadcasters that depend on News Corp.'s television production studio for their programming, creating a competitive imbalance that would be exacerbated if DirecTV and EchoStar enter into an agreement to share the high costs of local-into-local service but don't include Rainbow DBS in their plans.

News Corp.'s proffered "program access" commitments do not apply to its broadcast programming and so do nothing to prevent Fox stations from abdicating their responsibility to the public and using their government privilege to extract more and more compensation at the expense of the public's right to access local broadcasters at reasonable rates. Even with respect to the programming to which these commitments apply, nothing prevents News Corp. from charging excessive rates to DirecTV and using that price as the standard for the nondiscriminatory price it offers competing MVPDs.

The Commission has the responsibility and the authority to ensure that mergers within its purview are pro-competitive. In this case, the unique competitive concerns raised by News

Corp.'s acquisition of DirecTV can be addressed by requiring the Fox broadcast television stations to waive their retransmission consent rights and allowing them to exercise their must-carry right for their analog signals; closing the loopholes in News Corp.'s proffered program access conditions; and requiring the merged entity to share the advantageous local-into-local arrangements that will be available only to DirecTV through its association with the Fox broadcast network as well as any efficiencies it gains through collaboration with EchoStar.

I. THE APPLICANTS HAVE NOT PROVIDED SUFFICIENT INFORMATION TO ALLOW A DETERMINATION OF WHETHER THEY HAVE MET THEIR BURDEN OF PROOF

A. Standard of Review.

Under section 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the proposed transfer of control will serve the public interest, convenience and necessity.[1/] The Commission must balance the potential public interest harms of the proposed transactions against any demonstrated unique potential public interest benefits created directly by the transaction.[2/] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest[3/] -- in this case, by demonstrating that affirmatively that the merger does not increase

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1/ 47 U.S.C. §§ 214(a), 310(d).

2/ Alleged public interest benefits will be considered by the Commission only if they are "likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects." *See, e.g., Application of EchoStar Communications Corporation, et al.*, Hearing Designation Order, 17 FCC Rcd 20559, 20630 ¶ 25 (2002) ("*EchoStar-DirecTV Order*"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd 6547, 6666 ¶ 282 (2001) ("*AOL-Time Warner Order*").

3/ *See, e.g., EchoStar-DirecTV Order,* 17 FCC Rcd at 20574 ¶ 25; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3168-70 ¶¶ 13-15 (1999) ("*AT&T-TCI Order*"); *Application of GTE Corporation and Bell Atlantic Corporation*, 15 FCC Rcd 14032, 14046 ¶ 22 (2000) ("*GTE-Bell Atlantic Order*"); *AOL-Time Warner Order,* 16 FCC Rcd at 6554 ¶ 19; *Application of WorldCom, Inc. and MCI Communications Corporation,* 13 FCC Rcd 18025, 18031-32 ¶ 10 (1998) ("*MCI-WorldCom Order*").

their ability and incentive to exploit their post-merger status by impairing competition and consumer welfare. If the "applicants cannot carry this burden, the application must be denied."[4/] Furthermore, Applicants "cannot carry their burden if their efficiency claims are vague or speculative, and cannot be verified by reasonable means."[5/] As demonstrated below, Applicants here have not satisfied this burden.

B. The Application Fails To Provide the Data Necessary To Allow An Evaluation of the Public Interest.

There are serious questions as to whether a merger between one of the globe's most powerful programmers, whose power is based in part on the vast broadcast distribution network it already controls, and a satellite distribution platform with national reach and millions of subscribers, can meet the Commission's public interest standard. News Corp./DirecTV admit that a "vertical relationship could lead to anti-competitive results in the distribution market if a programmer discriminated against or refused to sell to unaffiliated MVPDs in order to gain a competitive advantage for its affiliated MVPD," but their assertion that the proposed transaction will not lead to discrimination against rival MVPDs is unsupported.[6/]

As the Commission has recognized, a vertically integrated content provider may have an incentive to contract exclusively with its affiliated MVPD for the distribution of its program networks for which good substitutes are not available.[7/] Broadcasters affiliated with an MVPD

4/ *Applications of NYNEX Corp. and Bell Atlantic Corp.*, 12 FCC Rcd 19985, 19987 (1997) ("*Bell Atlantic-NYNEX Order*").

5/ *Id.* at 20064.

6/ Consolidated Application for Authority to Transfer Control of General Motors Corp., Hughes Electronics Corp. and The News Corp., Ltd., filed May 2, 2003 ("Application") at 54-62.

7/ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition*, *Report and Order*, 17 FCC Rcd 12124, 12140 ¶¶ 35-36 (2002) ("*Program Access Order*").

similarly may have an incentive to withhold retransmission consent from competing MVPDs. Whether or not such behavior makes economic sense depends on how the short-term loss the programmer or broadcaster suffers from the loss of viewers compares to the benefit to the company as a whole from the increased subscription to its distribution service (*i.e.*, how many customers will switch MVPDs to obtain the programming).[8/]

In order to meet their public interest burden, the Applicants must demonstrate that the newly combined entity will not have the ability and incentive to favor its video distribution platform over its MVPD competitors.[9/] Such a demonstration requires that they produce the documentation -- uniquely in their hands -- that establishes that withholding News Corp.'s broadcasting signal and programming from competing MVPDs would not make economic sense.

In Cablevision's markets, such evidence would include, for example, data relating to the number of DirecTV subscribers, the compensation DirecTV pays and will pay to News Corp. for its programming, projections regarding the likely audience size and demographics of the current and new programming that will be controlled by the new entity (to determine its "must have" nature), the anticipated profit margins of the programming and distribution units, the value and profit News Corp. derives from selling advertising in broadcast programming shown on Cablevision cable systems, and projections generally as to the demand of subscribers (and potential subscribers) of DBS services, including specifically the price elasticity of demand.[10/] To the extent that DirecTV claims that it prices or plans to price on a national basis, a complete economic analysis would require out-of-Cablevision-market data on DirecTV revenues from

[8/] *See id.* at 12140 ¶¶ 35-39.

[9/] *Id.* at 12130 ¶¶ 15-16.

[10/] *See*, *e.g.*, *id.* at 12140-42 ¶¶ 36-39; *see also* Letter and Request for Information to Pantelis Michalopoulos, Esq., Counsel to EchoStar Communications Corporation and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation from W. Kenneth Ferree, Chief, Cable Services Bureau dated February 4, 2002.

subscriber fees and advertising. None of this information is provided in the Application. The Commission should not approve the Application without first having the chance to evaluate it.

II. THE MERGED ENTITY'S UNIQUE COMBINATION OF SPECTRUM AND PROGRAMMING ASSETS WOULD ENABLE IT TO ACT ANTICOMPETITIVELY BY WITHHOLDING FOX BROADCAST PROGRAMMING OR CHARGING COMPETITORS SUPRACOMPETITIVE PRICES FOR IT

News Corp./DirecTV's blithe assertions that "the proposed transaction raises no vertical concerns with respect to News Corp.-controlled broadcast programming" and creates "no prospect that [the merger] could create and enhance market power in the relevant distribution . . . market" are patently false.[11/] A News Corp.-DirecTV merger would give News Corp. significantly more leverage in retransmission consent negotiations that are already unfairly weighted in favor of broadcasters. Through its acquisition of an alternative, national distribution platform, News Corp.'s ability to withhold its programming from competing MVPDs and to distribute it instead on DirecTV -- or the markedly increased *credibility* of such a threat -- fundamentally changes the position of Fox broadcast stations in retransmission consent negotiations. This additional leverage would enable News Corp. to exact higher compensation from cable operators in the form of cash payments for Fox's broadcast services or the compelled carriage of Fox cable networks. The real losers in either case will be cable subscribers, who will end up paying cable rates that include the cost of services they do not want. Consumer welfare would be diminished further to the extent that a cable operator must forego or displace preferred programming to make room for the Fox services.

A. The Merger Would Distort Congress's Goal of Equalizing Negotiating Power Between Broadcasters and MVPDs.

Congress intended the retransmission consent provisions to create a competitive balance

[11/] Application at 48, 46.

between the cable and broadcast industries "now that cable competes with broadcasters for programming, audience, and advertising."[12/] The leverage enjoyed by broadcasters in retransmission consent negotiations already exceeds Congress's purpose and vision when it enacted retransmission consent. The merger will make a bad situation far worse.

Retransmission consent was part of a statutory scheme to ensure the economic viability and universal distribution of local broadcast stations on public airwaves. The retransmission consent provisions give the owners of broadcasting networks the ability to use a tremendously valuable government resource -- free broadcast spectrum -- as a lever to demand carriage of increasing numbers of cable program channels or other valuable consideration as a condition of access to the broadcast stations -- all at the expense of the consumers that were the purported beneficiaries of this scheme. Congress contemplated that given the benefits broadcasters already derive from carriage on cable systems, they might consider such benefits sufficient without additional payment, or might seek to negotiate other minimal demands such as joint marketing or the right to program an additional channel on the cable system.[13/] In reality, the demands that have emerged as commonplace in the retransmission consent marketplace -- such as monetary compensation *and* the right to program multiple channels *and* payments for the services on those channels[14/] -- have exceeded Congress' vision.

The exercise of retransmission consent by broadcasters already results in substantial leverage against MVPDs and their customers because of the unique ability of broadcasters to

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12/ Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (Sept. 14, 1992) at 58. *See also In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 7 FCC Rcd 8055, 8056 ¶ 4 (1992).

13/ S. Rep. No. 102-92, 102d Cong., 1st Sess. (June 28, 1991) at 35-36.

14/ *See, e.g., In the Matter of EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070, 15078 ¶¶ 15-19 (2001) ("*Young Broadcasting*") (retransmission consent dispute in which the broadcaster demanded carriage of multiple affiliated broadcasters and payments for those broadcasters as a price of its retransmission consent).

nurture and exploit programming under the government protected rubric that combines wide broadcast distribution and unparalleled must-carry and retransmission consent rights. As a result, broadcast stations continue to dominate the viewing patterns of American television viewers. In the final week of this last television season, for example, the top four broadcast networks, led by Fox, were watched in 26.9 percent of the nation's television households (rating) and enjoyed a 47 share of the percentage of in-use televisions.[15/] When the other three national broadcast networks are figured in, those numbers climb to a 32.3 rating and a 56 share.[16/] During that same week, only one cable network, TNT, managed a rating above 1.9, and it was televising the NBA playoffs during that time.[17/] Advertisers understand the continuing dominance of the broadcast networks, paying a record $13.1 billion in the upfront advertising market for the 2003-2004 broadcast season[18/] -- a total that more than doubles the upfront market for all cable networks combined.[19/] This persistent popularity among viewers enables broadcasters affiliated with the major networks to dictate the terms of their carriage and remain reasonably assured that the public will side with them in any retransmission consent dispute.[20/]

15/ David Bauder, *American Idol Gives Fox Ratings Win*, AP ONLINE (May 28, 2003), *available at* 2003 WL 56083610. Fox won the final week with a 7.2 rating and a 12 share.

16/ *Id.*

17/ *Basic Cable Rankings*, CABLEFAX DAILY (May 30, 2003) at 4.

18/ Steve McClellan, *Broadcast Net Hit the Jackpot*, BROADCASTING & CABLE (June, 2, 2003) at 24.

19/ Steve McClellan, *Cable Upfront Warms Up Slowly but Surely*, BROADCASTING & CABLE (June, 2, 2003) at 10. For the 2003-2004 season the cable upfront market stands at $5.7 billion. *Id.*

20/ This reality was dramatically demonstrated in May 2000 when Time Warner failed to reach a retransmission consent agreement with ABC. Time Warner was reluctant to add new Disney cable channels and convert the Disney Channel from a premium to a basic service in return for continued carriage of ABC-owned stations, and pulled the ABC signal from its cable systems in 11 markets, including New York City, Los Angeles, Philadelphia, Houston, Raleigh-Durham, Toledo, and Fresno. This prompted an "angry backlash" by viewers, newspaper editorialists, regulators and lawmakers. *Mass Media*, COMM. DAILY (May 19, 2000); *see also* Lisa Brownlee, *Backlash Hits Time Warner*, NEW YORK POST (May 17, 2000) at 43 ("Time Warner's disruptive brawl with ABC has become a public-relations nightmare for the cable operator."). Mayor Guiliani called for a Justice Department investigation and the Senate Commerce Committee vowed to hold hearings. *See* K.C. Neel, *Hot Crises Haunt Cable*, CABLE

Given the substantial market power behind broadcast stations, Cablevision and other similarly situated MVPDs already have little leeway in retransmission consent negotiations with Fox, since as a practical business matter, it is necessary to provide subscribers with the signals of the broadcast affiliates that routinely elect retransmission consent. Any cable operator that rebuffs the demands of a network affiliate risks the wrath of both the public and policy-makers -- even though the retransmission consent process is supposed to be a negotiation, in which each side is free to walk away from unreasonable demands. In recent years, the power imbalance has been exacerbated by the increased concentration in media ownership, which has led to more and more broadcasters being affiliated with and controlled by the top four broadcast networks. Network leverage will likely be further enhanced by the Commission's newly announced ownership rules, which would allow News Corp. to control even more broadcasters, particularly in large markets like New York.[21/]

B. The Merger Would Effectively Grant News Corp. The Power to Act Not Just Aggressively, But Anticompetitively, In Retransmission Consent Negotiations.

1. The merger presents a significant risk of anticompetitive harm to consumers in Cablevision's service areas.

Vertically and horizontally, a merger between News Corp. and DirecTV represents a fundamental shift in the balance of power between Cablevision and the Fox broadcasters, posing

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WORLD (May 8, 2000) at 1. Senator Schumer called for Senate Judiciary Committee hearings into the disruption of service. *See* Harry Berkowitz, *Rare View of Changing Cable World*, NEWSDAY (May 4, 2000) at A61. Representative Gene Green of Houston sought House hearings as well. *See* Mike McDaniel, *No Regis, No Marvin, Blacked Out*, HOUS. CHRON. (May 2, 2000) at A1.

[21/] News Release, Federal Communications Commission, "FCC Sets Limits on Media Concentration" (June 2, 2003).

a significant threat of harm to competition in Cablevision's service areas.[22/] Vertically, the unique combination of the Fox broadcast network and DirecTV will enable News Corp. to demand even higher compensation for its broadcast station from Cablevision due to Fox's ability to make a substantial and credible threat to walk away from negotiations and air its broadcast programming only on DirecTV. This ability, available as a practical matter only to the merged entity, will shift retransmission consent negotiations in favor of Fox and against unaffiliated MVPDs and their customers. Horizontally, the merger will give News Corp. a new outlet for its entertainment and sports content in addition to the broadcast station outlets it already controls, providing it with greater opportunities to leverage the full power of its broad range of media assets. In both instances, the result is that News Corp. will be able to extract higher compensation from Cablevision in retransmission consent negotiations, to the clear detriment of competition and consumers.

a. Vertical integration with DirecTV will allow News Corp. to engage in strategic anticompetitive leveraging in retransmission consent negotiations with Cablevision.

Approval of the merger would swing the balance of power in retransmission consent negotiations even more towards Fox broadcasters by handing News Corp. an automatic alternative distribution platform for the Fox television stations if cable operators will not agree to exorbitant retransmission consent demands. In Cablevision's service areas, News Corp. will have both the incentive and the ability to make a credible threat to withhold retransmission consent for Fox stations from cable operators, forcing Cablevision to enter into retransmission consent agreements on Fox's terms -- whether they be monetary compensation, carriage of one

[22/] The Commission has found that the relevant geographic market for MVPD service is local -- *i.e.*, the franchise area of the local cable operator, because consumers make decisions based on the MVPD choices available to them at their homes. *See EchoStar-DirecTV Order* at 20610 ¶ 119.

or more affiliated cable networks like the National Geographic Channel or the Speed Channel, the right to sell advertising on Cablevision systems or programming services, or any combination of these demands. Indeed, industry analysts are already predicting that cable operators will have no choice but to carry Fox's new "extreme sports and lifestyle" network.[23/] Any of these tactics, exercised with substantial clout by the newly integrated News Corp./DirecTV, will further increase the financial pressures on cable operators and exhaust their customers' ability and willingness to pay more for programming.

There can be little doubt that Fox has successfully exploited government protections for broadcast television to nurture a stable of "must have" programming assets. In the new News Corp./DirecTV world, Cablevision will be forced to comply with News Corp. demands or risk losing Fox network programming to its competitor DirecTV -- a risk it cannot take because Fox consistently produces programming that commands a wide audience unequaled by even the most popular cable programming service. Fox's prime-time programming features such popular and long-running series as *The Simpsons*, *King of the Hill*, *That 70's Show*, *Malcolm in the Middle*, *Boston Public*, *24*, *Bernie Mac*, and *Grounded for Life*.[24/] The season finales of Fox's reality shows *Joe Millionaire* and *American Idol* were the two most popular entertainment programs for the entire year, drawing 40 million and 38.1 million viewers respectively.[25/] For the entire season, *Joe Millionaire* and *American Idol* were the second, third, and fifth most popular

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23/ "Extreme Fox: Launch of New X lifestyle channel coming," *Electronic Media* (Dec. 2, 2002) ("It may be months before the new channel gets on the air, but it most likely will have the widespread carriage it needs to succeed, since Fox can drive a hard bargain.").

24/ FOX ENTERTAINMENT GROUP, INC., 2002 ANNUAL REPORT 11 (2002) ("Fox 2002 Annual Report").

25/ David Bauder, *American Idol Gives Fox Ratings Win*, AP ONLINE (May 28, 2003) *available at* 2003 WL 56083610.

programs.[26/] Fox also holds programming rights to live coverage of the National Football Conference of the National Football League, Major League Baseball and the Winston Cup and Busch Series of NASCAR.[27/] Fox has deliberately and successfully created a brand identity that appeals to 18 to 49 year-old adults, the group that advertisers seek to reach most often.[28/]

The "must have" status of the Fox broadcast programming is a direct result of its exploitation of the government rules intended to enhance the viability and *reach* of broadcast stations. Fox built its tremendous following through a combination of government-granted broadcast licenses and government-mandated cable carriage rights. While new cable programmers must build their audiences slowly and fight hard for carriage rights system-by-system -- and the majority of them fail -- Fox broadcasters were able to use must-carry to secure instantaneous widespread carriage of their broadcast signals, which the Fox network used to introduce and test its new brand of programming on multiple audiences. The strategy has worked: during the past two broadcast seasons, Fox ranked second in prime time programming among its target audience.[29/] Now the Fox network has an audience that Cablevision cannot afford to lose.

A merger with DirecTV would allow Fox broadcasters to tip the retransmission consent negotiation scales -- already weighted heavily in favor of Fox due to its affiliation with News Corp. -- completely to Fox's benefit. If Cablevision were to refuse Fox demands for high

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[26/] Alan Sepinwall and Matt Zoller Seitz, *Nielsen Numbers*, NEWARK STAR-LEDGER (May 29, 2003) at 31. Joe Millionaire ranked second with an average of 22.9 viewers. *Id.* American Idol, televised twice during each week, ranked third and fifth with an average of 21.9 million viewers on Wednesday nights and 21.6 million viewers on Tuesday nights. *Id*.

[27/] Fox 2002 Annual Report at 11.

[28/] *See id.*; "Murdoch Heads Mainstream," *Advertising Age* (Oct. 10, 1994).

[29/] Fox 2002 Annual Report at 11. For the 2001-2002 broadcast season, NBC had a 5.3 rating and a 14 share while FOX had a 4.0 rating and a 11 share. *Id.* For the recently concluded 2002-2003 broadcast season, NBC and FOX held their positions among 18 to 49-year-olds. *See* Dan Snierson, *TV Winners & Losers 2003*, ENT. WKLY. (May 30, 2003) at 71.

compensation and Fox were to withdraw its programming in favor of DirecTV, it would drive MVPD subscribers straight into DirecTV's waiting arms (and subscriber revenues into News Corp.'s pockets). Indeed, DirecTV is uniquely suited to provide this leverage because only DBS has the immediate, extensive subscriber coverage that would enable such a strategy to succeed.[30/]

These types of demands -- particularly those that result in a loss of control over channel capacity and the exhaustion of consumers' ability and willingness to pay for increasingly costly programming -- not only represent costs to Cablevision and thus, to Cablevision subscribers, but more importantly, result in lost opportunities to offer new, independent programming services to subscribers, to further goodwill with subscribers by adding a highly requested programming service, to use channel capacity to offer a new information service, or to create any other innovative new product or service that might be offered over the cable system.

This potential negative impact on competition and consumers posed by the merger raises significant competitive issues. Even if News Corp./DirecTV's argument that the merger does not allow the merged entity to exercise market power in a *new* market because it increases neither News Corp.'s programming nor DirecTV's distribution assets were true,[31/] the Supreme Court and others have recognized that a threat to competition arises when a party, through a vertical merger or otherwise, acquires the ability to exploit its power in an *existing* market to its fullest extent.

In *United States v. Griffith*, 334 U.S. 100, 105-07 (1948), for example, the Court found

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30/ In contrast, while various overbuilders serve Cablevision's service areas, none of them could offer News Corp. an immediate, alternative route to all potential subscribers, and positioning themselves to do so would require significant time and investment.

31/ Application at 45-46. As discussed below, the merger does increase News Corp.'s market power in the distribution of Fox network programming, because the merger will combine two of the four readily available platforms (over-the-air broadcast, cable, DirecTV and EchoStar) in Cablevision's service areas for distributing Fox network content.

that business practices that result in a restraint of trade or the acquisition of a monopoly (in *Griffith*, using buying power to obtain exclusive rights to exhibit films) -- regardless of whether or not the business practices are intended to produce such a result -- causes a cognizable injury to competition. Here, too, if the merger is allowed to proceed, Fox's business practices, even if not meant to drive competing distributors out of business (although the Court cautioned that an absence of intent should not be overstated, since "no monopolist monopolizes unconscious of what he is doing"), will hand DirecTV a strong advantage over its MVPD competitors.

Even if News Corp. does not deny retransmission consent, the threats to competition in a downstream (distribution) market posed by vertical integration that gives the merging party access on better terms and conditions to an upstream product (a necessary input to the service or product, such as programming) are well recognized. The FTC and Department of Justice's Merger Guidelines (§4.21) specifically express concerns about the anticompetitive effects of the foreclosure that can result from a vertically integrated firm denying its competitors access to essential inputs or raising those competitors' costs to obtain those essential inputs, and those agencies have frequently taken steps to prevent this result.

In *Shell Oil Company; Texaco, Inc.*, 62 Fed. Reg. 67868 (Dec. 30, 1997), for instance, a proposed joint venture between Shell and Texaco was found to present substantial risks of anticompetitive behavior in the transportation of crude oil in certain markets. Texaco (here, News Corp.) owned a pipeline that transported oil (Fox broadcast programming) to the only two refineries in the market (DirecTV and Cablevision), and proposed to enter into a joint venture with the owner of one refinery (DirecTV). The FTC found that the transaction would allow the Joint Venture to raise the prices for oil (Fox broadcast programming) charged the unaffiliated refinery (Cablevision), putting the affiliated refinery at a competitive advantage, causing significant costs increases to consumers, and thus required Texaco to enter into a ten-year supply agreement with the unaffiliated refinery.[32/]

This proposed merger poses even greater risks to consumers and competition than that identified in these decisions. As the evolution of DBS competition has well demonstrated -- and as DirecTV and News Corp. acknowledge – carriage of local broadcast programming is essential for any MVPD to remain competitive.[33/] Cablevision's ability to obtain it on nondiscriminatory terms could affect its capacity to attract and retain subscribers.

b. The merger will increase News Corp.'s market power in the distribution of Fox network programming in Cablevision's service areas.

The merger presents a further risk to competition by further concentrating News Corp.'s ownership of the means of distributing Fox network programming in Cablevision's service areas. In New York, News Corp. already owns two platforms for distributing these assets -- the broadcast licenses granted by the government without charge. The addition of another outlet in Cablevision's service areas for distributing Fox network programming -- this time, a DBS outlet -- threatens to confer significant market power on News Corp. in that market and elsewhere.

[32/] *See also In the Matter of Silicon Graphics, Inc.*, 120 F.T.C. 928 (1995) (allowing maker of computer hardware workstations (the product) incorporating entertainment graphics (the essential input) to acquire two entertainment graphics software firms only upon condition that it agree to provide the entertainment products to an approved unaffiliated party, to eliminate the risk that the acquisition would foreclose or increase costs to unaffiliated workstation producers for obtaining entertainment graphics software); *Eli Lilly and Co.*, 120 F.T.C. 243 (1995) (merger between drug manufacturer and pharmacy benefit manager (PBM) in position to benefit certain drugs allowed to proceed only on certain conditions due to danger that unaffiliated drug manufacturers and consumers would suffer harm their products were denied access to PBM or Lilly drugs were offered on more favorable terms and conditions, reducing competition).

[33/] Application at 27-28; *see, e.g., Policies and Rules for the Direct Broadcast Satellite Service, Report and Order*, 17 FCC Rcd 11331, 11336 ¶ 10 (2002) ("*Part 100 Order*") ("The significant increase in DBS subscribership has been in large part attributed to the authority granted to DBS providers in late 1999 to offer "local-into-local" service").

News Corp.'s two stations enable it to reach significant numbers of views in the New York market. More than 40 million Americans nationwide depend solely on over-the-air television for their access to video programming.[34/] Many others receive over-the-air programming on a second television set. The combination of DirecTV and existing broadcast assets will give News Corp. considerable leverage in its negotiations with Cablevision. If Fox denies retransmission consent for its broadcast stations to Cablevision, it will still have two different platforms -- over-the-air and DBS -- for reaping a return on this "must have" programming, while Cablevision will lack any means of providing this content to its subscribers. This unprecedented horizontal distribution combination of broadcast television outlets and an MVPD is significant -- yet unaddressed in the Application.

Moreover, News Corp. is far more than an owner of broadcasting stations. It is a "premier content provider"[35/] -- an owner of cable programming services, including several regional sports services; Twentieth Century Fox Studios, a motion picture studio; and Twentieth Century Fox Television, a program supplier. Fox's motion picture and television library has the rights to over 3,250 previously released films (including the Star Wars series) and many well-known television series. Fox owns the Los Angeles Dodgers, Dodger Stadium, and has an ownership interest in the Staples Center, the home of the Los Angeles Lakers, Clippers, and Kings. News Corp. owns the *New York Post*, the *Weekly Standard* and one of the nation's largest book publishers, Harper Collins.

News Corp. can look to all of these assets when it creates and designs programming for the Fox broadcasting network. If Cablevision resists Fox's retransmission consent demands, Fox

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34/ News Release, Federal Communications Commission, "FCC Sets Limits on Media Concentration" (June 2, 2003).

35/ "Extreme Fox," *supra*.

can draw on News Corp.'s powerful array of content to enhance the attractiveness of Channel 5's programming line-up and, in the event negotiations fail, offset the loss of Cablevision viewers. Allowing this merger to proceed on these terms would pose serious risks to competition.[36/]

2. The merger presents a serious risk of anticompetitive harm to national DBS competition.

The merger also presents a risk of anticompetitive harm to DBS competition by raising entry barriers for the nascent competitor Rainbow DBS.[37/] Rainbow DBS is now only a fledgling rival to DirecTV and has limited spectrum compared to DirecTV, but it has the potential to become a more formidable DBS competitor quite soon. DirecTV therefore has a strong incentive to hobble Rainbow DBS.

The marriage of News Corp. with DirecTV provides the perfect match of incentive and ability to hamper the development of national DBS competition. Without the merger, DirecTV has an incentive to disadvantage its DBS competitors, including Rainbow DBS, but little ability to do so. Likewise, standing alone, News Corp. has the ability to harm Rainbow DBS by denying it programming or broadcasting signals, but no incentive. Together, however, the merger parties can use the power of News Corp.'s control over an important source of content, the Fox television stations, to deprive Rainbow DBS of the Fox local broadcast signals or demand excessive concessions in exchange for retransmission consent, and so raise Rainbow DBS's costs -- and thus the cost of its service -- or reduce the effectiveness of Rainbow DBS's

[36/] *See Shell Oil*, *supra* (finding risk of harm to competition from horizontal combination of Shell and Texaco oil refineries in certain markets because lack of substitutes for the product, the availability of only one alternative refinery, and high barriers to entry for new refineries made those dependent on the refineries susceptible to price increases once horizontal market share was increased); *Silicon Graphics, Inc.*, *supra* (acquisition combining two of three makers of "industry standard" entertainment graphics software posed risk of horizontal exercise of market power through price discrimination, causing consumers to pay higher prices).

[37/] The ability to offer local broadcast signals has been recognized repeatedly as critical to the success of a DBS venture. *See* n.70, *infra.*

entry into the DBS market nationwide. As discussed above, this type of "vertical" merger that has downstream foreclosure (or "horizontal") effects, *i.e.*, giving the merged entity an improper competitive advantage over its competitors in the downstream (distribution) market, is well recognized to pose a threat to competition. *See* pp. 15-17 (and cases cited therein).

News Corp.'s claims that it would not act unreasonably in retransmission consent negotiations because it cannot risk losing viewers are wholly inapplicable to Rainbow DBS.[38/] News Corp. would suffer almost no harm from hindering Rainbow DBS' entry into the market, because Rainbow DBS will have virtually no subscriber base. News Corp. will not lose any viewers upon which its advertising contracts depend, and may well view the lost opportunity to gain viewers as a worthwhile investment cost for driving out a competitor to its distribution arm.[39/]

3. A merger with DirecTV will increase News Corp.'s incentive to use Gemstar and NDS as leveraging tools in retransmission consent negotiations with Cablevision and Rainbow DBS.

Vertical integration with DirecTV would also provide News Corp. with the incentive and ability to increase the use of Gemstar/TV Guide's electronic programming guide ("EPG") by unaffiliated MVPDs.[40/] EPGs have become an essential tool for customer access to and negotiation of the hundreds of channel and programming options available via cable and satellite

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38/ Application at 64.

39/ *See Program Access Order* at 12140 ¶ 37 ("an investment of this sort will tend to be most profitable when the costs of the investment are low and its benefits are high. The costs tend to be low when the initial loss in programming revenue is low (because, for example, the excluded platforms serve relatively fewer customers . . .) The benefits of the investment tend to be high when the vertically integrated [content provider] ultimately expects to serve a large number of subscribers, and will be able to charge them substantially more for cable distribution service than it could if it faced a strong rival distribution platform.").

40/ *See* Scanlon, Neel and Lafayette, "The Dish on DirecTV," *Cable World* (April 14, 2003) (DirecTV's reach can be extended by cross promotion with TV Guide").

programming, particularly the increasingly popular video-on-demand services,[41/] and Gemstar currently is the leading provider of such services to cable and satellite operators.[42/]

News Corp. could use its increased leverage in retransmission consent negotiations with Cablevision and Rainbow DBS to force them to carry the Gemstar EPG.[43/] Further, Gemstar has been extremely aggressive about asserting patent rights extremely broadly to virtually include even the very idea of an EPG, and has vigorously litigated any resulting infringement claims against competing providers of EPGs or the users of such EPGs.[44/] News Corp., as a competitor (through DirecTV) to MVPDs that do not use Gemstar EPGs, would have a strong incentive to continue Gemstar's practice. The prospect of such extensive litigation -- combined with the threat of losing the Fox broadcast signal -- is likely to impose such substantial uncertainty and

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41/ *See* Gene Fergolia, "A Maker of Interactive Programming Guides Makes the Case for Choice in the Cable Operations Community," *Cable World* (Oct. 21, 2002) ("The [interactive programming guide ("IPG")] is undeniably an essential asset for any operator, and an invaluable tool for television viewers. The IPG is the key navigational tool that allows viewers to efficiently find what they want to watch. More importantly for the network operator, the IPG is a tool through which to integrate additional revenue-generating applications such as VOD.").

42/ *See U.S. v. Gemstar and TV Guide*, D.D.C., Complaint filed Feb. 6, 2003, ¶ 28 (CV 1:03cv00198).

43/ Indeed, in the past Gemstar has even sought must-carry rights for its EPG. *See AOL-Time Warner Order at* 6631 ¶ 205 (rejecting Gemstar's request).

44/ *See* Gene Fergolia, "A Maker of Interactive Programming Guides Makes the Case for Choice in the Cable Operations Community," *Cable World* (Oct. 21, 2002) ("Over the years, a single provider, Gemstar, has controlled the IPG market through an aggressive strategy involving patents and lawsuits. Many cable operators, box manufacturers, and other companies have opted not to develop or use other IPG technology because of the fear of costly litigation. As a result competition and innovation in the IPG segment has been stifled."); John Lippman, "Entrepreneur Fights to Control TV Guide; U.S. Regulator's Ruling Threatens Gemstar's Dominance of Market for On-Screen Program Listings; Hong Kong-Raised Engineer and Lawyer Prevents Stakeholder News Corp. from Obtaining Audits of Its Financial Records," *The Asian Wall Street Journal, International* (June 24, 2002) ("Gemstar has always boasted that its patents are unassailable and repeatedly has used the threat of lawsuits to coerce cable television operators and other companies into licensing its patented technology for on-screen program guides."); *id.* (noting the "widely held notion that [Gemstar] is over-litigious.").

costs on Cablevision, Rainbow DBS, and others that they could be forced to use the Gemstar EPG despite the availability of alternative, preferred products.[45/]

News Corp.'s control over its subsidiary, NDS Group plc ("NDS") -- the world's leading provider of conditional access systems and interactive applications for digital pay television -- raises similar concerns.[46/] Once merged, News Corp. would have both the incentive and ability to discriminate against competitors to DirecTV in its provisioning of its conditional access systems and interactive applications to other MVPDs.

C. The Merger Threatens the Underlying Goals And Policies of the Communications Act.

The risks to competition and consumers identified above, both in Cablevision's service areas and nationally, are sufficient grounds for the Commission to condition this merger. Even if News Corp./DirecTV are correct that the transaction will not violate any provision of the Communications Act or the Commission's rules,[47/] that assertion is necessary but not sufficient for approval of the merger. The Commission has long held that the Communications Act requires an evaluation of a proposed transaction under the broad public interest standard.[48/]

45/ *See id.*

46/ "NDS Group PLC Reports Increased Revenues and Major New Contract Wins in Third Quarter Results," *Business Wire* (Tuesday, April 29, 2003); "Access Security on Viasat Pay TV Platform," *Associated Press Newswires, Business Editors/High Tech Writers* (Mar. 31, 2003) (describing NDS as "the leading provider of technology solutions for digital pay-TV"); "Modern Times Group MTF AB: Viasat Signs Agreement with NDS, PrimeZone Media Network, Inc.," (Mar. 30, 2003) ("NDS Group plc is a News Corporation company and is the leading provider of technology solutions for digital pay-TV operators. NDFS is a leading supplier of open end-to-end digital pay-TV solutions for the secure delivery of entertainment and information to both television set-top boxes and IP devices.").

47/ Application at 16.

48/ *EchoStar-DirecTV Order* at 20575 ¶ 26 ("Our public interest evaluation necessarily encompasses the 'broad aims' of the Communications Act, which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services") (internal citations omitted). *See also In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors to AT&T Comcast Corporation, Transferee*, 17 FCC Rcd. 23246, 23255-56 ¶ 27 (2002) ("*AT&T-Comcast Order*") (same); *AOL-Time Warner Order* at 6555-56 ¶

Under this standard, the Commission has regularly imposed conditions in addition to generally applicable rules in order to ensure that the transaction does not substantially frustrate or impair the "broad aims of the Communications Act."[49/] The imposition of the conditions proposed herein, at a minimum, are necessary to ensure that that the merger will neither impede competition -- by, among other things, increasing a market participant's incentive and ability to engage in discrimination, raise rivals' costs, or exclude competition from a market -- nor negatively affect the quality of existing services or the provision of new or additional services to consumers.[50/]

As discussed in detail above, the proposed merger of a content provider, broadcaster, and MVPD platform, in combination with cable operators' obligation to secure retransmission consent from broadcasters, would provide the newly merged entity with substantial leverage and market power that could result in increased costs to cable operators and their subscribers, reduced local broadcast programming, less programming choices for cable subscribers, and

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22 ("Our public interest evaluation necessarily encompasses the 'broad aims' of the Communications Act"); *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, 14 FCC Rcd. 14712, 14738-39 ¶¶ 48, 51 (1999), *vacated in part on other grounds by Association of Communications Enterprises, Inc. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) ("*SBC-Ameritech Order*"); *AT&T-TCI Order* at 3168-70 ¶¶ 13-15; *MCI-WorldCom Order* at 18030 ¶ 9.

49/ For example, in the Bell Atlantic-NYNEX merger, the Commission imposed a number of interconnection conditions that went beyond the mandates of the Communications Act and the Commission's rules in order to promote market entry by new competitors. *See Bell Atlantic-NYNEX Order* at 20069-79 ¶¶ 177-200. In the Bell Atlantic-GTE and SBC-Ameritech mergers, the Commission imposed numerous conditions aimed at promoting the policy goals of the Act, including provisions that required the merging ILECs to enter local markets outside of their regions as competitive carriers. *See GTE-Bell Atlantic Order* at 14143-14202 ¶¶ 246-372; *SBC-Ameritech Order* at 14856-86 ¶¶ 354-418. In its review of the MCI-WorldCom merger, the Commission stated that it did not seek to "regulate the Internet, but rather to ensure that Internet services, which rely on telecommunications transmission capacity, remain competitive, accessible and devoid of entry barriers" and then imposed a requirement that MCI divest its Internet assets. *MCI-WorldCom Order* at 18103-04 ¶ 142.

50/ *See, e.g., EchoStar-DirecTV Order* at 20575 ¶ 26; *AT&T-Comcast Order* at 23255-56 ¶¶ 27-28.

decreased competition in the national DBS market -- results directly contrary to the goals of the Communications Act and to Congress' goals in adopting the retransmission consent regime.

Congress' purpose in establishing and the Commission's aim in implementing the retransmission consent requirements were to preserve the financial health of local broadcasters, and ensure that they remained competitive vis-à-vis cable operators, because local broadcasting was deemed an important source of diverse, locally originated programming, local news programming, and public affairs programming.[51/] Indeed, it is because local broadcasting is believed to serve the public interest in such a unique fashion that broadcasters enjoy a free distribution mechanism -- extremely valuable spectrum -- granted by the government.[52/]

It is completely contrary to the goals and policies of the Act to allow local broadcasters to use the means designed to ensure the continued availability of local broadcasting as a tool to threaten to decrease diversity and localism by withholding that programming from the public unless substantial wealth -- far beyond the compensation needed to preserve the health of local broadcasting -- is transferred from a cable operator to a far larger media conglomerate. The Commission must take action to prevent this result.

51/ *See* 47 U.S.C. §§ 521 nt (a)(6), (10), (11), (12).

52/ *See Office of Communication of the United Church of Christ v. Federal Communications Commission*, 707 F.2d 1413, 1427 (D.C. Cir. 1983) ("In return for 'the free and exclusive use of a limited and valuable part of the public domain,' broadcasters were to be burdened by enforceable public obligations") (*quoting Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994, 1003 (D.C. Cir. 1966)); *Black Citizens for a Fair Media, et al. v. Federal Communications Commission*, 719 F.2d 407, 419 (D.C. Cir. 1983) (Wright, J., dissenting) ("It is a fundamental premise of the Act that the public, and not the broadcaster, owns the airwaves. Under the regulatory scheme, a broadcaster receives free and exclusive use of a slice of this public resource, the remunerative potential of which has proven to be vast. In return, the broadcaster must use this public resource so as to serve the "public interest, convenience, and necessity." This public interest standard mandates programming that meets the needs of a broadcaster's viewing or listening community.") (internal citations omitted).

1. The proposed merger presents a unique situation to which past pronouncements on retransmission consent are inapplicable.

Although the Commission has refused to prohibit retransmission consent tying arrangements in various past proceedings as a general matter, those decisions have no bearing on the issues presented here. In none of those situations did the Commission consider a situation in which a proposed merger would fundamentally swing the balance of power so far in favor of broadcasters as to provide them with virtually unrestrained ability to exact unreasonable compensation. To the contrary, in the general rulemakings in which the Commission considered and rejected requests to restrain retransmission consent demands, the background assumption was that the MVPD rather than broadcaster would be in position to exercise market power.[53/]

Similarly, when concerned parties have raised retransmission consent issues in past merger proceedings, those proceedings did not involve the consolidation of a broadcaster and a major distribution platform. In the ABC/Disney merger, for example, an organization of small cable operators contended that the proposed merger between a broadcaster and cable programmer would unfairly shift power to large cable operators because of the higher retransmission consent prices that were likely to result from the merger.[54/] The merger did not offer any additional leverage to broadcasters, however, who remained dependent on successful reasonable retransmission consent negotiations to reach the MVPD audience. The Commission

53/ *See generally Implementation of the Satellite Home Viewer Improvement Act of 1990; Retransmission Consent Issues; Good Faith Negotiation and Exclusivity*, 15 FCC Rcd. 5445 (2000) ("*Good Faith Negotiation Order*") (indicating that adoption of good faith negotiation requirements would protect MVPDs from anticompetitive retransmission consent demands under normal market conditions); *Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission's Rules*, 16 FCC Rcd. 2598, 2613 ¶ 35 (2001) (refusing to prohibit tying demands because there was not yet evidence of a threat of anticompetitive behavior by broadcasters).

54/ *Capital Cities/ABC, Inc. (Transferor) and the Walt Disney Company (Transferee) for Consent to the Transfer of Control of Licenses*, 11 FCC Rcd 5841 (1996) (an organization of small cable operators contended that the proposed merger would unfairly shift power to large cable operators because of higher retransmission consent prices that were likely to result from the merger).

has never been presented with a situation -- like that presented here -- in which a merger dramatically increased broadcasters' market power over MVPDs through the acquisition of a major interest in an MVPD platform to use a leveraging tool in retransmission consent negotiations.

2. The Commission's good faith negotiation rules are insufficient to protect against the threat posed by the merger.

News Corp./DirecTV contend that MVPDs are protected adequately against unreasonable retransmission consent demands by the good faith negotiation rules.[55/] Those rules, however, were specifically designed to govern and evaluate MVPD agreements and behavior in an otherwise "competitive marketplace."[56/] If the merger is allowed to proceed, the marketplace among MVPDs seeking consent for retransmission of Fox broadcasting stations will be anything but "competitive." Thus, behavior that the Commission has found in the past to be only aggressive negotiation consistent with the rules, including tying retransmission consent to carriage of one or more affiliated cable networks -- behavior that DirecTV itself has identified as anticompetitive in the past[57/] -- cannot be evaluated under the same standards.[58/]

55/ Application at 64-65.

56/ 47 C.F.R. § 76.65(a); *Young Broadcasting*, 16 FCC Rcd at 15082-03 ¶ 29.

57/ *See In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues*, CS Docket No. 99-363, Comments of DirecTV, Inc. (Jan. 12, 2000) at 7 (arguing "it is a clear breach of the good faith obligation of broadcasters" to tie retransmission consent to carriage of other programming that "the DBS provider would not otherwise elect to carry" and that "result[s] in inefficient use of the spectrum").

58/ While the Commission has indicated in the past that the "totality of the circumstances" test set forth in the good negotiation rules is meant to be used when differences among MVPD agreements on based on factors other than competitive marketplace considerations, it is unreasonable to require cable operators to follow this route when it is well established that Fox broadcasting stations have the incentive and ability to favor one MVPD – DirecTV-- over all others.

D. Fox Broadcasting Stations Should Be Required to Waive Retransmission Consent Rights And Elect Must-Carry Throughout Cablevision's Markets for their Broadcast Signals.

Because the merger would substantially frustrate the "broad aims of the Communications Act," the Commission may not approve the Application unless it restricts News Corp.'s ability to act anticompetitively in retransmission consent negotiations.[59/] Attempting to foresee and regulate against all the types of demands that might be advanced in retransmission negotiations, however, is infeasible. Further, the Commission clearly does not have the personnel and resources to police every private retransmission consent agreement to which a Fox broadcasting station is a party.[60/] Rather, the only means of protecting against the substantial risks of harm to consumers and competition is to require Fox broadcasting stations to waive their rights to elect retransmission consent on Cablevision's cable systems, and to require them to elect must-carry for their analog broadcast signals.

III. THE PROPOSED PROGRAM ACCESS COMMITMENTS DO NOT ALLEVIATE THE HARMS POSED BY THE MERGER

News Corp./DirecTV's "offer" to comply with select program access commitments fails to remedy the serious harm to MVPD competition posed by the merger. News Corp./DirecTV purport to remedy this threat by designing their own program access commitments. It is the Commission's duty, however, to design meaningful commitments to address the competitive harm presented, not to allow individuals to dictate the parameters of competition convenient to their business plans. The Commission should not allow the merger to proceed in the absence of

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59/ *SBC-Ameritech Order* at 14854 ¶ 348 (if proposed merger increases the "incentive and ability of the merged entity to discriminate against rivals," and there are no mitigating public benefits, it does not serve the public interest and must be denied in the absence of conditions).

60/ *Good Faith Negotiation Order*, 15 FCC Rcd at 5454-55 ¶ 23 (noting lack of Commission resources to undertake such a task).

meaningful program access commitments that eliminate in full the threats posed by the transaction.

The Commission renewed the program access rules applicable to cable programmers affiliated with cable operators last year because it believed that vertically integrated programmers have the ability and incentive to favor their affiliated MVPD when that MVPD has the power to reach all potential subscribers, who can switch to that provider to receive the programming if they view it as valuable.[61/] Although cable operators argued, as News Corp. does here, that it would not make economic sense to limit distribution of affiliated programming, the Commission rejected that defense as unpersuasive.[62/]

The Commission concluded that particularly where so-called "must-have" programming is involved, the loss suffered by refusing to make programming available to a competitor is an "investment" that brings benefit because subscribers will search for the programming and switch providers in order to receive it.[63/] A combined News Corp./DirecTV has precisely the same power and incentive to withhold programming as the Commission found in an integrated cable operator/cable programmer combination. Indeed, its ability to do so is even greater, given that local broadcast signals win a substantially greater share of the viewing audience and represent "must have" programming far more than any cable programmer could.

A merger with DirecTV provides News Corp. with all it needs to deny competing MVPDs access to its programming. As the Commission recognized in its program access order, DBS is a means of reaching all subscribers throughout the country and has consistently gained

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61/ *Program Access Order* at 12125 ¶ 3.

62/ *Id.* at 12139-42 ¶¶ 35-39.

63/ *Id.* at 12410-11 ¶¶ 36-38.

market share since it gained the ability to offer local broadcast signals.[64/] A decision by Fox to concentrate sports or other desirable Fox programming on DirecTV, or to use its NFL and other sports connections to design a programming service for DirecTV, would present a serious threat to competition and diversity in the distribution of video programming.

News Corp./DirecTV have essentially conceded this, and have attempted to ward off the full extent of the rules by offering up their own, personally-designed program access commitment in the event that News Corp. is freed from compliance with the current program access rules because Liberty divests its interest in News Corp. The News Corp./DirecTV program access "commitment", however, -- which they have taken the liberty to "tailor[] . . . to better fit the DBS context in general and the facts of the proposed transaction in particular"[65/] -- has gaping holes that could jeopardize competition in the MVPD marketplace.

On its face, the Applicants' proposal to treat affiliated and unaffiliated video platforms equally is admirable -- but does nothing to prevent News Corp. from raising the price or terms and conditions of programming above competitive levels. News Corp. can easily make a sweetheart deal with DirecTV that requires DirecTV to "compensate" News Corp. for its programming at unreasonably high levels or to give News Corp. programming other unreasonably favorable terms of carriage. While even the most successful cable programmers must negotiate with numerous cable operators to gain nationwide carriage -- resulting in the eventual emergence of a benchmark price for the programming -- News Corp. would only need to make a single deal with DirecTV that would then establish the terms for all other MVPDs.

News Corp. concedes that the merger presents this threat, but concludes that the threat is illusory because it has established an "Audit Committee" to ensure that all News Corp.-DirecTV

64/ *Id*. at 12143-46 ¶¶ 45-46.

65/ Application at 60.

contracts are on arms'-length terms.[66/] An independent Audit Committee, however, cannot be expected to police the industry. Independent board members could not possibly study the intricacies associated with each individual contract on an ongoing basis and assign a value to each differing input -- term, advertising availabilities, etc. -- in order to draw a meaningful comparison between the terms offered to DirecTV versus those offered to other MVPDs.

The Commission should not allow the merger to proceed in the absence of meaningful program access commitments precluding DirecTV from using its relationship with Fox to obtain exclusive rights to programming.

IV. THE MERGER GIVES DIRECTV AN UNFAIR ADVANTAGE OVER COMPETING DBS PROVIDERS IN PROVIDING LOCAL-INTO-LOCAL

DirecTV already has a government-granted competitive advantage over Rainbow DBS consisting of significantly more DBS spectrum. While DirecTV has announced its intentions to offer local-into-local to 85-90% of American homes by the end of the year,[67/] Rainbow DBS, when it begins to offer consumers a new DBS service in competition with DirecTV shortly, likely will lack sufficient satellite capacity to provide full local-into-local broadcast service in every market, or even a majority of markets. As the spectral capacity of Rainbow grows, however, access to broadcast stations for the provision of local-into-local will become increasingly critical to its success as a DBS competitor. News Corp.'s ability to withhold that programming may serve to substantially impair Rainbow DBS's ability to enter the DBS market as a substitute to the incumbents.

66/ *Id*. at 59.

67/ Testimony of K. Rupert Murdoch, Chairman and Chief Executive Officer of News Corp., *Oversight Hearing on Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market*, House Judiciary Committee (May 8, 2003).

News Corp.'s portfolio of assets even gives it leverage over other, competing broadcasters that may lead to a diminution in Rainbow DBS's ability to acquire retransmission consent rights from those broadcasters. DirecTV's association with News Corp. -- and its motion picture, television, and other content assets -- means that other broadcasters, too, are likely to grant retransmission consent on favorable terms to DirecTV. Twentieth Century Fox, for example, is producing shows for five of the six networks next season,[68/] and has been "the largest studio supplier of TV series to the broadcast networks for three years running."[69/] Broadcasters will not want to risk being cut off from this programming flow, and may be supportive of the News Corp./DirecTV efforts to undercut entry by Rainbow DBS.

Rainbow DBS's inability to get access to local signals on such favorable terms would place it at a competitive disadvantage. History has shown that the ability to offer local broadcast signals significantly enhances the competitiveness of DBS service.[70/] But if Rainbow DBS, as a new entrant without the control over broadcasters that DirecTV exercises, cannot afford the additional costs broadcasters demand from it as a price of retransmission consent, or must pass those costs through to subscribers, its service and price cannot remain competitive with

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68/ "Ownership vs. Quality; Reversing a Trend Toward TV Networks' Owning What They Air," *Television Week* (May 19, 2003).

69/ "Brad Grey signs exclusive deal with 20th Century Fox," *Electronic Media Online* (May 8, 2002).

70/ *See Part 100 Order* at 11336 ¶ 10 (The significant increase in DBS subscribership has been in large part attributed to the authority granted to DBS providers in late 1999 to offer "local-into-local" service."); U.S. GENERAL ACCOUNTING OFFICE, GAO-03-130, ISSUES IN PROVIDING CABLE AND SATELLITE TELEVISION SERVICES 3 (Oct. 2002) ("According to results from our econometric model, the provision of local broadcast channels by DBS companies is associated with significantly higher DBS penetration rates … our model indicates that in areas where DBS subscribers can receive local broadcast channels from both DBS companies, the DBS penetration rate is approximately 32 percent higher than in areas where subscribers cannot receive local broadcast channels via satellite. Thus, it appears that DBS is able to compete more effectively for subscribers with cable in areas where the DBS companies offer local channels than in areas where the DBS companies do not offer local channels…").

DirecTV's, and consumers will have lost the opportunity to subscribe to a new and innovative service offering.

The Commission should not allow DirecTV to use a merger to gain an advantage over other DBS competitors, particularly fledgling competitors like Rainbow DBS. Rather, the Commission should redress this competitive imbalance by taking action to promote Rainbow DBS's ability to offer local-into-local service. For example, it could require DirecTV to allow Rainbow DBS access to DirecTV's local signals, or it could ensure that DirecTV does not exclude it from any agreement to share backhaul it makes with EchoStar in the course of this merger.[71/] Whatever the means, it is critical that the Commission not approve a merger without ensuring that it does not stifle meaningful DBS competition before such competition even has a chance to start.

[71/] K. Rupert Murdoch, Chairman and Chief Executive Officer of News Corp., indicated in recent testimony to the House Judiciary Committee that he "intend[s] to approach Mr. Ergen [of EchoStar] and see if we can't share some of the costs [associated with offering local-into-local service]." *Oversight Hearing on Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market*, House Judiciary Committee (May 8, 2003). It would be clearly anticompetitive for the two largest DBS providers to enter into a joint venture of this type that does not also include Rainbow DBS.

CONCLUSION

The Application of News Corp. and DirecTV for authority to transfer control of Hughes' FCC licenses to News Corp. should be conditioned on appropriate safeguards to prevent News Corp. from using its increased market power and new leverage anticompetitively.

Respectfully submitted,

/s/

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June 16, 2003

CERTIFICATE OF SERVICE

I, Christopher R. Bjornson, hereby certify that on this 16th day of June 2003, I caused copies of the foregoing "Comments of Cablevision Systems Corporation" to be sent to the following by electronic mail or by first class mail(*).

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