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

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

PETITION TO DENY AND COMMENTS IN OPPOSITION TO TRANSFER OF CONTROL

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EchoStar Satellite Corporation ("EchoStar")[1] hereby files these comments in opposition to The News Corporation Limited ("News Corp.")'s proposed acquisition of a controlling stake in Hughes Electronics ("Hughes"). The Commission should deny the Application.

I. INTRODUCTION AND SUMMARY

The creation of a News Corp./Hughes conglomerate, with vast programming properties, a worldwide satellite distribution platform, major newspapers throughout the world, and now Hughes's DirecTV, Inc., the largest Direct Broadcast

[1] EchoStar is a Multichannel Video Programming Distributor ("MVPD") competing with Hughes's subsidiary DirecTV, Inc. ("DirecTV"), and believes that it will suffer anticompetitive harm as a result of News Corp.'s acquisition of a stake in Hughes. It is thus clearly a "party in interest" under Section 309(d)(1) of the Communications Act of 1934, 47 C.F.R. § 309(d)(1).

Satellite ("DBS") provider in the U.S., poses a threat to the American consumer that the Commission must address head-on. EchoStar calls upon the Commission to deny the proposed transaction or, failing that, impose critical conditions, not the symbolic gestures that News Corp. proposes. Even the most robust conditions will not prevent the imminent abuses brought on by the proposed transaction, but might at least stem the flow of consumer harm that is likely to occur.

The proposed transaction does not serve the public interest and raises competitive concerns for a number of reasons. By acquiring its crown jewel of nationwide U.S. distribution for its core programming assets, News Corp. will have the ability and incentive to force cable firms and EchoStar to accept higher programming fees, which, in turn, would result in higher cable and DBS prices and harm to consumer welfare.

By securing for News Corp. what it has so far lacked – a guarantee of distribution, the proposed transaction may allow News Corp. to abuse its retransmission consent rights. Such abuse would in turn hinder EchoStar's ability to offer a competitive local broadcast package in ways that cannot be adequately addressed by the current FCC restrictions on bad faith bargaining, ultimately resulting in higher prices for consumers. For example, by withholding its broadcast network programming even for a limited time, News Corp. could cut EchoStar's average subscriber growth rate attributable to local service by more than two thirds and substantially increase churn from current customers as well. News Corp. could also harm both competing distributors and consumers by charging uniformly high retransmission fees for the signals of its owned and operated stations.

With a nationwide distribution guarantee, News Corp. will also have an unfettered incentive to use its market power in several segments of the programming market in order to withhold or charge excessive rates for essential programming, to the detriment of consumers. Indeed, News Corp. has candidly avowed its intent to continue raising both its fees for cable programming and its retransmission fees for broadcast stations. News Corp. also will be in a position to leverage its worldwide distribution power to win exclusive rights to programming in the U.S. Indeed, News Corp. has apparently followed a systematic practice of locking up sports and other exclusives for its affiliate BSkyB in the U.K., undermining its intimation that it will not use its new power to gain exclusivity or other undue advantages over competing distributors.

News Corp. appears to claim that it will not have the incentive to engage in such abuses because the revenue it stands to lose from reduced distribution of its programming content is greater than any gains from higher fees. This disregards the fact that demand for much of News Corp.'s programming is very inelastic as well as the different economic stakes that News Corp. would have in its programming and distribution arms. With a majority or 100% stake in much of its programming and only a minority stake in Hughes, News Corp. is better off with every cent that leaves the pocket of Hughes and ends up in the pocket of its programming arm – *i.e.*, with higher programming prices. Moreover, one need look no further than News Corp.'s past practices to get a preview of how this particular company is susceptible to anticompetitive behavior.

Access to a nationwide distribution outlet will give News Corp. new incentives to engage in similar practices to those castigated by the U.S. Department of

Justice when it sued to stop the News Corp./Primestar transaction – colluding with the cable industry. In particular, by becoming vertically integrated in the United States, News Corp. will have the currency with which to reach mutually beneficial agreements with other vertically integrated distributors – the large cable multiple system operators ("MSO"s). There is only upside, and no downside, to News Corp. agreeing with vertically integrated MSOs to excessively high prices for the other company's programming and *vice versa*. Such an agreement would be costless to both companies – each would be receiving through the higher prices for its programming what it gives up by paying fees to distribute the other company's programs. The cost would of course be shouldered by competing distributors such as EchoStar in the form of higher programming prices, and by consumers in the form of higher subscription fees.

News Corp.'s subsidiary British Sky Broadcasting ("BSkyB") was recently investigated in the U.K. for just this kind of practice – a profit squeeze on competing distributors. While BSkyB was ultimately cleared in that investigation, it was only after the U.K. regulatory authorities had voiced serious concerns about these practices and after most of its competing distributors had either been forced into reorganization or out of business altogether. Moreover, the U.K. investigators found that, in different but analogous circumstances to those here, BSkyB possesses market dominance in the relevant programming market. In its Application to this Commission, of course, News Corp. makes precisely the reverse allegation – that it does not have market power in what it describes as a single market encompassing all programming.[2]

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[2] Consolidated Application for Authority to Transfer Control, MB Docket No. 03-124 (filed May 2, 2003) ("Application"), at 54 ("News Corp. has no market power in the sale of video programming . . . .").

The Commission should conduct its own investigation into the issue, particularly in light of the U.K. regulator's contrary finding. In addition, in 1996, the U.K. regulator had accepted a variety of undertakings from BSkyB to try to ensure that News Corp.'s programming arm did not impose excessively high prices on BSkyB's competeting distributors. If it were to grant the Application, the Commission should include the same conditions here.

As a general matter, the Applicants have not supplied much of the information that the Commission needs to assess the competitive implications of this deal. The Applicants venture unproven assertions on matters that require economic expertise and testimony, such as the relevant markets for competitive analysis.[3] The Applicants apparently plan to offer such testimony for the first time on rebuttal. Such a plan is inconsistent with the fact that the *Applicants* have the burden of showing that deal will serve the public interest. Indeed, in indistinguishable circumstances, the Commission asked EchoStar and Hughes to accompany their *initial* merger application with economic testimony. While the staff has inexplicably followed a different path here,[4] the need for the Applicants to prove their case remains the same. The Commission

[3] *See, e.g.*, Application at 47 (referring to two product markets – "(1) the acquisition of programming (the 'programming market'); and (2) the distribution of programming to consumers (the 'distribution market').")

[4] *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*, Public Notice, DA 03-1725, at 2 n.4 (rel. May 16, 2003) ("We note that we did not request Applicants to file additional economic data or testimony in advance of putting the Application on Public Notice. All participants in this proceeding will have an opportunity to submit expert economic testimony during the course of this proceeding.").

should open a new window for public comment upon receiving the first economic testimony from the Applicants.

News Corp.'s claimed public interest benefits appear to be illusory, insignificant, and not at all merger-specific. They pale in comparison to the harms to consumers that the proposed combination portends. The Commission should not justify granting a merger of this magnitude on so thin a record of consumer welfare (especially given the significant risks to consumer welfare that the deal presents).

Moreover, News Corp.'s qualifications as the proposed transferee may be in question. News Corp.'s subsidiary NDS Group plc ("NDS") is reportedly the subject of a criminal investigation by the U.S. Attorney's office and, depending on the outcome of that investigation, News Corp. may be unfit to receive the Title III licenses in question. The investigation relates to allegations of hacking into the security systems of several MVPD distributors. Parallel allegations have been made in civil lawsuits brought by DirecTV itself, by Vivendi and by EchoStar.[5] DirecTV in particular has alleged, among other things, that NDS "has misappropriated DIRECTV's technology, the secrecy of which is vital to thwarting piracy, . . . and has committed fraud on, and breached its duty to, DIRECTV by furnishing to DIRECTV 'insecure security' and security measures that were readily penetrated by the pirate networks."[6] The Commission should undertake its own thorough investigation of these very serious allegations prior to granting the

[5] The Vivendi lawsuit was settled in the context of a broader transaction where News Corp. acquired a Vivendi platform. Curiously, the DirecTV lawsuit appears to not have been settled yet notwithstanding the instant transaction.

[6] *DirecTV Operations, Inc. v. NDS Limited*, Case No. 02-07010 ABC (CTx) First Amended Complaint for Damages and Injunctive Relief and Demand for Jury Trial at ¶ 10 (C.D. Cal. Oct. 4, 2002).

requested authority. At the very least, the Commission should postpone any final action until the appropriate law enforcement authorities have had a chance to complete their investigation.

News Corp., an Australian company, may also be unqualified to receive the licenses because its home market, Australia, does not give U.S. companies effective competitive opportunities to provide the same DBS services that it would like to provide here. While the Applicants are correct that the foreign ownership restrictions placed by Section 310(b) of the Communications Act on the transfer of broadcast or common carrier radio licenses would not apply to them,[7] this does not eliminate the need for an "effective competitive opportunities" analysis before the Commission were to grant the above captioned Application. The reason for this is simple. An attempt by a foreign company to control a U.S. satellite licensee is no different, as a factual and policy matter, than an attempt by a foreign licensee to provide service to the United States. The Commission must clearly apply its effective competitive opportunities test in the latter case,[8] and should do likewise in the former case, at least by analogy.

Finally, the Commission should also consider the consequences of this transaction in many Latin American markets, including those of Mexico and Brazil.

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[7] Application at 16 n.30.

[8] *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States*, Report and Order, 12 FCC Rcd. 24,094 at 24,136, ¶¶ 98-99 (1997) ("*DISCO II*") (establishing the effective competitive opportunities test ("ECO-Sat") to requests by foreign companies to provide non-WTO covered services such as DTH and DBS to the U.S. market via non-U.S. satellites). *See also Digital Broadband Applications Corp.*, Order, DA 03-1526, at 3-4 ¶¶ 6-7, 7-10, 13-19 (rel. May 7, 2003) (applying the ECO-Sat test to an application by a Canadian company to provide DTH and DBS service to the United States from Canadian-licensed satellites).

Hughes and News Corp. affiliates (Galaxy Latin America and Sky Latin America) are the only two Direct-to-Home Satellite providers in Latin America, while the presence of cable operators in many of these countries tends to be much more anemic than here. The creation of a near MVPD monopoly in Latin America may have an indirect impact on the U.S. consumer, for example by increasing the leverage of News Corp. as a "monopsonist" in Latin America to extract concessions from unaffiliated programmers in other countries, including the U.S. The Commission has the authority to conduct this inquiry – it did so in 1997 when it approved Hughes's acquisition of control over PanAmSat. In that proceeding, the issue arose because Sky Latin America leased capacity from PanAmSat. The Commission concluded that the PanAmSat acquisition created no basis for competitive concern in that regard, partly because "the programming ventures themselves would remain separately owned and competitive in the market."[9] The instant transaction would eliminate precisely the separate ownership on which the Commission relied in 1997.

If the Commission ultimately decides to grant News Corp.'s Application, it should impose real conditions that might address the actual harms brought on by the merger. Specifically, it should:

- Limit News Corp.'s equity position in Hughes to 34%, increasing the likelihood that News Corp.'s dealings with Hughes will still be subject to scrutiny under Section 1 of the Sherman Act, and bolstering the independence in program decision-making recommended below.

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[9] *Hughes Communications Inc., et al.*, 12 FCC Rcd. 7534, 7542, ¶ 23 (1997).

- Require independent programming authority at the DirecTV level through corporate governance restrictions.
- Prohibit the sharing of information between News Corp.'s programming divisions *(e.g.*, Fox, Fox News, etc.) and DirecTV about any programming negotiation with a competitor (*e.g.*, cable distributors and EchoStar).
- Strengthen News Corp.'s proposed program access condition:
  - Prohibit satellite exclusives of any kind for any News Corp. programming.
  - Close the terrestrial "loophole."
  - Apply the program access rules to News Corp.'s non-video properties.
  - Apply the program access rules to broadband.
  - Make the program access rules permanent with respect to News Corp.
  - Include all attributable News Corp. and Liberty programming.
  - Make explicitly clear that the program access rules apply to all non-price terms.
  - Require News Corp. to supply programming to MVPDs on a separate basis (*i.e.*, no bundling), publish a rate card showing its fees for all MVPDs with a discount rate structure approved in advance by the Commission,

and provide the Commission with separate accounting records for its programming and distribution businesses, showing that the rates paid by DirecTV are not so high that DirecTV cannot make a reasonable profit. News Corp.'s affiliate BSkyB agreed to such conditions in the United Kingdom.[10]

- Prohibit the tying of any non-programming intellectual property rights to the carriage of programming.
- Generally, apply to News Corp. all applicable conditions found in the 1996 Undertakings given by BSkyB in the U.K., including those relating to BSkyB's control of proprietary technologies.[11]
- Apply to News Corp. the substantive good-faith retransmission consent negotiation rules as originally proposed by DirecTV.
- Require that retransmission fees for Fox-owned and operated stations do not exceed the lower of: the highest fees agreed to with any other network station in the same market or the fees agreed to for Fox-*affiliated* stations in other markets.

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[10] *See* U.K. Office of Fair Trading, *BSkyB investigation: alleged infringement of the Chapter II prohibition*, No. CA98/20/2002, at 1-2 (Dec. 17, 2002) ("*OFT BSkyB Decision*") (*available at* http://www.oft.gov.uk/Business/Competition+Act/Decisions/BSkyB.htm). While these conditions, agreed upon in 1996, appear to have been superseded in the U.K. by a competition law that became effective in March 2000, this does not eliminate the need for them here or the fact that BSkyB was willing to commit to them in the U.K.

[11] *See id.* at 1.

While no remedy would sufficiently address the structural forces toward anticompetitive behavior established by this transaction, the above conditions would be far preferable to News Corp.'s ineffective proposed conditions.

II. THE PROPOSED TRANSACTION WILL REDUCE COMPETITION, RAISE PRICES, AND ELIMINATE CHOICES FOR DBS AND CABLE SUBSCRIBERS

By combining its programming empire with its missing crown jewel – nationwide U.S. distribution for its programming, News Corp. will have the ability and incentive to harm competition in relevant markets. News Corp. will be able to exercise its market power in the relevant programming markets without any longer being disciplined by the need for nationwide distribution of that programming. As a result, the consumer ultimately will bear the burden for this loss in competition in the form of higher prices and/or less choice. Despite its allusion to the conventional economic arguments downplaying the anticompetitive effects of vertical integration, News Corp. omits the most important indicators of how it will behave in the MVPD marketplace: (1) its avowed intent to continue raising prices for its cable and broadcast programming, coupled with the fact that the distribution outlet provided by this deal will allow it to exercise its market power over programming unfettered;[12] (2) its past history of

[12] In a News Corp. conference call regarding its third quarter earnings, Peter Chernin, President and COO of News Corp., referred in his opening remarks to "higher affiliate rates." *See* Transcript of News Corp. 3Q Earnings Release Conference Call, May 13, 2003. When asked about this, he acknowledged that News Corp. had secured increased rates with the Time Warner and Newhouse systems and "hope[d to] grow[] our affiliate fees at a slightly larger level." *Id.* Later, in response to a question regarding the fact that Fox's affiliate fees were "under-leveraged in terms of . . . audience size relative to . . . affiliate fees"), Mr. Chernin responded:

> We're constantly having internal discussions and discussions with cable operators about what the best way is for us to maximize the

coordination with the cable industry and incentives to reach agreements with vertically integrated cable operators that will be beneficial to the parties but detrimental to the public; and (3) its current practices in other countries where it has a stranglehold over essential programming as well as a distribution outlet, as it would like to have here. In the relevant local and regional geographic markets for programming distribution, as well as the relevant markets for programming, News Corp. will have the ability and incentive to act anticompetitively, raising rates and reducing choice in the process.

A. News Corp. Will Be Able To Coordinate Its Broadcast Stations' Retransmission Consent Rights With DirecTV To Thwart EchoStar's Competitiveness And Raise Consumers' Rates

One of the most immediate and direct means of leveraging News Corp.'s new DBS asset to its own benefit, at the expense of consumers, will be potentially through the retransmission consent process. The retransmission of local channels is key to subscriber growth and general competitiveness for every MVPD – whether cable or satellite. Therefore, one MVPD provider would gain a significant advantage over its competitors if it were able to bring a complete slate of local network affiliates into a Designated Market Area ("DMA") while keeping another MVPD provider at bay.

In addition, News Corp. has already candidly expressed its view that retransmission consent fees are too low.[13] Of course, News Corp. could not raise these

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> results. . . . I think no one has done better than Fox News, but I also feel that we're accomplishing the same things at the RSN's, at FX, at Speed, at [National Geographic]. We're very cognizant of where our [affiliate fees] are relative to others'. Clearly, our [affiliate fees] are currently below CNN's, which is a joke. We'll maximize that, but we're not going to pre-negotiate on this call. . . . The same thing is true, frankly, at the broadcast networks.

[13] *See id.* (Mr. Chernin stating: "I think that certainly if you look at the broadcast networks, we would expect to get our just desserts for that; but we'll figure out the exact

fees in a truly competitive marketplace because retransmission is exactly as much in the interest of the broadcaster as it is in the interest of the distributor. For that reason, the Copyright Office has correctly found the fair market value of the relevant copyright license to be zero, agreeing in that regard with News Corp.'s own subsidiary ASkyB.[14] The only way to achieve higher prices, therefore, is through the exercise of the market power that News Corp.'s Fox stations possess in the market for network programming. By giving Fox channels a guarantee of distribution – the one thing that Fox lacks now (save through the exercise of no-fee must-carry rights), the deal will enable News Corp. to accomplish precisely this – charge higher retransmission fees or engage in exclusionary practices that will undermine seriously the competitive ability of competing distributors, without fear of failing to secure distribution for any of its programming.

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way to do it, and we'll announce it when the time comes."); and *id.* (in response to a question regarding the cable industry's lobbying efforts to overturn retransmission consent: "I think that we would expect to be appropriately compensated for product which we think is the highest-quality product that's available on any broadcasting, cable, anyplace else, which is great series, great sports, great local services and news and local products.").

[14] *See* Rate Adjustment for the Satellite Carrier Compulsory License, 62 Fed. Reg. 55,742 at 55,753 (1997) (Copyright Office) (Final Rule and Order) (setting a zero royalty rate for all allowed local retransmissions of broadcast signals); *Rate Adjustment for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP-SRA, at 51-52 (Aug. 28, 1997) (Report of the Copyright Arbitration Royalty Panel) ("CARP Report") (in setting a zero rate for retransmissions of superstations, the Panel reasoned "Local retransmission of broadcast stations benefits the broadcast station and the copyright owners of the programming. . . . The copyright owners have already sold the rights to transmit their programming to the entire local market. They have been fully compensated and are not injured by retransmission into the same market. . . . We recognize that copyright owners are free to *attempt* to obtain additional compensation for this separate use of their work. We simply believe they would likely fail in that endeavor."). A zero royalty fee for local retransmissions was the result that News Corp.'s subsidiary ASkyB had sought in that proceeding. *See* CARP Report at 27-28, 51.

By coordinating its owned-and-operated ("O&O") stations' and network affiliates' retransmission consent rights with DirecTV's local broadcast carriage, News Corp. would be able to hamstring EchoStar's competitiveness, thereby enhancing DirecTV's subscriber base, and ultimately securing more favorable distribution terms for its broadcast properties, as well as a greater return on its DirecTV investment.

For the first time ever, local broadcast stations will negotiate retransmission consent agreements with a co-owned MVPD in the same market. Prior to this transaction, broadcasters never negotiated retransmission consent agreements with co-owned cable operators in the same market. For one thing, the cable/broadcast cross-ownership ban prohibited such activities with respect to cable operators. While the D.C. Circuit Court of Appeals has stricken that prohibition,[15] the court did not foreclose its reasoned re-promulgation by the Commission.[16] In any event, the News Corp./Hughes conglomerate would be the first example of a major MVPD negotiating retransmission consent rights with co-owned or affiliated network stations in the same local market.

News Corp. will find it in its interest to either increase retransmission fees or reduce consumer choice by delaying, frustrating, and precluding the retransmission of local signals by competing distributors. It has the incentive to do so. The absence of a big-4 network affiliate in a competing distributor's local broadcast offering can have an immediate, detrimental impact on the distributor's ability both to attract subscribers and

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[15] *See Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *reh'g granted in part*, 293 F.3d 537 (D.C. Cir. 2002).

[16] *See 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Order, 18 FCC Rcd. 3002, 3005 (2003) (per Commissioner Copps) ("It is important to understand that, although the court vacated the rule, it suggested we could re-promulgate it.").

to prevent churn from current subscribers – it can substantially constrain penetration increases and substantially increase churn. EchoStar knows this from its own experience, including with Fox affiliates. In markets where one of the four network affiliates was unavailable to EchoStar, its penetration increase brought about by local-into-local dramatically dropped (by more than two thirds) compared to markets where EchoStar could retransmit the signals of all four affiliates.

With this kind of economic incentive to help its new DirecTV asset, News Corp. will find it in its interest to bring its broadcasting power to bear. First, it will have the incentive to delay retransmission consent agreements for as long as possible, both at the initial carriage stage and for each contract renewal. With 25 Fox network O&O's, this by itself is significant leverage.[17]

Second, it may also exercise pressure on its non-O&O affiliates to do the same. Indeed, the merger will coincide with recent changes in media ownership rules that grant more leverage to broadcast networks. The new 45% nationwide horizontal cap for broadcast television stations will enable Fox to obtain better terms and conditions from its network affiliates, possibly including requirements to offer DirecTV preferential retransmission consent terms compared to other distributors. The independent affiliates appear to know that this kind of network leverage is coming, as demonstrated by the adamant lobbying against the new cap by the National Association of Broadcasters, the Network Affiliated Stations Alliance, and multiple independent broadcast groups. News

[17] News Corp. also holds nine stations affiliated with the United Paramount Network. While not as essential a component of MVPD packages, the UPN affiliate is important enough to impel News Corp. to behave in the same way with respect to these stations, too.

Corp. acknowledges its power over affiliates today.[18] This influence only stands to increase if Fox acquires more stations under the new 45% cap.

In addition, the new three-station-per-market rule may grant News Corp.'s stations additional leverage over distributors competing against DirecTV – News Corp.'s three stations in a given market all could elect retransmission consent, then coordinate among themselves to slow EchoStar's entry into the market with a full complement of local channels.

News Corp. claims that its broadcast network's natural incentive to gain as much distribution as possible would make favoring DirecTV "economically irrational." Application at 64. Not if News Corp. is hoping to secure a penetration growth drop of as much as two thirds from the introduction of local-into-local service by a competitor.

News Corp. has indicated that it would not be advantageous to forego the "eyeballs" of EchoStar's 8.5 million subscribers when News Corp. would own just 34 percent of DirecTV. News Corp. argues that it would incur all of the costs of lost subscriber revenue, but receive only 34 percent of the benefits that accrue to DirecTV. However, the 34 percent may be enough to motivate News Corp. to withhold key programming (such as the Fox broadcast stations) from EchoStar and from cable systems. As shown above, the resulting subscriber losses to EchoStar from not offering Fox would be substantial. Thus, the 34 percent ownership stake may be dangerous to competition, and that danger should at the very least be mitigated with measures that attempt to protect competition from anticompetitive foreclosure from programming.

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[18] Application at 25 ("FOX's standard affiliation agreement has required affiliates to commit to launch or increase local news programming . . . .").

Of course, such measures cannot be expected to be fully effective in the face of anticompetitive incentives, but they can help to cut off the possibility of conduct particularly damaging to competition. Moreover, in the future, News Corp. may purchase more of DirecTV's shares. In that case, News Corp. would have further amplified incentives to withhold Fox from EchoStar in order to diminish competition. Thus, in addition to proscribing anticompetitive foreclosure from programming, the FCC should limit News Corp.'s ownership of DirecTV to no more than 35 percent. That restriction may also help ensure that coordination between News Corp. and DirecTV will remain subject to Section 1 of the Sherman Act.[19]

Moreover, as a result of the proposed transaction, DirecTV will know which local markets EchoStar will serve. Since EchoStar needs to obtain retransmission consent from Fox before it enters a local market, News Corp. will know where EchoStar plans to offer local service next. As a result, DirecTV can take strategic actions to minimize whatever benefits may accrue to EchoStar from entering a local market. If DirecTV can preempt EchoStar's entry, it will be able to obtain any available "first mover" advantage. Since EchoStar will understand that DirecTV knows what local markets it may enter, EchoStar may assume that whatever benefits it may obtain from local broadcast service will be lower (since DirecTV can preempt EchoStar's move). In such a case, economic theory would suggest that EchoStar would introduce local-into-

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[19] *See, e.g.*, *Sonitrol of Fresno, Inc. v. AT&T Co.*, 1986-1 Trade Cas. (CCH) ¶ 67,080 (D.D.C. 1986) (D.C. District Court considered and rejected the contention that AT&T's *de facto* control of entities in which it had 32.6% and 23.9% equity stakes could make conspiracy legally impossible under the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984)).

local service in fewer markets than would otherwise be the case. This would harm competition and thus consumer welfare.[20]

Thus, merely by delaying retransmission consent agreements by its O&Os and affiliates, News Corp. can use its market power in the market for network programming to secure a decisive competitive advantage over EchoStar and cable operators. In each market where News Corp. delays an agreement with a competing distributor, DirecTV will experience far superior subscriber growth over its MVPD rivals. EchoStar currently outpaces DirecTV quarter after quarter in net new subscriber additions. EchoStar fears that a possible dramatic reversal of this trend post-merger would not be due to News Corp.'s management prowess, as News Corp. suggests, but to the anticompetitive tactics described herein.

Even if it were not to resort to exclusionary tactics, News Corp. has an unquestionable incentive to raise retransmission consent fees for the Fox-owned and operated stations. Indeed, it has recently expressed an interest in doing so.[21] By giving Fox an assured distribution outlet, even without need to invoke must-carry rights, this deal will help Fox to realize this plan. In either case, the net result would be higher rates for the consumer.

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[20] The price and quality discipline on cable operators asserted by News Corp., Application at 28 (citing GAO report), only applies where both DirecTV and EchoStar compete vigorously for local-into-local subscribers. News Corp.'s incentive to thwart EchoStar's rollout of comparable local-into-local service will detract from the otherwise disciplining effect that both companies' full presence would bring to bear on the incumbent cable operator.

[21] *See supra* notes 12 and 13.

B. The Existing Good Faith Requirement Governing Retransmission Consent Negotiations Is Insufficient To Protect Against The Abuses News Corp. Will Perpetrate

News Corp. asserts that, even if it were tempted to take advantage of the opportunity to hinder EchoStar's competitiveness through Fox's retransmission consent rights, the Commission's good faith negotiation rules would protect EchoStar against such abuses.[22] Not so. The Commission has never granted a DBS operator relief under the good faith negotiation rules. Broadcasters wishing to exert market power against DBS operators through retransmission consent rights may do so easily. As interpreted by the Commission, the good faith requirement,[23] except in the most blatant situations, applies to the process of negotiations, not the substantive terms of those negotiations, and its violations are hard to prove, leaving broadcasters relatively free to abuse the process.

In general, under the Commission rules, a broadcaster negotiating retransmission consent rights with a satellite carrier may be viewed as meeting the good faith standard by abiding by the most basic of procedural requirements, such as returning phone calls, attending scheduled meetings, and avoiding stone-wall tactics.[24] Only when a broadcaster makes a "sufficiently outrageous" demand will the Commission reach into

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[22] Application at 65.

[23] 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. 76.65(c), 76.7.

[24] *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Good Faith Negotiations and Exclusivity*, 15 FCC Rcd. 5445, 5463 ¶ 43 (2000) (hereinafter, *SHVIA Good Faith Negotiations R&O*) ("a broadcaster may not put forth a single, unilateral proposal and refuse to discuss alternate terms or counter-proposals. 'Take it, or leave it' bargaining is not consistent with an affirmative obligation to negotiate in good faith").

the substantive terms of a retransmission consent negotiation.[25] Although the Commission has stated that anticompetitive abuses of market power would be sufficiently outrageous to violate the good faith standard,[26] it has never fully expanded on this notion by indicating exactly what types of behavior or demands would be sufficiently anticompetitive to run afoul of the good faith standard.

These rules would give any company with a distribution and a broadcast programming arm a clear roadmap for how to frustrate another distributor's competitiveness while appearing to act in good faith. DirecTV itself correctly pointed out in the good faith rulemaking proceeding that the procedurally-oriented approach proposed by the Commission is inadequate, and it suggested a set of detailed, substantive benchmarks that broadcasters must meet when negotiating retransmission consent

[25] *Id.* at 5458, ¶ 32 ("[w]hile the Commission will not ordinarily address the substance of proposed terms and conditions or the terms of actual retransmission consent agreements, we will entertain complaints under the totality of the circumstances test alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach a broadcaster's good faith negotiation obligation."). *See also EchoStar v. Young Broadcasting*, 16 FCC Rcd. 15070, 15082 (Cable Servs. Bur. 2001)(the "totality of circumstances" test is "to be used to entertain complaints alleging that specific retransmission consent proposals are sufficiently outrageous, or where evidence has been presented that differences among MVPD agreements are not based on competitive marketplace considerations.").

[26] *SHVIA Good Faith Negotiations R&O*, 15 FCC Rcd. at 5462-63, ¶¶ 39-40. As the Commission has stated: "[I]t is implicit in Section 325(b)(3)(C) that any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement. Considerations that are designed to frustrate the functioning of a competitive market are not 'competitive marketplace considerations.' Conduct that is violative of national policies favoring competition – that is, for example, intended to gain or sustain a monopoly, an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market – is not within the competitive marketplace considerations standard included in the statute." *Id.* at 5470, ¶ 58.

agreements.[27] These benchmarks included, among others, a prohibition on "discrimination in the price, terms or conditions of retransmission consent afforded an MVPD relative to any other MVPD, unless such discrimination is related to 'competitive market conditions' as defined by the Commission."[28] The Commission rejected DirecTV's proposal and essentially adopted its proposed approach.

Even assuming the current rules have been a sufficient bulwark against anticompetitive acts to date, the new and novel circumstances presented by the News Corp./Hughes conglomerate, and the self-evident economic incentive to muscle other distributors into an uncompetitive position and raise its fees for retransmission, demand a much more vigilant regime.[29] The substantive benchmarks for gauging good faith proposed by DirecTV in the good faith rulemaking are an appropriate starting point for such a regime.

C. News Corp. Will Reduce Consumer Choice Among Competing Satellite Platforms And Raise Consumer Prices By Withholding, Or Charging Unreasonable Fees For Essential Content And Functionality

News Corp. offers numerous assurances that its proposed merger poses no threat of exclusionary or other anticompetitive behavior because the transaction involves the vertical integration of two firms, neither of which has sufficient market power in its respective programming or distribution market to leverage against competing MVPDs. EchoStar disagrees. In addition to the broadcast affiliates described above, News Corp. will place under one roof a combination of assets that, at the very least, will *allow* for

[27] *See generally* Reply Comments of DirecTV, Inc. CS Dkt. No. 99-363 (Jan. 21, 2000); Comments of DirecTV, Inc., CS Dkt. No. 99-363 (Jan. 12, 2000).

[28] *SHVIA Good Faith Negotiations R&O*, 15 FCC Rcd. at 5460, ¶ 36.

[29] *See infra* Section VIII (proposing conditions).

anticompetitive behavior. News Corp.'s past behavior indicates that it will take advantage of that opportunity.

Essential programming. News Corp. does have market power in key segments of the programming market, and the U.K. regulatory authorities have already found this to be the case in slightly different but certainly informative circumstances (*see* below). It controls certain "must have" programming that any MVPD needs if it is to be an effective competitor: regional sports networks (Fox Sports Net); the most popular non-broadcast news network, Fox News; NFL football and other sporting events on the Fox broadcast network; some of the highest rated entertainment programming on broadcast television (also on Fox network); Fox movies, and the non-news Fox Cable Networks such as FX. In addition, Liberty, a likely partner in this transaction, controls yet other key programming assets, such as Discovery and Encore. EchoStar understands what drives consumers to choose EchoStar's service: the threshold requirement is product substitutable with cable and DirecTV, which allows the consumer to then choose the lowest priced, highest quality service. Without the key programming, EchoStar cannot compete. News Corp. has essentially acknowledged the must-have nature of its own programming assets,[30] including key sports rights, such as NFL games.[31]

News Corp. will have the ability to demand high enough fees from EchoStar for its programming that it either will successfully prevent EchoStar from acquiring such programming, thereby driving subscribers to DirecTV or Fox broadcasting, or will force EchoStar to raise subscription fees in order to pay for the

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[30] *See, e.g.*, Application at 25.

[31] *Id.* at 25-26.

programming. News Corp. could simply have DirecTV accept the high fee and would be willing to absorb that high fee because the payments would remain within the News Corp. organization. Indeed, such a strategy would be in the organization's economic interest: with a majority or 100% stake in much of its programming and only a minority stake in Hughes, News Corp. is better off with every cent that leaves the pocket of Hughes and ends up in the pocket of its programming arm – *i.e.*, with higher programming prices. In either event, consumers ultimately pay a higher price for the products they receive today.

To illustrate the plausibility of these scenarios, one need only look at News Corp.'s regional sports networks. The government has recognized the importance of sports to MVPDs. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005, 6014, ¶ 15 (2001) ("MVPD Seventh Annual Report") ("Sports programming warrants special attention because of its widespread appeal and strategic significance for MVPDs"; availability of sports programming could have "substantial impact on the ability of alternative MVPDs to compete in the video marketplace"); *see also id.* at 6082, ¶ 183 (referring to RCN survey results showing that "40 and 58 percent of cable subscribers would be less likely to subscribe to cable service if it lacked local sports."). The program access condition to which News Corp. proposes to submit would not curb its anticompetitive conduct in this area for a simple reason: News Corp. can charge uniformly high rates for that programming, thereby avoiding the discrimination prohibited by the program access rules. As for DirecTV's exclusive sports programming, the Applicants do *not* propose to make it subject to the rules. Thus, News Corp. would have the power to cripple competitors by refusing to provide sports programming.

Moreover, News Corp. would certainly have the incentive to coordinate with DirecTV about the rates and other terms sought from other distributors for its programming. To check such behavior, it is essential to keep News Corp. from owning a majority stake in Hughes, meaning that coordination between the two companies would likely still be subject to Section 1 of the Sherman Act.

Proprietary technology. News Corp.'s control of key technology will enable it to raise competitors' prices and diminish consumer choice by leveraging its non-programming assets. News Corp. holds a 42.9% interest in Gemstar, which in turn has asserted that it holds every applicable patent governing the use of electronic program guides ("EPGs"). For example, Gemstar claims that it owns all rights to the interactive grid guide, and that EchoStar or any other MVPD must receive a license from Gemstar before providing such functionality. EchoStar has challenged this practice in various venues with some success, but the ultimate outcome of these proceedings remains unknown. If News Corp.'s Gemstar prevails, News Corp. will have the ability to extract enormous concessions from EchoStar and every other MVPD, all to the benefit of News Corp.'s satellite distribution arm, DirecTV (which undoubtedly will be allowed to use the Gemstar technology).

News Corp. argues that under the Commission's reasoning in the AT&T/Media One merger, its equity position in Gemstar is not problematic because DirecTV's MVPD market share is too small.[32] Stated another way, News Corp. argues

[32] *Id.* at 65-66.

that DirecTV cannot harm unaffiliated programmers by using its EPG to drive viewer traffic to DirecTV's affiliated programming.

This misses the point. Gemstar, if successful in its patent litigation claims, would exert monopoly power over all EPG providers, including EchoStar. News Corp. could use that power to the detriment of all distributors competing against DirecTV. Also, endowed with an assured distribution outlet in DirecTV, News Corp. would now be unfettered to extract unreasonable fees or other terms and conditions relating to its programming assets by leveraging its market power in the EPG realm. News Corp. could demand, for example, that EchoStar carry the latest Fox network, or lose the ability to implement an EPG.

Worldwide distribution. News Corp.'s ability to offer worldwide distribution to content providers will lead to *de facto* exclusives for DirecTV. Given News Corp.'s dominant satellite presence in Great Britain, Asia, and Latin America, it will be able to out-bid EchoStar for sporting events such as the World Cup soccer games or certain Olympic events. News Corp. will be able to offer international distribution to the purveyors of such content, something EchoStar and many cable operators cannot offer. This might appear to be perfectly valid, market-based competition, but in reality will be the product of an international conglomerate leveraging market power outside the U.S. to create more market power within the U.S. News Corp. has apparently followed a systematic practice of locking up sports and other exclusives for its affiliate BSkyB in the U.K., undermining News Corp.'s intimation that it will not use its new power acquired through this transaction to gain exclusivity or other undue advantages over competing distributors.

These are powerful tools and incentives to engage in anticompetitive conduct. Yet even if one accepts News Corp.'s conventional argument that a content provider does not act in its own best economic interest by denying distribution on any MVPD, and ignores News Corp.'s incentive to increase programming prices, the historical behavior of News Corp. itself provides additional cause for concern.

D. News Corp. Has Been Found to Possess Dominance Over Programming in the United Kingdom

The Applicants' assertion that News Corp. lacks market power over programming is not only unsupported in the Application, this claim is also flatly contradicted by the findings of the expert competition authority in the United Kingdom in different but certainly analogous circumstances. By the same token, predictions that a vertically integrated News Corp. will engage in anticompetitive conduct to squeeze its closest competitors out of the market are more than idle speculation. Indeed, the Commission need only look to the activities of News Corp.'s vertically integrated British distribution affiliate, BSkyB, for a preview of what can be expected in the U.S. Over the last several years, BSkyB's conduct has prompted numerous complaints from its MVPD competitors and attracted persistent attention from U.K. competition regulators.

In 1996, following complaints from U.K. cable operators regarding BSkyB's competitive conduct, the U.K. Office of Fair Trading ("OFT") began an investigation of the wholesale market for pay television in the U.K. and BSkyB's activities. The OFT found that BSkyB possessed a dominant position in relevant programming markets:

> The [OFT] Director concluded that premium programming rights gave BSkyB a powerful position in the wholesale Pay TV market and that BSkyB's acquisition of premium

> programming had created a barrier to entry into the market. The Director also concluded that BSkyB was dominant in the supply of sports channels in the UK Pay TV market.

OFT BSkyB Decision at 1. As a consequence of OFT's investigation, BSkyB agreed to certain "Undertakings" regarding its conduct. For example, BSkyB agreed to supply certain channels on a separate basis, and to publish a rate card showing its wholesale prices for cable companies with a discount structure *approved in advance by OFT. See id.* BSkyB also agreed to provide to OFT separate accounting records for its wholesale and retail businesses (dubbed "BroadCo" and "Disco" respectively), and agreed to show in its accounting records a "notional charge" for the supply of its channels to Disco "to allow the [OFT] to determine if Disco made a reasonable profit when 'purchasing' channels on the terms of the ratecard." *Id.*

The 1996 agreement between the OFT and BSkyB provided for subsequent review of the Undertakings. *Id.* at 2. During a review that began in 2000, the OFT determined that it had "reasonable grounds" to suspect that BSkyB had violated the U.K. Competition Act 1998. Accordingly, the OFT launched an investigation into BSkyB conduct both within and outside the scope of the 1996 Undertakings (the "Competition Act investigation"). *See id.* at 3. In the Competition Act investigation, the OFT considered whether BSkyB had violated the Competition Act prohibition of conduct amounting to "the abuse of a dominant position." Competition Act 1998, c. 41, § 18 (Eng.). Based upon concerns raised by BSkyB competitors, the OFT focused on "the terms on which BSkyB supplies its premium sports and film channels" to other distributors. *OFT BSkyB Decision* at 4.

After completing its initial investigation, the OFT issued a "Rule 14 Notice"[33] proposing to conclude that BSkyB had a dominant position in relevant markets, and that BSkyB had abused its dominant position by exerting an anticompetitive "margin squeeze," by adopting "mixed bundling" pricing that effectively required distributors to purchase multiple BSkyB channels, and by offering an anticompetitive volume discount structure. *See id.* at 4. After further comments from interested parties, the OFT issued a final decision affirming its conclusion of BT's market dominance. *Id.* at 81. However, the OFT also concluded that there was insufficient evidence to support a finding of abuse of a dominant position by BSkyB through a margin squeeze, mixed bundling and discount schemes. *See id.* at 133-35, 151, 165.

The OFT observed that the supply chain for pay TV channels in the U.K. is made up of two links – (1) suppliers of programming, and (2) distributors who deliver the programming. *Id.* at 6. With respect to programming, the OFT concluded that the relevant market was for "content unique to premium sports pay TV channels (currently identified as live FAPL football), and the supply of packages containing premium film channels." *Id.* at 9-10. Distribution channels included Direct-to-Home satellite (essentially, BSkyB); cable, with Telewest and NTL being the dominant cable operators; and digital terrestrial television via ITV Digital (since insolvent). *Id.* at 5.

The evidence of BSkyB's dominance in the relevant programming markets was extensive and conclusive. BSkyB is the exclusive licensee for live FAPL football (*i.e.*, the top division of English soccer), essentially giving it 100% of the market,

[33] The OFT rules require such a notice if OFT "proposes to make a decision that the Chapter II prohibition [regarding abuse of a dominant position] … has been infringed …." Competition Act 1998 (Director's rules) Order 2000, SI 2000/293 § 14.

a position which enabled the OFT to "presume dominance" of BSkyB in this market. *See id.* at 67-68. As for premium film channels, the OFT found that BSkyB had a portfolio of contracts granting exclusive rights to broadcast movies from the seven major Hollywood film studios (Sony/Columbia, Disney, Paramount, MGM, Universal, Warner Brothers, and News Corp. owned-Twentieth Century Fox), which supply more than 70% of the films sold in the European Economic Area. *Id.* at 73.[34] The OFT accordingly concluded that "BSkyB's exclusive contracts ... exclude any new entrant from this content and prevent it from acquiring sufficient rights to compile a premium film channel." *Id.* The OFT also found that BSkyB's vertical integration and large subscriber base (including 54% of all U.K. pay TV subscribers) acted as a barrier to entry in the programming market – "any premium channel provider would need access to BSkyB's subscriber base more than BSkyB (given its current portfolio) would need such channel." *Id.* at 77.

The question of whether BSkyB abused this dominant position was a very close call for OFT. OFT's decision not to find such abuse, after its contrary proposal in its Rule 14 Notice, provoked widespread surprise in the U.K., *see, e.g.,* Dan Milmo, *OFT Lets Sky Off The Hook*, THE GUARDIAN (London), Dec. 17, 2002; and OFT itself stated that the decision on margin squeeze was "borderline." Summary, U.K. Office of Fair Trading, *BSkyB: The outcome of the OFT's Competition Act investigation*, at 6-7 (Dec. 2000). With respect to margin squeeze, notwithstanding the imputation of a conservative rate of return, *see OFT BSkyB Decision* at 104, BSkyB's programming pricing led to unprofitability of its own distribution operations for most of the period of investigation,

[34] BSkyB also has agreements with several smaller U.S. film studios such as Dreamworks, New Line and Polygram, and with several U.K. film distributors. *Id.* at 73.

id. at 133. Thus, while BSkyB was ultimately cleared in the OFT's investigation, it was only after the OFT had voiced serious, repeated concerns about BSkyB's practices. Indeed, the OFT's final decision declared that BSkyB was a "vigorous competitor eager to acquire market share at distribution level, and so may be expected to have strong incentives to increase share at the expense of rivals, including anticompetitive incentives." *Id.* at 94. Furthermore, the effect of BSkyB's conduct on its pay TV competitors has been striking – ITV Digital has gone out of business, NTL has been reorganized in bankruptcy, and Telewest has been forced to restructure its debts and turn over control to bondholders. *See, e.g., Merger of NTL and Telewest Postponed,* THE GUARDIAN (London), Jan. 28, 2003. Meanwhile, BSkyB is thriving. *See* BSkyB 2002 Annual Report, at 7 (from 2001 to 2002, BSkyB revenues grew from £2.306 billion to £2.776 billion, and operating profits grew from £160 million to £192 million).[35]

News Corp.'s incentives in the U.S. are no different. In light of its recognized anticompetitive incentives, the conduct of its vertically integrated arm in the U.K., and the fact that U.K. regulators have determined that News Corp. holds a dominant position in key U.K. programming markets, the Commission should not accept News Corp.'s unsupported assertion that it lacks market power in the relevant U.S. programming markets such as regional sports programming. The Commission should conduct its own investigation into the issue.

[35] The OFT also appears to have found that BSkyB's 1996 Undertakings were superseded by a new competition law that became effective in 2000. *See* OFT BSkyB Decision at 2, 166 and Annex 1.

E. News Corp. Will Have an Incentive to Coordinate with Vertically Integrated Cable MSOs to the Detriment of Consumers

News Corp. essentially claims that the merged entity will have neither the programming or distribution market power to withhold key content from competing MVPDs, nor will it have the economic incentive to do so.[36] News Corp.'s argument generally can be summarized as follows: withholding programming from competing MVPDs would not be economically justifiable because the programming divisions would lose more revenue than the distribution division would gain. In making this argument, News Corp. cites to precedent involving horizontal mergers such as AT&T/Media One. This is a spurious comparison. First, as stated above, EchoStar believes that News Corp. does have market power in a number of relevant segments of the programming markets, including regional sports and network programming. While News Corp. postulates a single product market encompassing all programming, it proffers no evidence or economic testimony in support of that view. Second, unlike the large cable MSOs, whose profit centers are in distribution and whose programming assets are smaller by comparison, News Corp. is primarily a programmer. Its incentives are always toward the improvement of its programming profitability. Third, News Corp.'s bias in favor of profits on the programming side is further compounded by the fact that News Corp. would have only a minority interest in its U.S. distribution arm and a majority stake or 100% in much of its programming.

EchoStar knows something about this phenomenon. EchoStar has experienced the consequences of News Corp. acquiescing to the cable industry's demand to terminate the EchoStar/News Corp. merger. The U.S. Department of Justice is

[36] *See, e.g.*, Application at 51-52.

familiar with this dynamic, as demonstrated by its action to block the Primestar transaction. As seen below, the proposed transaction will give News Corp. new incentives to coordinate with other vertically integrated distributors – the large cable MSOs – to the detriment of independent distributors and consumers.

1. The DOJ Blocked the Primestar Deal Due to News Corp.'s Apparent Collusion with Cable

Like the FCC, the DOJ recognizes that DBS "has emerged as the first real challenge to cable's dominance and the best hope for consumers who seek alternatives to their local cable company." Complaint, *United States v. Primestar, Inc. et al.,* No. 1:98CV01193 (D.D.C.) (filed May 12, 1998), ¶ 5 ("DOJ Primestar Complaint"). Not surprisingly, cable firms have responded to this threat aggressively. In 1990, several cable firms formed Primestar Partners, intending to use it as a means to collectively prevent DBS access to crucial programming. The DOJ and 45 states brought suit and obtained consent decrees prohibiting exclusive programming deals.

In 1996-97, News Corp.'s announcement that it planned to enter the DBS business in the United States and its subsequent deal to merge its DBS business with EchoStar pushed DBS's competitive threat to the fore, and the cable firms again responded. News Corp.'s programming needed cable distribution, and the cable firms convinced News Corp. to pull out of the EchoStar deal in favor of a transaction with Primestar. According to the Department of Justice, when it was clear that News Corp. would not compete, the cable companies dropped their resistance to carrying Fox programming. DOJ Primestar Complaint ¶¶ 48-61. The DOJ again brought suit, alleging collusion between the cable firms and News Corp. The Primestar/News Corp. transaction was abandoned in the face of this litigation.

2. News Corp.'s Proposed Transaction Would Provide New Incentives for Coordination with Big Cable

The proposed transaction gives News Corp. a new opportunity to engage in practices akin to those condemned by the Department of Justice only a few years ago. It will make complementary the interests of News Corp. and the large vertically integrated cable operators and will allow mutually beneficial, but anticompetitive, deals between those companies. Specifically, there is only upside and no cost in an agreement between News Corp. and a vertically integrated MSO to raise the rates of the News Corp. programming carried by the cable company's system *and* the cable company's programming carried by DirecTV. In such an agreement, the higher programming fees would cancel each other out for the two companies; independent distributors and consumers would bear the burden in the form of higher programming prices and subscription fees.

The government's criteria for determining the likelihood of collusion demonstrate the probability of competitive harm. The market is highly concentrated and difficult to enter; the same firms have colluded before; the terms of collusion will be easy to reach; and the agreement is simple to monitor and enforce. *See* Horizontal Merger Guidelines, issued by the U.S. Department of Justice & Federal Trade Commission, Apr. 2, 1992, revised Apr. 6, 1997, § 2.1 ("DOJ/FTC Merger Guidelines").

Concentrated Markets with Comparatively Substantial Barriers to Entry. In the average geographic region, the incumbent cable provider holds roughly 80% of the MVPD market and DirecTV controls about 10%. *See* MVPD Seventh Annual Report, 16 FCC Rcd. at 6076-77 ¶¶ 168-169 & Appendix C, Table C-1. The HHI would be over 6000. Of course, substantial barriers prevent easy entry into the MVPD market compared to other industries. *See id.* at 6065 ¶ 134.

Accordingly, collusion or coordination is much more likely. *See FTC v. H.J. Heinz Co.,* 246 F.3d 708, 724 (D.C. Cir. 2001) ("The combination of a concentrated market and barriers to entry is a recipe for price coordination."); *see also, e.g.,* DOJ Antitrust Division, *United States v. Earthgrains Co.,* Proposed Final Judgment and Competitive Impact Statement, 65 Fed. Reg. 21018, 21025 (2000) (requiring divestiture of certain assets after merger where "Earthgrains and only one or two other competitors would control more than 90 percent of annual sales" in certain markets, and therefore merger "increased likelihood of coordinated pricing"). While by itself this criterion is not enough to raise undue concern about the potential for collusion, it is compounded dramatically by the three other criteria discussed below.

History of Collusion. As indicated above, in its investigation of the Primestar deal, the Department of Justice uncovered evidence that key figures at News Corp. and cable operators had met and discussed ways to avoid competition. *See* DOJ Primestar Complaint ¶¶ 54-55. John Malone and Leo Hindery of TCI met with Rupert Murdoch of News Corp. and concluded "with both organizations saying, 'Let's talk. Let's not whale on each other.'" *Id.* ¶ 524. Mr. Malone told Mr. Murdoch that his plan of hard competition was "lunacy" and Mr. Murdoch asked for "help" to "find something else to do," "Plan B." *Id.* ¶ 55. While Mr. Hindery reportedly attempted to play the role of "peacemaker" to "convince everybody that there was more profit in peace than war," *id.* ¶ 56 (quoting Mr. Malone), Mr. Malone met with officials from Time Warner and other cable firms to explore "whether or not [they] could 'make peace'" with News Corp. *Id.*

Liberty and its Chief Executive Officer, Mr. Malone, are centrally connected with all the players in the News Corp.-DirecTV-cable triangle. As a result of the recent Liberty-News Corp. transaction involving Gemstar-TV Guide, Liberty is a major News Corp. shareholder, second only to Mr. Murdoch and his family. Mr. Malone and Liberty also hold substantial stakes in AOL-Time Warner. Further, Liberty and its holdings control significant programming, and thus will be in near continuous contact with all the major cable firms. Clearly, Mr. Malone's central and overlapping positions with News Corp./DirecTV and its cable competition would place him in as good or even a better position to fulfill the function of "peacemaker" that Liberty has allegedly played before in the event that News Corp. acquires DirecTV. Moreover, as the Applicants acknowledge, Liberty plans to participate in the DirecTV-News Corp. deal as a "strategic partner." To date, News Corp. has not produced the relevant agreement and has avoided a full discussion of the *quid pro quo* received by Liberty for its role in financing the deal.[37] In any event, Liberty's participation further heightens the concerns with the potential of anticompetitive collusion.

As the government and the courts recognize, past collusion in an industry and the involvement of the same firms and same individuals substantially raise the risk of repeated collusion. *See* DOJ/FTC Merger Guidelines § 2.1; *see also Hospital Corp. v*

[37] *See* Letter from William H. Wiltshire, Counsel for News Corp., to Marlene H. Dortch, FCC, MB 03-124 (filed May 15, 2003) (containing Declaration of Lawrence A. Jacobs, Executive VP and Deputy General Counsel of News Corp.). The Declaration of Mr. Jacobs generally does not go beyond the scant information about the deal that News Corp. had provided to the Securities and Exchange Commission.

FTC, 807 F.2d 1381, 1388 (7th Cir. 1986) (Posner, J.) ("But a market in which competitors are unusually disposed to cooperate is a market prone to collusion. The history of successful cooperation establishes a precondition to effective collusion – mutual trust and forbearance . . . .").

Easy Detection of Deviation. This would simply not be an issue here – there would be no need for it because of the win-win arrangement of two vertically integrated distributors agreeing to raise all of their programming prices. In addition, the higher prices could be embedded in superficially legitimate program carriage agreements, so there would be no need to police deviations from some illicit backroom deal.

Punishment for Deviation. Again, deviations from collusion can be policed automatically by the kind of mutually beneficial agreement that the proposed deal would make possible. If one partner wanted to charge an independent distributor lower programming rates, for example, it might no longer be able to finance the higher programming rates charged by the other partner. In addition, the Commission's program access rules would work perversely to ensure *uniformly high* programming prices and effectively police deviations.

Plainly, given the structure of the market and the history of the players, the risk of collusion alone would justify government opposition to a DirecTV/News Corp. merger. But even without explicit collusion, News Corp. and cable MSOs have incentives to avoid hard competition with one another, especially on price. As carriers of each others' programming, the competitors would share in each others' revenues, and so would avoid vigorous price competition, which would effectively decrease the size of the total programming revenue pie. Moreover, as described above, News Corp./Hughes