cable operators, the cable companies dropped their resistance to carrying certain Fox programming networks. As a result, DOJ brought suit against Primestar and News Corp. alleging collusion. The Primestar/News Corp. transaction was abandoned in the face of this litigation.[768]

278. EchoStar further argues that easy detection of deviation from the collusive arrangement makes it easier to maintain collusive arrangements. According to EchoStar, there would be no need to detect deviations because of the win-win arrangement whereby the two vertically integrated distributors would agree to raise all of their programming prices. In addition, EchoStar argues that 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.[769] Regarding punishment for deviation, EchoStar states that deviations from collusion can be policed automatically by the kind of mutually beneficial agreement that the proposed deal would make possible -- for example, if one partner wanted to charge an independent distributor lower programming rates, it might no longer be able to finance the higher programming rates charged by the other partner. In addition, EchoStar argues that our program access rules would work perversely to ensure uniformly high programming prices and effectively police deviations.[770]

279. EchoStar argues that even without explicit collusion, News Corp. and cable MSOs have incentives to avoid hard competition with one another, especially on price, because, as carriers of each others' programming, the interested companies would share in each others' revenues, and so would avoid vigorous price competition at the MVPD level, which would effectively decrease the size of the total programming revenue pie.[771] In addition, EchoStar believes that News Corp./Hughes faces tough decisions about how aggressively to court cable consumers, and a revenue stream from cable programming alters that calculus by allowing News Corp. to earn some revenue from consumers remaining with cable. Thus, according to EchoStar, given the significant costs of luring customers from cable to satellite, it is predictable that programming revenue would make rational less aggressive competitive efforts than would otherwise be expected. EchoStar also notes that because News Corp. owns the Fox broadcast network, and to the extent that high cable and DBS prices push consumers to avoid pay programming altogether, News Corp. could recover some of its losses by increasing Fox network advertising revenues.[772]

280. EchoStar provides three scenarios to illustrate how collusion between News Corp. and the cable industry would undermine competition, raise rates and reduce choice for consumers. Under the "Programming Quid Pro Quo" scenario, in exchange for carrying a cable company's affiliated programming network at an inflated rate, News Corp. could demand that the cable company reciprocate with an inflated rate for a Fox network, to the detriment of non-vertically integrated MVPDs and consumers. Due to the non-discrimination program access provisions, both programmers would charge the same inflated rate to all MVPDs. Non-integrated MVPDs would have no programming assets with

[768] EchoStar Petition at 32 (citing *See United States v. Primestar, Inc. et al.*, No. 1:98CV01193 (D.D.C.) (filed May 12, 1998) ("DOJ Primestar Complaint"), available at http://www.usdoj.gov/atr/cases/f1700/1757.pdf).

[769] EchoStar Petition at 36.

[770] *Id.* at 36.

[771] *Id.* at 36.

[772] *Id.* at 37.

which to barter in this fashion, and therefore would simply have to absorb the higher rate without any corresponding benefit.[773] In its second scenario, EchoStar argues that rival MVPDs and consumers may be harmed by News Corp. and the cable industry extending their mutually beneficial arrangements to the set-top box market, with agreements to share standards, software, patents, and other assets to the exclusion of other MVPDs.[774] Finally, EchoStar argues that News Corp. will likely partner with cable operators for an alternative means of providing broadband services, rather than using DSL or facilities-based satellite broadband.[775]

281. Applicants deny the existence and the likelihood of a "cable cabal" made up of vertically integrated cable operators that would coordinate their behavior with DirecTV to compete less vigorously with one another. The Applicants argue that antitrust theory supports the notion that collusion of this sort is very difficult to establish and maintain, citing, for example, problems with the prevention of individual cartel members cheating on the cartel.[776] Applicants argue that EchoStar fails to establish how this problem will be avoided and disputes EchoStar's claim that News Corp.'s incentives in the proposed transaction are the same as those in the PrimeStar transaction. The Applicants contend that the PrimeStar transaction involved News Corp. investing in an organization made up of cable operators, while the present transaction involves News Corp. investing in a DBS operator that has dedicated itself to competing with cable operators.[777] Finally, Applicants argue that consistent comments from cable operators opposing this proposed transaction and reflecting a recognition of a strengthened DBS competitor further negate EchoStar's theory that the transaction will result in collusion and the reduction of price competition between cable and DBS operators.[778]

282. *Discussion.* We find EchoStar's theories of cable collusion unpersuasive. The record in this proceeding indicates that the MVPD market has been and will remain fiercely competitive between cable operators and DBS providers. EchoStar's claims regarding potential collusion between cable MSOs and the Applicants post-transaction are highly speculative.

283. Moreover, several fundamental bases supporting EchoStar's collusion theory are flawed. At the outset, EchoStar's arguments concerning market concentration are misdirected. EchoStar estimates market concentration in the MVPD market based on the national market shares of the three major MVPD platforms (i.e., the cable MSOs and the two incumbent full-CONUS DBS providers) and assumes that vertically integrated cable MSOs will collude with the Applicants to raise programming prices. In assessing the likelihood of collusion on the prices of video programming, however, it is the characteristics of the programming market and not the MVPD market that are relevant. Even a cursory examination of the programming market reveals, however, that there are numerous owners of cable networks and that many of the programming owners are not vertically integrated with MVPDs.[779] This

[773] *Id.* at 38.

[774] *Id.* at 38-39.

[775] *Id.* at 39.

[776] Applicants' Reply at 73-74.

[777] *Id.* at 74.

[778] *Id.*

[779] *2002 Video Competition Report*, 17 FCC Rcd at 26980-88, Tables C-1 and C-2.

suggests that, if the News Corp. and vertically integrated cable MSOs collude to raise the price of their programming, this attempted price increase alone would prove unprofitable.

284. We also disagree with several of EchoStar's factual claims regarding the history of collusion in the MVPD industry. EchoStar does not accurately describe the first PrimeStar lawsuit brought by DOJ and 45 states.[780] News Corp., in fact, was not involved with that lawsuit, which involved integrated cable programmers that created a joint venture, PrimeStar, used to coordinate their activities. In the transaction before us, there is no joint venture to tie together the disparate economic interests of the parties. We note that in the case of PrimeStar, the firms had to form a company to create a mechanism by which they could commit to sell to only one DBS competitor, which was jointly owned. That mechanism included a joint economic interest and an enforcement provision to avoid the cheating problem. The proposed transaction creates no such mechanism.

285. With respect to the second PrimeStar lawsuit, DOJ filed suit to block a horizontal merger in which MVPDs in the same relevant market as DBS, and also owning a DBS firm, PrimeStar, agreed to acquire a potential DBS competitor that owned rights to DBS orbital slots and in which News Corp. owned an interest.[781] As in the previous case, the solution to reduce competition was to tie together the economic interests of the firms through a formal joint venture. While neither case involved explicit collusion, both did involve creating formal organizations to force the firms to cooperate to achieve specific goals. The proposed transaction would create no such formal linkage of DBS and cable operators. The record is devoid of evidence of a history in the MVPD industry of the sort of loosely organized collusive relationships involving News Corp. and vertically integrated cable operators alleged by EchoStar.

286. EchoStar is also incorrect in its claim that there is no need to detect and punish deviation from a collusive arrangement. There are strong incentives in the video programming industry to deviate from collusive agreements because the marginal cost of acquiring additional viewers is near zero. Because the costs of programming production remain the same regardless of the number of viewers, each additional viewer and resulting dollar is almost entirely profit for a video programmer, thereby creating strong incentives to lower price and increase the reach of the programming, particularly in the face of a competitor that has naively agreed to maintain high prices. In addition to the existence of strong incentives to cheat on collusive agreements, it is difficult to detect cheating in collusive agreements in video programming markets. **[REDACTED]**.[782] **[REDACTED]**.

287. EchoStar's contention that following the transaction, the Applicants will have a reduced incentive to compete with vertically integrated cable operators on the basis of the revenue stream they obtain from providing video programming runs counter to the allegations of many commenters and our analysis of the potential vertical harms likely to result from this transaction. As we discussed above with respect to temporary foreclosure of RSN and local broadcast television signals, the profit margin DirecTV earns from each additional subscriber is substantial. This creates a strong incentive to drive customers to DirecTV, even when it requires sacrificing profits from video programming sales. In the

[780] *See United States v. Primestar Partners, L.P.*, 1994 WL 196800 (S.D.N.Y.); *State of New York v. Primestar Partners, L.P.*, 1993 WL 720677 (S.D.N.Y.).

[781] *See* DOJ Primestar Complaint.

[782] **[REDACTED]**.

case of regional sports networks and retransmission consent we found that in addition to having an incentive, the Applicants possess the ability to behave in this manner.

288. We examine EchoStar's three collusion scenarios in turn. EchoStar's proposed scenario regarding collusion between vertically integrated cable operators and the Applicants in the video programming market is at best a highly unlikely scenario unsupported by any facts in the record. EchoStar's hypothesis that it "and other non-vertically integrated MVPDs would have no programming assets with which to barter in this fashion, and therefore would simply have to absorb the higher rate without any corresponding benefit," ascribes a degree of market power and lack of substitutes to a broad range of video programming products which in general does not exits.[783] EchoStar's scenario of collusion in the set-top box market is curious. EchoStar claims that integrated MVPDs will "share standards, software, patents, and other assets,"[784] yet provides no evidence that any other integrated MVPD owns any assets used in set-top boxes.[785] Finally, EchoStar's allegation that following the transaction DirecTV will abandon all forms of broadband access in favor of partnerships with providers of cable broadband services is wholly unsupported and defies the evidence contained in several recently announced partnerships with major providers of DSL broadband access.[786]

D. Exclusive Arrangements with Unaffiliated Programmers

289. *Positions of the Parties.* Some commenters are concerned that the combination will allow DirecTV to secure exclusive contracts for desirable programming that is *not* affiliated with News Corp. to the detriment of competing MVPDs and consumers.[787] These commenters seek to end DirecTV's ability to enter into exclusive contracts with unaffiliated programmers, such as the NFL.[788] EchoStar contends that News Corp.'s ability to offer worldwide distribution to content providers will result in exclusive arrangements for DirecTV.[789] According to EchoStar, News Corp.'s dominant presence in Great Britain, Asia, and Latin America will enable it to out-bid EchoStar for sporting events such as World Cup Soccer or the Olympic Games.[790] EchoStar contends that News Corp.'s ability to

[783] *2002 Video Competition Report*, 17 FCC Rcd at 26980-88, Tables C-1 and C-2.

[784] EchoStar Petition at 38.

[785] The leading set-top box manufacturers are Motorola, Scientific-Atlanta, Pioneer, Sony, and Pace. *Kagan Media Trends 2003* at 110-113.

[786] Vince Vittore, *Bellsouth Samples Satellite with DirecTV Resale Setup*, TELEPHONY, Sept. 8, 2003 (reporting on BellSouth's agreement to resell DirecTV service); Kris Hudson, *Qwest Might Tell You How to Pay Less*, DENVER POST, Nov. 3, 2003 (reporting that "Qwest now offers DirecTV's satellite service in Arizona and Washington state."); SATELLITE WEEK, November 24, 2003 (reporting that "a DirecTV spokesman confirmed reports that a strategic marketing agreement with Verizon was in the works but declined to give details. Reports have said Verizon would offer DirecTV service as part of its product mix. 'Both companies expect to bring their products to market after the first of the year. We'll announce details at that time,' the DirecTV spokesman said.").

[787] EchoStar Petition at 25-26, 64; ACA Comments at 21-23; ACA Reply Comments at 7-8, CFA Reply, Attachment at 3.

[788] EchoStar Petition at 64.

[789] EchoStar Petition at 25-26.

[790] EchoStar Petition at 25-26.

outbid EchoStar would not be the result from normal, market-based competition, but from the leveraging of market power abroad to create market power in the United States.[791]

290. ACA is concerned that News Corp. will have strong incentives to expand DirecTV's practice of entering into exclusive arrangements for popular content, such DirecTV's current NFL Sunday Ticket offering. ACA contends that such arrangements could be used to target small cable competitors that are ill-equipped to secure such deals.[792] Accordingly, ACA urges the Commission to require Applicants to make such "all" News Corp. and DirecTV programming, including unaffiliated programming carried by DirecTV, available to small cable operators under reasonable prices, terms, and conditions.[793] CFA agrees, asserting that the Applicants' program access commitments must be expanded to prevent News Corp. from entering into exclusive arrangements with third parties.[794]

291. *Discussion.* The record does not demonstrate that the transaction is likely to increase DirecTV's incentive and ability to secure exclusive programming contracts with unaffiliated programmers, as its share of the MVPD market is not being increased by the transaction. In several prior mergers involving MVPDs, the Commission has rejected arguments that the post-merger entity should be required to abide by an exclusivity restriction with respect to programming of unaffiliated programming vendors.[795] Similarly, the Commission considered whether to expand the exclusivity provision to non-vertically integrated programmers in the last program access proceeding and found that such an expansion would directly contradict Congress' intent in limiting the program access provisions to a specific group of market participants.[796] Commenters have failed to offer a cogent rationale for doing so in the context of this proceeding.[797]

292. We disagree with the contention that the transaction will increase News Corp.'s ability to outbid EchoStar by leveraging its market power abroad in the worldwide distribution of sporting events to create market power in the United States. In making this claim, EchoStar apparently confuses News Corp.'s ownership of satellite assets covering broad geographic areas with the ability to deliver large audiences worldwide. In fact, only eight percent of television households throughout the world subscribe to DBS services.[798] The vast majority of the world's television households (61%) receive video

[791] EchoStar Petition at 25-26.

[792] ACA Comments at 21-23; ACA Reply Comments at 7-8.

[793] ACA Comments at 23.

[794] CFA Reply, Attachment at 3.

[795] *See, e.g., Comcast-AT&T Order,* 17 FCC Rcd at 23290; *AT&T MediaOne Order,* 15 FCC Rcd at 9854-55.

[796] *Program AccessOrder,* 17 FCC Rcd at 12158.

[797] As stated previously, we have accepted without change Applicants' additional program access commitments, described in Section VI.C.4.a, *supra,* which specify that DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (e.g., NFL Sunday Ticket).

[798] According to the ITU, 8% of television households in the world subscribe to satellite delivered programming services, while 29% subscribe to programming services delivered via cable. The remaining households, over 600 million, receive their programming from over-the-air broadcasts. *See* International Telecommunication Union, World Telecommunication Indicators, Mar. 2001 at 71. We do not know News Corp.'s share of the worldwide DBS market, but the entire market represents only small percentage of the world's television viewers.

programming only via free over-the-air television.[799] It is the ability to deliver large audiences via free over-the-air television, not large geographic areas, that increases a distributor's ability to secure rights to sports programming of worldwide interest, and News Corp. is competing for such rights with many international broadcasters who can deliver larger audiences.[800] In addition, the sporting events EchoStar is concerned about are governed by organizations such as Federation Internationale de Football Association ("FIFA")[801] or the International Olympic Committee ("IOC"), which seek to maximize distribution of the events, not restrict supply and raise prices. IOC, for example, only grants distribution rights to broadcasters who can guarantee the broadest coverage throughout their respective countries free of charge.[802] Therefore, while News Corp. has the ability to distribute the Olympics through its free over-the-air television O&Os and affiliates, its ownership of or acquisition of satellite distribution platforms—which are not free to the public—is unlikely to expand or enhance News Corp.'s ability to secure rights to the Olympics. To the extent that other U.S. programming distributors are willing and able to offer wider, free distribution of these few events, they are likely to remain on at least an equal footing with News Corp. in the bidding for distribution rights.

293. In conclusion, we find objections concerning exclusive programming arrangements with third parties unrelated to the present transaction. There is no evidence in the record to support a finding that the proposed transaction will increase the incentive or ability of DirecTV to enter into exclusive arrangements with programmers, and commenters have not convinced us of the benefits to the public of limiting the ability of unaffiliated programmers to enter into exclusive contracts with DirecTV.

E. Applicants' Conduct in Foreign Jurisdictions

294. *Positions of the Parties.* Several parties contend that News Corp.'s alleged anticompetitive track record and market power with respect to its MVPD satellite provider BSkyB in the United Kingdom (UK) should be factored into the Commission's determination of the potential harms of this proposed transaction.[803] EchoStar and JCC argue that News Corp.'s operation of BSkyB offers a "preview of what can be expected in the U.S."[804] JCC claim that BSkyB's UK track record underscores the risks that this transaction will expand opportunities for News Corp. to artificially inflate programming costs and impose unfair tying and bundling requirements for content it controls in order to

[799] *Id.*

[800] EchoStar's concern that News Corp. would "outbid" other MVPDs also is misplaced—the possession of market power by a buyer of programming confers the benefit of paying *lower* prices, not higher prices.

[801] FIFA owns the television and radio rights to World Cup soccer matches.

[802] "The IOC has often declined higher offers for broadcast on a pay-per-view basis or because a broadcaster could reach only a limited part of the population, as this is against Olympic Broadcast Policy. This fundamental IOC Policy, set forth in the Olympic Charter, ensures the maximum presentation of the Olympic Games by broadcasters around the world to everyone who has access to television. Rights are only sold to broadcasters who can guarantee the broadest coverage throughout their respective countries free of charge." *International Olympic Committee - Organisation - Facts And Figures* at http://www.olympic.org/uk/organisation/facts/broadcasting/index_uk.asp (visited Oct. 9 2003).

[803] *See* JCC Comments at 49-54; EchoStar Petition at 26-30; *see also* CDD Petition at 6 (calling the Commission's attention to the MVPD market in Italy).

[804] EchoStar Petition at 26; JCC Comments at 49-50.

harm rival content suppliers and distributors.[805] EchoStar recommends that the Commission should not accept News Corp.'s claim that it lacks market power in the United States programming markets and accordingly should conduct its own investigation in light of the anticompetitive incentives recognized by the UK regulatory authority, the conduct of News Corp.'s vertically integrated UK subsidiary, and the UK regulatory authority's finding that News Corp. is dominant in UK programming markets.[806]

295. Applicants respond that the "preview" should be encouraging for domestic consumers because BSkyB offers a fully digital, interactive service with a host of features not yet available in the United States.[807] Moreover, Applicants claim that the allegations of BSkyB's malfeasance in the UK are irrelevant to the Commission's review of the proposed transaction based on the Applicants' reliance on a 1999 Commission decision regarding an MCI-EchoStar-News Corp. license transfer application.[808] Finally, Applicants urge the Commission to reject EchoStar's request to subject News Corp. to certain conditions imposed on BSkyB in 1996 by UK regulatory authorities regarding prior approval of rate cards, channel unbundling, the submission of various accounts, and its control of proprietary encryption technology.[809] Applicants contend that there is no support offered by EchoStar for this type of unprecedented MVPD regulation, even on cable operators with far greater market share than DirecTV, and note that EchoStar did not recommend such conditions for itself in 1999 when News Corp. purchased a 32% share of EchoStar.[810]

296. *Discussion.* In *MCIT/EchoStar*, the Commission was unpersuaded by arguments calling for the imposition of program access conditions on EchoStar in its acquisition of MCI and News Corp. satellite licenses.[811] One of the primary bases for these proposed conditions was the conduct of News Corp.'s BSkyB satellite service in the UK and the resulting program access conditions imposed on BSkyB by the UK regulatory authority.[812] The Commission did not, however, analyze BSkyB's conduct in the UK when it decided not to impose program access conditions. Instead, the Commission declined to impose the conditions because of an inadequate record to support a finding that EchoStar had market power and because of the ability of MVPDs to use the Commission's program access rules for redress if a News Corp. programming arrangement resulted in price discrimination or unfair practices.[813] Thus, the Commission precedent discussed by Applicants is of limited assistance.

297. While the Commission generally does not consider harms resulting from a transaction

[805] JCC Comments at 54.

[806] EchoStar Petition at 30.

[807] Applicants' Reply at 70.

[808] *Id.* (citing *Application of MCI Telecommunications Corporation*, 16 FCC Rcd 21608, 21621 (1999) (*MCIT/EchoStar*)).

[809] *Id.* at 70-71.

[810] *Id.* at 71.

[811] *MCIT/EchoStar*, 16 FCC Rcd at 21621 ¶ 25.

[812] *MCIT/EchoStar*, 16 FCC Rcd at 21620 ¶ 23.

[813] *MCIT/EchoStar*, 16 FCC Rcd at 21621-22 ¶¶ 25-27.

occurring outside the United States in its public interest analysis of a transaction unless the transaction directly impacts a relevant domestic market, nothing in relevant statutory or case law would prevent the Commission from considering the conduct of the Applicants in foreign jurisdictions to determine the likelihood of similar future conduct in the United States.[814] Evidence regarding foreign conduct could provide useful guidance as to how Applicants might act in the United States if they had similar media assets and economic incentives. Based on our understanding of the UK BSkyB experience, however, we do not believe the proposed transaction would result in sufficiently parallel market conditions to warrant great reliance upon BSkyB's UK experience.

298. The UK's Office of Fair Trading (OFT) conducted two formal investigations of BSkyB's wholesale business practices. In its 1996 decision, OFT examined several complaints lodged against BSkyB, including its wholesale pricing for programming, programming packaging, programming rights, and conditional access services.[815] OFT's investigation determined that several of BSkyB's business practices warranted scrutiny, which led to BSkyB agreeing to submit separate accounting information for its wholesale and retail operations.[816] BSkyB also committed to modify certain of its programming carriage requirements in response to concerns raised by OFT.[817] OFT determined that the undertakings to which BSkyB agreed were sufficient to avoid a formal referral to the UK's Monopolies and Mergers Commission.[818]

299. In its 2002 review of BSkyB, OFT again reviewed numerous aspects of BSkyB's business practices in response to various complaints from BSkyB's wholesale customers and retail competitors.[819] OFT focused on three main areas: whether BSkyB had imposed a margin squeeze on its retail competitors; whether discounts in BSkyB's mixed program bundling scheme prevented rival premium channel providers from entering the market; and whether BSkyB's rate card discounts were anti-competitive.[820] In framing its investigation, OFT determined that BSkyB held a dominant position in the market for the wholesale supply of certain premium sports channels and certain premium films channels.[821] Under UK law, however, dominance in and of itself is not a violation of the UK

[814] *See, e.g., General Electric Capital Corp. and SES Global, S.A.*, 16 FCC Rcd 17575, 17594 (2001).

[815] Office of Fair Trading, *The Director General's Review of BSkyB's Position in the Wholesale Pay TV Market (1996 Review)*, Dec. 1996.

[816] *Id.* at 9 and Appendix A, at 117.

[817] *Id.* at 10-18, 115-116.

[818] *Id.* at 17.

[819] Office of Fair Trading, *BSkyB Investigation: Alleged Infringement of the Chapter II Prohibition ("2002 Review")*, Dec. 17, 2002.

[820] *Id.* at 4.

[821] *Id.* at 14-43; 44-63. With respect to sports channels, OFT focused only on channels showing content available strictly via pay TV, specifically the UK Football Association Premier League football matches and those films that had exceeded $50 million in ticket sales in the U.S. BSkyB had secured exclusive license to the broadcast rights of 66 Premier League live matches, or 100% of the market. Under European Commission precedent, market shares significantly exceeding 70% are by themselves an indication of dominance. With respect to films, BSkyB has exclusive contracts with seven major Hollywood studios, which together supplied more than 70% of the films sold (continued….)

Competition Act of 1998. Rather, abuse of a dominant position must be shown. OFT determined that BSkyB had not abused its dominant position in either sports or film programming, nor in the manner in which it made that programming available to its competitors. OFT determined that there was insufficient cause to find that BSkyB had exercised a margin squeeze on its competitors.[822] It further determined BSkyB's mixed bundling wholesale price strategy was not an abuse of its dominant position.[823] Finally, OFT determined that BSkyB's rate card discounts were not an abuse of its dominant position and had not forestalled entry into the wholesale market for premium channels.[824] Thus, in its most recent investigation of BSkyB's business practices, which built upon its previous investigation, the principle UK regulator determined that BSkyB's behavior did not violate UK competition law. We assume that OFT continues to examine BSkyB's behavior as it continues to maintain its position of dominance.[825]

300. There is no evidence in the record indicating that BSkyB's current wholesale provision of programming is in violation of UK competition law, and although the company was found in an earlier investigation to be engaging in marginally anticompetitive activities, those same concerns appear to have dissipated during the more recent review. We do not believe it would be fair to focus on a set of behaviors, which BSkyB agreed to modify via specific undertakings and have since been modified or superceded by properly competitive behavior in the UK pay TV market, as evidenced by the lack of UK regulatory censure or referral for anticompetitive remedies. Furthermore, although it is instructive to examine the behavior of News Corp.'s various subsidiaries, we find that each of those subsidiaries functions in essentially a unique commercial environment and is subject to specific national regulatory regimes. To arbitrarily apply a set of conditions, as espoused by EchoStar, without taking into consideration the specific conditions and competitive dynamic of the relevant market, in this case the MVPD market in the United States, would be arbitrary and inappropriate.

F. Competitive Harms in Latin America and Impact on U.S. Consumers and Programmers

301. *Positions of the Parties.* EchoStar argues that the Commission should consider the impact the proposed transaction will have on MVPD markets in Latin America, as well as the resulting indirect impact on U.S. consumers and independent programmers.[826] EchoStar claims that the only two Direct-to-Home satellite providers in Latin America are affiliates of Hughes and News Corp., Galaxy Latin America and Sky Latin America, and cable is not a significant competitor to those two MVPDs.

(Continued from previous page)
in the European Economic Area. These rights were distributed across only two BSkyB channels: Sky MovieMax and Sky Premier.

[822] *Id.* at 135.

[823] *Id.* at 151.

[824] *Id.* at 165.

[825] We note that it was announced on December 17, 2003 that the European Union and UK Soccer League had agreed to air some games on free television, thus forcing BSkyB to sell some rights of live soccer games to free-to-air broadcasters. Reportedly, the settlement means that BSkyB must lift its control over exclusive rights to as many as eight live games a season as early as next year. *See* WALL ST. J., December 17, 2003 at D4; Associated Press, *EU Settles Antritrust Dispute Over Soccer Game Broadcasts*, Dec. 16, 2003.

[826] EchoStar Petition at 58.

EchoStar argues that the proposed transaction will result in a near monopoly for MVPD services in Latin America, which will indirectly impact U.S. consumers by increasing the leverage of News Corp. as a "monopsonist" in Latin America to extract concessions from programmers in other countries, including the U.S.[827] EchoStar contends that the Commission has adequate authority to take this alleged harm under consideration based on the Commission's inquiry in 1997 involving Hughes acquisition of PanAmSat. EchoStar claims that in 1997 the Commission dismissed a concern regarding Sky Latin America, who had leased capacity from PanAmSat, because, in part, the programming ventures at issue would remain under separate ownership. Under the proposed transaction, EchoStar argues that the separate ownership relied upon in 1997 would be eliminated.[828] Tectelcom Tecnica em Telecommunicacoes Ltda. ("Tecsat"), a Brazilian company, also raises concerns about the competitive impact of the transaction in Brazil where News Corp. provides satellite subscription service in competition with DirecTV.[829]

302. Applicants urge the Commission to reject EchoStar's call to consider the impact of the proposed transaction on Latin America. First, Applicants note the Commission's prior holding that the effects of a transaction arising outside of the United States are not relevant to the Commission's public interest analysis of the transaction.[830] Second, Applicants argue that the 1997 merger of Hughes and PanAmSat is not analogous to the proposed transaction.[831] The Applicants contend that the impact on the Latin America video market was raised by a party, Comsat, not the Commission, and was more relevant to that transaction because the relevant market for that transaction was the international telecommunications service market. The Applicants conclude that the proposed transaction does not address that market and raises no similar issues.[832]

303. *Discussion.* We find that commenters have failed to provide persuasive evidence as to why the Latin America MVPD market is relevant to our consideration of the harms resulting from the proposed transaction. As the Applicants indicate, the Commission generally does not consider harms resulting from a transaction occurring outside the United States in our public interest analysis of a transaction, unless the transaction directly impacts a relevant United States market.[833] We also agree with the Applicants that the 1997 Hughes-PanAmSat transaction targeted a different market from the markets at issue here.

G. DirecTV and Fox Network Service in Alaska and Hawaii

[827] EchoStar Petition at 58.

[828] EchoStar Petition at 58 (citing *Hughes Communications, Inc.*, 12 FCC Rcd 7534, 7542 (1997).)

[829] Letter from John F. McNaughton and Peter D.P. Vint, Marcondes Advogados Associados, Counsel to Tecsat, to Marlene H. Dortch, Secretary, FCC, Dec. 12, 2003.

[830] Applicants' Reply at 75 (citing *General Electric Capital Corp. and SES Global, S.A.*, 16 FCC Rcd 17575, 17594 (2001) ("We need not analyze the impact of the proposed transaction on competition in the provision of satellite services to foreign countries that do not involve service to or from the United States.").

[831] *Id.* at 75-76.

[832] *Id.*

[833] *See supra* note 105.

304. *Positions of Parties.* Microcom argues that the Commission should deny the proposed transaction unless the Commission conditions its approval with measures designed to address the alleged failure of Hughes and News Corp. to provide satellite service to Alaska consumers.[834] Microcom contends that DirecTV has failed to provide Alaska and Hawaii with comparable service to that provided in other states even though existing regulation requires them to do so.[835] Microcom also contends that News Corp. is the only major broadcaster that has effectively denied many Alaska commercial establishments Fox network programming by refusing to allow DBS satellite reception of distant Fox affiliate stations by commercial establishments outside the grade B contour of the local Fox affiliates and requiring that these establishments install a C-band satellite system to receive the programming from a satellite many cannot see, *i.e.*, that is below or close to the horizon.[836]

305. The Applicants argue that Microcom's allegations are meritless and do not represent cognizable reasons for the Commission to deny approval of the proposed transaction or to condition it as Microcom suggests. The Applicants claim that DirecTV has always provided Alaska with the same programming it offers to continental U.S. subscribers although with larger satellite dish antennas for reception.[837] The Applicants also dispute the allegation that commercial establishments in Alaska are denied DBS reception of distant affiliate signals, noting that copyright law permits satellite carriers to retransmit distant signals for private home viewing only and not into commercial establishments.[838]

306. *Discussion.* The Commission's rules require that DBS licensees provide service where technically feasible to Alaska and Hawaii, and DBS licensees must offer packages of services in Alaska and Hawaii that are reasonably comparable to what they offer in the contiguous 48 states.[839] The issues raised by Microcom regarding DBS service to Alaska and Hawaii are not specific to this transaction and

[834] Microcom Comments at 1.

[835] *Id.* at 1-2.

[836] *Id.* at 2. To address these alleged public interest harms facing Alaska consumers, Microcom requests that the Commission impose the following conditions on its approval of the proposed transaction: (1) within one year of completion of the transfer, DirecTV must start offering small dish service to Alaska and Hawaii that provides all programming from its core slot at 101° (small dish coverage is defined as anything under on meter in the Anchorage, Fairbanks, and Juneau DMAs and the Honolulu DMA); (2) PanAmSat will make a good faith effort to ensure that all future satellites provide coverage equal to the CONUS over all of Alaska where the elevation angle is 5° or greater consistent with international agreements (including the Aleutian islands); (3) failing condition 1 above, News Corp. should be required to subsidize DirecTV equipment prices and installations to keep the overall cost for consumer services consistent with the CONUS pricing or their nearest competitor in Alaska (alternatively, they should make available for sale on Dish Network's Alaska and Hawaii 110° spot beams their exclusive sports programming packages); (4) immediately make all DirecTV and Fox Networks promotions applicable to all 50 states without exception; and (5) Fox Networks immediately allow reception of distant Fox affiliates in commercial establishment outside the grade B contour of a local Fox affiliate, and Fox Networks should immediately make available other Fox sports and entertainment programming from DBS satellites to commercial operators when there is no other alternative to receive that programming. *Id.* at 2-3.

[837] Applicants' Reply at 71-72 n.200.

[838] *Id.*

[839] *See* 47 C.F.R. §25.148(c); *Policies and Rules for Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11364 ¶ 65 (2002).

are more appropriately being addressed in another Commission proceeding focused specifically on those issues.[840] Further, issues raised regarding News Corp.'s provision of distant affiliate signals involve interpretation of copyright law and are not properly addressed in this proceeding.[841]

H. Exclusion of Non-Network Affiliated Broadcasters from the Benefits of Local-Into-Local Carriage

307. *Positions of the Parties.* Johnson Broadcasting contends that DirecTV has denied it local-into-local carriage, as a licensee of TV station KLDT, Lake Dallas, Texas, in violation of the SHVIA.[842] Since SHVIA's implementation, Johnson Broadcasting claims DirecTV has attempted to undermine the Act's policy objectives by excluding non-network affiliated broadcasters from the benefits of local-into-local carriage.[843] Johnson Broadcasting states that DirecTV alleged that Johnson Broadcasting filed its request for carriage one day late and therefore denied Johnson's request. Johnson Broadcasting argues that the deadline fell on a Sunday and therefore filed the next day, Monday, in accordance with Commission filing rules. As a result, Johnson Broadcasting filed a complaint with the Commission's Cable Services Bureau, which was subsequently denied.[844] Johnson Broadcasting now has an Application for Review regarding its complaint pending before the Commission. Johnson Broadcasting contends that it will not be eligible for carriage on DirecTV's system until January 1, 2006, as a result of DirecTV's denial of local-into-local carriage.[845] Johnson Broadcasting seeks the imposition of several conditions. First, before acting on the proposed transaction, the Commission should first ensure that all broadcasters be guaranteed the right to mandatory carriage in any market where DirecTV provides local-into-local service. Second, the Commission should grant Johnson Broadcasting's Application for Review and order DirecTV to commence carriage of KLDT in the Dallas DMA.[846]

308. The Applicants argue that this license transfer proceeding is not the proper forum to litigate Johnson Broadcasting's complaint and note that the Media Bureau and a federal district court have already dismissed this same mandatory carriage complaint against DirecTV.[847]

---

[840] *See Petitions Regarding DirecTV's DBS Service to the States of Alaska and Hawaii*, MB 03-82, Public Notice, DA 03-862 (rel. Mar. 25, 2003).

[841] *See* 17 U.S.C. § 119.

[842] Johnson Broadcasting Comments at 1.

[843] *Id.* at 2.

[844] *See Johnson Broadcasting, Inc. v. DirecTV, Inc.*, 16 FCC Rcd 21329 (2001); *Johnson Broadcasting of Dallas, Inc. v. DirecTV, Inc.*, 17 FCC Rcd 886 (2002)

[845] Johnson Broadcasting Comments at 2.

[846] *Id.* at 3.

[847] Applicants' Reply at 73 (citing *Johnson Broadcasting, Inc. v. DirecTV, Inc.*, 16 FCC Rcd 21329 (2001); *Johnson Broadcasting of Dallas, Inc. v. DirecTV, Inc.*, 17 FCC Rcd 886 (2002); *Johnson Broadcasting, Inc. and Johnson Broadcasting of Dallas, Inc. v. DirecTV, Inc.*, Civil Action No. H-02-0136, Opinion (S.D. Tex., Houston Div.) (Jul. 15, 2002) (granting motion to dismiss of DirecTV).

309. *Discussion.* We agree that this license transfer review proceeding is not the proper forum to address Johnson's Broadcasting's complaint, and Johnson Broadcasting has provided no evidence indicating that DirecTV is in violation of SHVIA on an industry-wide basis. Accordingly, we reject the conditions proposed by Johnson Broadcasting.

I. Lack of Final Media Ownership Rules

310. *Positions of the Parties.* The National Hispanic Media Coalition (NHMC) argues that the Commission should deny the proposed transaction application and find that a substantial and material question exists as to whether the proposed transaction is in the public interest because the Commission has not provided the public with final media ownership rules allegedly needed to determine the relevant factual showings and/or legal standards for reviewing the proposed transaction. Initially, NHMC argued that the Commission had not released final rules at the time initial comments were due on the proposed transaction application.[848] Subsequently, NHMC contended in its reply comments that the Commission had only recently released an erratum to the *Media Ownership Order* and had not published final rules in the Federal Register as of the deadline for reply comments.[849] As a result, NHMC argues that, if the Commission were to issue a decision on the proposed transaction during this time of legal limbo where the Commission lacks final multiple ownership and cross-interest rules, the decision would violate the fair notice and opportunity for comment provisions of the Administrative Procedure Act.[850] If the Commission does not deny the proposed transaction application for these reasons, NHMC argues that the Commission must release a new public notice allowing interested parties to file comment on the proposed transaction within 30 days upon release of final media ownership rules.[851]

311. The Applicants argue that NHMC's request is groundless and largely moot and therefore should be rejected.[852] The Applicants note that the new media ownership rules were released with the Commission's *Media Ownership Order* on July 2, 2003.[853] Further, the Applicants contend that the new media ownership rules are irrelevant to their license transfer Application because the Application does not involve any broadcast licenses of the type that are at issue in the *Media Ownership Order* and thereby subject to the broadcast license transfer processing freeze.[854]

312. *Discussion.* Since the filing of NHMC's reply comments, the Commission has released its final media ownership rules.[855] Those rules, however, were stayed by the United States Court of Appeals for the Third Circuit.[856] As a result, the previous media ownership rules have been reinstated.

---

[848] NHMC Petition at 2-4.

[849] NHMC Reply at 2.

[850] NHMC Petition at 5.

[851] NHMC Reply at 3.

[852] Applicants' Aug. 28 *Ex Parte*.

[853] *See 2002 Biennial ReviewOrder*.

[854] Applicants' Aug. 28 *Ex Parte*.

[855] *See 2002 Biennial Review Order*.

[856] *See Prometheus Radio Project v. FCC*, No. 03-3388, rel. Sept. 3, 2003 (3rd Cir. 2003).

Thus, all commenters have had, and continue to have, available what are now the current media ownership rules at the deadlines for initial and reply comments on the proposed transaction. Moreover, because this is a permit-but-disclose proceeding, interested parties, including NHMC, were able to file comments addressing the impact of the current media ownership rules on the proposed transaction in the form of oral or written ex parte presentations throughout this up proceeding. Finally, these rules are part of the Commission's continuing biennial review process and therefore will be subject to change at least every two years. For these reasons, we do not find NHMC's arguments compelling and will not release a subsequent public notice seeking comment as requested.

J. Protection of General Motors Class GMH Stockholders

313. *Positions of the Parties.* Wyser-Pratte Management Co. (Wyser-Pratte) petitioned the Commission to deny the proposed transaction or condition its approval of the proposed transaction on the equitable treatment of holders of General Motors Class H Common Stock ("GMH stock")[857] so that GMH stockholders are treated as favorably in the proposed transaction as GM, the holder of all of Hughes common stock.[858] Wyser-Pratte alleges that the proposed transaction discriminates against GMH stockholders through a $275 million distribution from Hughes to GM as a part of the transaction for claimed "value enhancements" for GMH stockholders arising from the conversion of GMH from a tracking stock to an asset-based stock.[859] Wyser-Pratte claims the proposed transaction will result in proceeds of sale of Hughes to News Corp. at $15 per share to GM and $14 per share to GMH shareholders.[860] Wyser-Pratte argues based on Commission precedent that the Commission is obligated to protect the rights of GMH shareholders in the Commission's review of the proposed transaction.[861]

314. *Discussion.* We disagree with Wyser-Pratte that its claim falls within the scope of our review of the proposed transaction. While it is true that the Commission does consider the rights and interests of the relevant companies (shareholders) and consumers (ratepayers) in its review of license transfers, we agree with the Applicants that it is beyond the scope of our review to consider allegations of unfair premiums paid to specific classes of shareholders in a given transaction.[862] The Commission is not the proper forum for what is, in effect, a shareholder derivative suit seeking a share of an alleged control premium. Such claims are properly within the jurisdiction of the appropriate state court.[863] Accordingly, we dismiss Wyser-Pratte's petition as beyond the scope of our review of the proposed transaction.

VIII. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

[857] GMH is a tracking stock of GM designed to provide its holders with financial returns based on the financial performance of Hughes, a wholly owned subsidiary of GM. *See* Wyser-Pratte Management Co. Petition at 7.

[858] Wyser-Pratte Management Co. Petition at 1.

[859] Wyser-Pratte Management Co. Petition at 11.

[860] Wyser-Pratte Management Co. Petition at 2-3

[861] *Id.* at 15 (citing *Illinois Public Telecommunications Assoc. v. FCC*, 117 F.3d 555, 569 (D.C. Cir. 1997)).

[862] *See* Applicants' Aug. 28 *Ex Parte*.

[863] *See id.* (citing *A.L.Z. Broadcasting, Inc.*, 15 FCC Rcd 23200, 23201 (2000); *Loral Corp.*, 12 FCC Rcd 24325, 24322 (1997)).

315. We now consider the efficiencies and other public interest benefits that Applicants claim will result from the proposed merger. As discussed below, we find that the proposed transaction is likely to yield several cognizable benefits. First, we find that News Corp., in its management of BSkyB, Sky Italia, and its other DTH operations, has demonstrated a willingness to take risks in introducing and promoting new and innovative services. Based on this management history, and in particular, its record of innovation in many media businesses, including its introduction of interactive services in the United Kingdom, we find credible the Applicants' claim that News Corp. will accelerate the introduction of new services, and, in particular, interactive television services by DirecTV, and that the public will benefit from the entry of this innovative and aggressive competitor in the MVPD market. Second, we conclude that consumers will benefit, and our goals of promoting localism and competition will be furthered, to the extent that the transaction increases the number of DMAs that receive local-into-local broadcast television channels. To ensure that this benefit is realized, we impose a condition described below that is intended to ensure that News Corp. will adhere to its promised build-out plans. Third, we find that the proposed transaction is likely to yield some benefits in the form of increased economies of scale and scope, improved customer satisfaction and reduced churn, and a reduction in double marginalization. We assign little weight to those claimed benefits, however, for the reasons given below. Finally, as discussed below, we do not recognize as potential public interest benefits the Applicants' claims that the proposed transaction will result in increased operating efficiencies, improved access to capital, or expanded program and employment diversity and equal opportunity.

A. Analytical Framework

316. The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products."[864] Under Commission precedent, however, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transfer outweigh the potential public interest harms.[865]

317. There are several criteria the Commission applies in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be *transaction-* or *merger-specific*. This means that the claimed benefit "must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects."[866] Second, the claimed benefit must be *verifiable*. Because much of the information relating to

---

[864] *See EchoStar-DirecTV HDO,* 17 FCC Rcd at 20630, ¶ 188; Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control, 12 FCC Rcd 19885, 20063 ¶ 158 (1997) ("*Bell Atlantic-NYNEX Order*"); *see also DOJ/FTC Guidelines* § 4

[865] *See, e.g., EchoStar-DirecTV HDO,* 17 FCC Rcd at 20630, ¶ 188; *see also Bell Atlantic-NYNEX Order,* 12 FCC Rcd at 20063 ¶ 157; Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer of Control, 14 FCC Rcd 14712, 14825 ¶ 256 (1999) ("*SBC-Ameritech Order*").

[866] *EchoStar-DirecTV HDO,* 17 FCC Rcd at 20630 ¶ 189; *see also Bell Atlantic-NYNEX Order,* 12 FCC Rcd at 20063 ¶ 158 ("Pro-competitive efficiencies include only those efficiencies that are merger-specific, *i.e.,* that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger."); *SBC-Ameritech Order,* 14 FCC Rcd at 14825 ¶ 255("Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger. . . "); *Comcast-AT&T Order,* 17 FCC Rcd 23246, 23313 ¶ 173 (Commission considers whether benefits are "merger-specific"). *Cf. DOJ/FTC Guidelines* § 4 .

the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each benefit claim so that the Commission can verify the likelihood and magnitude of the claimed benefit.[867] In addition, as the Commission has noted, "the magnitude of benefits must be calculated net of the cost of achieving them."[868] Furthermore, speculative benefits that cannot be verified will be discounted or dismissed. Thus, as the Commission explained in the *EchoStar – DirecTV HDO,* "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present."[869] Third, the Commission has stated that it "will more likely find marginal cost reductions to be cognizable than reductions in fixed cost."[870] The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.[871]

318. Finally, the Commission applies a "sliding scale approach" to evaluating benefit claims. Under this sliding scale approach, where potential harms appear "'both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.'"[872]

B. Claimed Benefits

319. The Applicants claim that the proposed transaction will generate several types of public interest benefits. These claimed benefits are summarized and evaluated below.

1. Improvements in DirecTV's Service Offerings Resulting from News Corp's Innovative Management

320. Claiming that News Corp. "has a proven track record of innovation in programming and DTH services," Applicants contend that News Corp. will apply its innovative management style to

[867] *EchoStar-DirecTV HDO,* 17 FCC Rcd at 20630 ¶ 190; *see also, Bell Atlantic-NYNEX Order,* 12 FCC Rcd at 20063 ¶ 157 ("These pro-competitive benefits include any efficiencies arising from the transaction if such efficiencies . . . are sufficiently likely and verifiable. . . "); *Comcast-AT&T Order,* 17 FCC Rcd at 23313 ¶ 173 (Commission considers whether benefits are "verifiable"); *SBC-Ameritech Order,* 14 FCC Rcd at 14825 ¶ 255; *DOJ/FTC Guidelines* § 4 ("[T]he merging firms must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm's ability to compete. . . ").

[868] *EchoStar-DirecTV HDO,* 17 FCC Rcd at 20630 ¶ 190.

[869] *EchoStar-DirecTV HDO,* 17 FCC Rcd at 20630 ¶ 190.

[870] *See EchoStar-DirecTV HDO,* 17 FCC Rcd at 20630 ¶ 191; *see also DOJ/FTC Guidelines* § 4.

[871] *See EchoStar-DirecTV HDO,* 17 FCC Rcd at 20630 ¶ 191; *see also DOJ/FTC Guidelines* § 4.

[872] *EchoStar-DirecTV HDO,* 17 FCC Rcd at 20630 ¶ 192 (citing *SBC-Ameritech Order,* 14 FCC Rcd at 14825). *Cf. DOJ/FTC Guidelines* § 4 ("The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.").

Hughes.[873] In particular, the Applicants claim that News Corp. will enhance DirecTV's interactive television offerings and increase the penetration of integrated set-top boxes among DirecTV customers.

321. *Interactive Television.* News Corp. claims that it will use its experience from launching interactive television ("ITV") services in the U.K. through BSkyB to "enhance the ITV capabilities available to DirecTV subscribers and to create a greater level of awareness among consumers."[874] According to Applicants, BSkyB's SkyActive service offers interactive news and delivers "online shopping, banking, games, e-mail, travel, tourism, and information services with all the look, feel, and immediacy that customers expect from television."[875] Subscribers can "choose from multiple segments being broadcast simultaneously on a news channel," "view multiple screens of programming within a certain genre and click on the one that interests them, and can choose from among multiple camera angles during the broadcast of sporting events."[876] Applicants contend that an ITV offering will make DirecTV a better competitor in the MVPD market.[877]

322. Applicants have additionally stated that, as a first step toward introducing "robust interactive services," the merged entity would release a new user interface in 2004 that will be incorporated in all new set-top-boxes and will be downloaded to as many as 10 million legacy set-top-boxes that are already operating in subscribers' homes.[878] Applicants further state that, by the end of 2004, the parties will incorporate new middleware into subscriber set-top-boxes that will enable DirecTV to introduce new interactive services, including interactive news, weather, traffic, and games.[879]

323. Several parties opposing the transaction contend that allowing News Corp. to apply its experience and assets relating to ITV services to DirecTV will result in public interest harms, rather than

[873] As examples of innovations News Corp. introduced into DTH services, the Applicants cite: (1) BSkyB's conversion to digital technology in 1998 and its decision to provide free set-top-boxes and dishes in 1999; (2) BSkyB's introduction of an interactive news service in 2000, which offered multiple segments broadcast simultaneously; (3) BSkyB's subsequent introduction of additional interactive services, such as "shopping, banking, games, e-mail, travel, tourism and information services;" and (4) BSkyB's introduction of "Europe's first fully integrated DVR." As examples of News Corp.'s innovations in programming, the Applicants, among other things, point to: (1) News Corp.'s introduction of the Fox Network in 1986; (2) its launch of Fox News Channel in 1996; (3) its innovations in the news and informational programming offered by Fox Television Stations; and (4) its founding of Fox Sports Net in 1997. Application at 21-27.

[874] Application at 22; Giacalone Decl. ¶¶ 19-20.

[875] *Id.*; *see also* News Corp. July 28 Response at 41.

[876] *Id.*

[877] Application at 23; *see also* News Corp. Sept. 10 Ex Parte at 2 and Attachment 2.

[878] Applicants' Sept. 22 Ex Parte at 4.

[879] Applicants' Sept. 22 Ex Parte at 4. To facilitate implementation of its ITV plans, News Corp. entered into two agreements with Thomson on September 13, 2003. Under the first agreement, News Corp. purchased the *MEDIA*HIGHWAY middleware business from Thomson. The Applicants claim the *MEDIA*HIGHWAY product line will enable set-top-boxes to better interpret and execute interactive applications. Under the terms of the second agreement, News Corp. and Thomson will enter into a non-exclusive preferred supplier relationship, which the Applicants claim will enable News Corp. to capture economies of scale and scope. *Id.* at 5-6.

a benefit.[880] These arguments are addressed in section VI.C.4.d, *supra*.

324. *Integrated Set-top Boxes.* Applicants also claim that the proposed transaction will increase the penetration of digital video recorders ("DVRs") contained in integrated set-top boxes. According to Applicants, the merged entity, by "drawing on the marketing expertise within FEG, BSkyB and other affiliated companies . . . [will] create consumer awareness of and demand for the product."[881] Applicants state that they plan to deploy set-top-boxes with integrated DVRs at more competitive prices by 2005.[882] In addition, they claim that they are "exploring the potential of incorporating digital terrestrial television tuners into DirecTV set-top boxes."[883] They further claim that "these digital signals can be seamlessly processed by the set-top-box with the DirecTV satellite signal in a manner that will be transparent to the viewer."[884] Applicants also contend that the "proposed transaction should result in a significant reduction in signal piracy" because of the post-transaction combination of efforts by DirecTV (which currently uses its own proprietary conditional access technology) and News Corp.'s subsidiary, NDS, a leading provider of conditional access technology.[885]

325. *Discussion.* We find that News Corp., under the leadership of Rupert Murdoch, has demonstrated a willingness to take risks, introduce innovative services, and fundamentally change the nature of competition in multiple media markets. And in numerous cases, this willingness to take risks has benefited both News Corp. and consumers. For example, in its management of BSkyB, Sky Italia, and its other DTH operations, News Corp has demonstrated a willingness to take risks in introducing and promoting new services, including, in particular, interactive services and new programming channels. We further find that these innovations have generated increased subscriber growth and reduced churn, indicating increased consumer satisfaction. For example, in October 1998 BSkyB introduced digital satellite service and aggressively promoted it by giving away set-top boxes and introducing a new low-cost entry-level digital tier.[886] Between its introduction of digital DTH service in October 1998 and June

[880] *See* CDD Petition at 4; NAB Comments at 20. For example, NAB argues generally that beyond simple blatant denials of access to DirecTV, the post-transaction entity could discriminate against content owners in such technology-related areas as interactivity, channel assignment and positioning, use of navigation devices and electronic program guides, date transfer speed and downstream and upstream return path traffic. Id.

[881] Application at 23.

[882] Applicants' Sept. 22 Ex Parte at 5.

[883] Application at 29-30. The Applicants contend that, "[b]y mounting a small antenna for receiving broadcast signals at the same point where the satellite dish is located, most subscribers would be able to receive digital television broadcast signals from their local stations over-the-air." *Id.*

[884] *Id.* at 30.

[885] Application at 37. NDS is also "a leading supplier of open end-to-end digital systems and solutions for the secure delivery of entertainment and information to televisions and IP devices. NDS enables broadcasters, network operators and content providers to profit from the deployment of digital TV technologies including innovative interactive applications and personal TV, secure broadband and datacasting solutions." *See* NDS, About NDS, at http://www.nds.com/about_nds/about_nds.html (visited Sept. 11, 2003).

[886] *See, e.g.,* Dan Milmo, *BSkyB Does Digital Dash to 7 m Subscribers Mark,* THE GUARDIAN (Sep. 29, 2003) ("Sky Digital's growth was backed by a high-risk strategy . . . of giving away set-top boxes to customers for free."); Paul Davies, *BSkyB Makes Bid for Mass-Market with £ 6.99 Entry-Level Digital Tier,* NEW MEDIA MARKETS 1 (Aug. 13, 1998)(BSkyB offers cheaper than expected entry-level digital tier)..

2002, News Corp. increased the total number of subscribers to BSkyB from 3,547,000 to 6,101,000 (an increase of 72%), while reducing churn significantly.[887] Moreover, the majority of this increase followed the introduction of digital interactive services.[888] In fact, in the first six months after the introduction of interactive TV news in June 2000, BSkyB's subscribership increased by 12 percent.[889] News Corp. has also aggressively introduced new programming and programming services in its Sky Italia and STAR operations. For example, Sky Italia launched a new 24-hour news channel in August 2003.[890] Similarly, in Asia, STAR expanded its offering of services, ranging from radio to television to interactive digital cable TV,[891] and including the introduction of Xing Kong Wei Shi, the first all-new channel granted cable carriage in mainland China.[892]

326. News Corp. has pursued a similar strategy of innovation and aggressive competition in the United States and in many cases has successfully challenged incumbent broadcast and cable programming networks. For example, in the mid-1980s, News Corp. purchased six television stations and then challenged the long-standing dominance of the then big-three broadcast television networks by launching a fourth broadcast network, despite widespread skepticism that no such network could survive.[893] Over the years, News Corp. acquired additional independent broadcast television stations and entered into affiliation agreements with more, and News Corp. helped the local stations build market share by, among other things, introducing prime-time local news broadcasts (the 10:00 p.m. time slot), by introducing new and popular programming on the Fox network (such as *The Tracey Ullman Show, Married. . . .With Children, The Simpsons, America's Most Wanted, The X-Files,* and *24)* and by outbidding CBS for the right to broadcast National Football Conference games.[894] News Corp. has been similarly aggressive in introducing new cable networks. For example, its launch of Fox News Channel brought a new perspective on cable news and brought heightened competition to a market that previously had been dominated by CNN.[895] Similarly, News Corp., by accumulating stakes in a number of regional networks and by aggressively bidding for broadcast rights, built Fox Sports Net into the largest RSN that now challenges ESPN.[896] Finally, News Corp. has introduced new and innovative programming on its

[887] Letter from Gary M. Epstein, Counsel for General Motors Corp. and Hughes Electronics Corp., *et al.* to Marlene H. Dortch (Sept. 10, 2003) ("Applicants' Sept. 10 Ex Parte") at Attachment 2. *See also* Applicants' Sept. 22 Ex Parte at 8.

[888] Applicants' Sept. 10 Ex Parte, Attachment 2.

[889] *Id.*

[890] *Id.*; Gagliardi Aff. at 2.

[891] News Corp. 2003 Annual Report at 17.

[892] News Corp. 2002 Annual Report at 21.

[893] *See, e.g.*, WALL ST. J. May 17, 1985; WASHINGTON POST, May 19, 1985; BUSINESS WEEK, May 20, 1985; Application at 24.

[894] *See, e.g.*, WALL ST. J., May 27, 1987; LOS ANGELES DAILY NEWS, Jan. 1, 1990; WALL ST. J. Dec. 20, 1993; PORTLAND OREGONIAN, May 15, 1994; ST. LOUIS DISPATCH, October 31, 1996; Application at 24.

[895] *See, e.g.*, ROCKY MOUNTAIN NEWS, Mar. 3, 1996; Application at ii-iii, 23-24; Applicants' Reply at 78.

[896] FORTUNE, Oct. 26, 1998, at 92 *et seq.*; Fox Entertainment Group, Form 10-K (for the year ending Jun. 30, 2000); Application at 26.

various overseas DTH platforms.[897]

327. Given News Corp.'s history of taking significant risks and introducing new and innovative media services, including in particular DTH services, we find credible the Applicants' claim that they will accelerate the introduction of new DTH services, including interactive services. Moreover, it has been reported that cable MSOs, in anticipation of the consummation of this proposed transaction, are already stepping up plans to introduce new interactive services.[898] In this regard, we find that News Corp.'s recent acquisition of *MEDIA*HIGHWAY from Thomson for $66.5 million indicates a commitment on the part of News Corp. to interactive television.[899] Although we can not estimate exactly the value to consumers of News Corp.'s innovative management style, we find it to be a major benefit to the public of the transaction.[900]

328. On the other hand, we find that the Applicants have not demonstrated that their claims concerning increased penetration of integrated set-top-boxes are either credible or transaction-specific. More specifically, we find that the Applicants make broad claims about set-top boxes without providing adequate supporting evidence. In addition, with respect to the claim that they might integrate digital terrestrial television tuners into DirecTV set-top boxes, they do not explain why this integration could not take place in the absence of the transaction.

2. **Increased Offering of Local-into-Local, HDTV, and Broadband Services**

329. Applicants claim that, after the merger, News Corp.: (1) will bring its commitment to local-into-local to DirecTV and thus increase the number of DMAs in which local broadcast signals are available; (2) will increase the amount of HDTV programming that DirecTV makes available; and (3) will develop new options for consumer broadband services.[901] Applicants state that they will consider using new satellites and new technologies to achieve that goal, and they specifically point to the possibility of using Ka-band satellite capacity and/or integrating digital terrestrial tuners into the DirecTV set-top boxes. Applicants further assert that News Corp. will work aggressively to expand broadband options to better compete with cable's video and broadband offerings.

330. NRTC and ACA respond that Applicants have not explained how the merged firm will expand local-into-local service and have not made a commitment as to how many markets it will serve. NRTC asserts that, while Applicants claim that they will increase both local-into-local and HDTV, they do not explain how they will accomplish both at the same time.[902] NRTC asserts that the same is true

[897] News Corp. 2003 Annual Report at 17 & 21; Application, Gagliardi Decl. ¶ 12; Applicants' Sept. 22, 2003 ex parte at 10.

[898] *See* MULTICHANNEL NEWS, December 1, 2003.

[899] *Id.* at 5; *see also* Applicants' Sept. 22, 2003 Ex Parte at 5.

[900] Certain parties, including CDD, contend that the transaction will give News Corp. a "stranglehold" over ITV technologies and products, including conditional access technologies. These comments are addressed in section VI.C.4.d.ii, *supra.*

[901] Application at 27.

[902] NRTC Petition at 17-18; ACA Comments at 25-26.

with respect to broadband services -- that the Applicants have failed to discuss how or when DirecTV's satellite broadband offerings will be expanded.[903] ACA asserts that News Corp. could increase the availability of HDTV nationwide by broadcasting HD on Fox Network.[904] JCC claim that Applicants admit that Hughes can expand DirecTV's local-into-local offerings absent the transaction.[905] EchoStar contends that these claims are not transaction-specific, and that DirecTV, absent the transaction, has access to all the means cited by Applicants for providing local-into-local in additional markets. EchoStar also states that DirecTV has already announced that, without the merger, it will offer additional HDTV, for a total of seven HDTV channels. Finally, EchoStar asserts that, to the extent that News Corp. enters into partnering arrangements with existing broadband providers, this will not create new broadband options.[906]

331. Responding to critics' questioning of the claim that the merger will result in an increase in the number of DMAs receiving local broadcast television signals via satellite, Applicants point to News Corp's expertise and commitment to local services, and the economies of scale and scope and improved access to capital that will result from the transaction. And they contend that these factors provide sufficient evidence that such an expansion will occur. With respect to NRTC and EchoStar's argument concerning expanded broadband deployment, Applicants acknowledge that Hughes already provides broadband and could engage in various partnering solutions, but maintain that, as a result of the proposed transaction, DirecTV will be able to increase these offerings, due to its improved capital structure.[907]

332. Applicants subsequently committed to a schedule for providing a greater number of local channels and/or HDTV channels than DirecTV previously announced. Specifically, they committed to provide by end of 2004, either local channels in 30 additional DMAs, or 30 more national HDTV channels, or some combination of additional local-into-local DMAs and HDTV channels, based on the bandwidth requirements.[908] In addition, Applicants claim that, in the longer term, they will design and launch a new generation of satellites as early as 2006 and no later than 2008 that will provide much greater capacity for DirecTV services. This effort, which involves a financial commitment above that which Hughes's current owner has authorized, will enable DirecTV to provide local broadcast channels in all 210 DMAs, including local channels in HDTV format in select markets.[909] Applicants stated that, "as early as 2006 and no later than 2008, (1) DirecTV will offer a seamless, integrated local channel package in all 210 DMAs, and (2) DirecTV will offer at least 200 to 300 channels of local and national HDTV programming." Applicants claim that DirecTV will be the strongest possible competitor to cable *only if* it can provide consumers with their local broadcast channels and with HDTV programming and

[903] NRTC Petition at 19. NRTC urges that we require Applicants to make specific commitments to deploy broadband services to rural America. *Id.* at 19-20.

[904] ACA Comments at 26-27.

[905] JCC Comments at 68.

[906] EchoStar Petition at 40-43.

[907] Applicants' Reply at n. 224; Applicants' July 28 Response at 35.

[908] *See* Letter from William M. Wiltshire, Counsel for The News Corporation, *et al.*, to Marlene H. Dortch, Secretary, FCC, (September 22, 2003) ("Applicants' Sept. 22 Ex Parte") at 3.

[909] *Id.* at 2, 4.

that they intend to extend that capability as quickly and efficiently as possible.[910]

333. *Discussion.* The Commission has long recognized the importance of local broadcast television and its contribution to the Commission's goal of fostering localism in media. To the extent that the transaction results in an increase in the amount of DBS-provided local-into-local service and/or the number of HDTV channels offered to subscribers, this should increase competition in MVPD markets and should benefit consumers through increased choice, lower prices, or both. In addition, we find that increasing the number of DMAs in which DirecTV subscribers can receive local broadcast television stations furthers the Commission's goal of promoting localism.[911]

334. Applicants have alleged that a benefit of the transaction will be the provision by the end of 2004, by DirecTV of either local channels in an additional 30 DMAs or 30 more channels of HDTV, or a combination of local channels and HDTV channels that have similar bandwidth requirements above and beyond what had been previously funded, projected or planned by Hughes/DirecTV.[912] In order to ensure that Applicants live up to their commitment to achieve the important public interest benefit of increased local channel service to all regions of the country, we require, as a condition of our license transfer approval, that, by year end 2004, Applicants provide local channel service in an additional 30 DMAs beyond what had been previously funded, projected or planned by Hughes/DirecTV. In the event that circumstances beyond DirecTV's control limit its ability to fulfill this license condition, DirecTV may petition the Commission for waiver pursuant to Commission rules.[913]

3. Increased Operating Efficiencies

335. Applicants claim that, as a result of the transaction, DirecTV will realize savings in annual overhead and other operating expenses in the range of $65 million to $135 million. These savings, according to the Applicants, will be due largely to News Corp.'s experience in direct to home satellite services and its commitment to cost-efficient operations. The major elements of these claimed savings are: (1) savings of $40-80 million from reduced customer service costs, of which $20-40 million is assumed to be merger-specific; (2) savings of $40-80 million from reduced general and administrative expenses; and (3) savings of $7-15 million from drawing on News Corp.'s experience and rationalizing operational areas of overlap.[914]

336. ACA responds that, to the extent that the Applicants might realize any efficiencies, they will provide the merged firm with resources to support anticompetitive conduct.[915] EchoStar and JCC state that the claimed efficiencies are unsupported by the evidence, are not transaction-specific and verifiable, and that the benefits of those efficiencies would flow to News Corp. rather than to

[910] *Id.* at 4.

[911] *See*, e.g., *2002 Biennial Review Order*, 18 FCC Rcd at 13643-45 ¶¶ 73-79.

[912] Applicants' Sept. 22 Ex Parte at 2.

[913] See 47 C.F.R. § 1.925.

[914] Application at 31-33, Giacalone Decl. ¶¶ 9-14.

[915] ACA Comments at 26.

consumers.[916]

337. *Discussion.* Excluding for the moment savings that result from integration of the current distribution facilities of News Corp. and DirecTV, Applicants have not provided sufficient supporting evidence for us to verify and quantify the claimed savings resulting from increased operating efficiency. More importantly, Applicants have not demonstrated that the claimed savings in operating costs are transaction specific. In this regard, we note that many of the claimed savings are related to the introduction of "best practices," but Applicants fail to demonstrate why DirecTV, by itself or through other means that pose fewer competitive risks than the merger, could not also introduce those same best practices. For example, Applicants claim that, with the proposed transaction, DirecTV might reduce its costs by scaling back its reliance on third-party customer service centers, and performing that function in-house. Applicants estimate annual savings of \$40-\$80 million annually by instituting this change. Applicants claim that half those savings would be transaction specific, but provide no evidence that the incentive or ability to increase the use of in-house service centers is unique to News Corp. or that specific synergies exist by which News Corp. could operate in-house customer service facilities more efficiently than an outside contractor, or than could DirecTV itself if it provided customer service solely on an in-house basis. In fact, DirecTV currently has ten customer service centers, one of which is operated in-house.

338. Applicants also estimate annual savings of \$7-15 million by rationalizing operational areas, including the sharing of national distribution facilities operated by Fox Cable Networks and by DirecTV.[917] We note, however, that News Corp. will have only a partial interest in DirecTV, and this may affect the feasibility of realizing benefits related to rationalizing operational areas.[918] In particular, the Applicants have not demonstrated that, with a 34% interest in DirecTV, News Corp. could realize benefits above that which DirecTV could already realized through contractual agreement with News Corp. or some other entity.[919] Thus, we exclude these savings from estimated benefits of this transaction.

4. **Economies of Scope and Scale**

339. Applicants claim that the proposed transaction, by more than doubling the post-transaction entity's subscriber base (from 11.4 million for DirecTV alone to over 23 million subscribers for News Corp./DirecTV worldwide), will allow the merged entity to take advantage of economies of scale and scope. For example, Applicants claim that, by spreading the costs of research and development

[916] EchoStar Petition at 43-44; JCC Comments at 69-70.

[917] It appears that these claimed savings were not included in the estimate of the total savings that would result from the merger. *See* Application, Giacalone Decl. ¶ 7.

[918] In this regard, we note that the Applicants attempt to rebut claims that News Corp. and DirecTV will engage in temporary foreclosure on the ground that News Corp. will possess only a minority interest in DirecTV and that consequently joint profit maximization is not feasible. The logic of this argument also suggests that News Corp.'s minority interest should also limit the ability of the Applicants to jointly achieve operating efficiencies.

[919] We use the 34% ownership stake in evaluating this claimed benefit because this is the ownership stake that News Corp. will possess immediately after consummation of the transaction, and there is no certainty that News Corp. will increase that stake. In analyzing potential harms, however, we use higher ownership stakes because News Corp. may increase its ownership interest without further Commission review, and this may affect its incentive to engage in temporary foreclosure.

("R&D") over all News Corp.'s satellite operations and by pursuing common technology standards for both hardware and software, will be able to develop and introduce innovations more economically.[920] Applicants further claim that the transaction will permit the merged entity to explore more efficiently next-generation technologies, such as improved video and audio compression, improved spectrum efficiency using 8PSK and other advanced modulation techniques and Turbo coding.[921] Finally, Applicants claim that the vertical integration that will result from the transaction will reduce the risks of developing and launching new programming.[922]

340. In addition, Applicants contend that the proposed transaction can achieve "significant economies of scope and scale" in the area of set-top boxes.[923] According to Applicants, DirecTV's set-top boxes, which use a DirecTV proprietary standard, can be incorporated into the set-top-box platform used by News Corp. satellite affiliates.[924] They argue that, by specifying the design of its set-top-boxes in greater detail than DirecTV has in the past, set-top-box manufacturers will be able to minimize their development costs and maximize component purchasing power, resulting in lower costs to DirecTV.[925] Applicants further argue that research and development costs can be reduced by pursuing common technology standards across DirecTV and its other satellite affiliates.[926] According to Applicants, these cost savings will amount to about $10 per set-top box (or approximately $60 million annually).[927] The Applicants claim that these cost savings will not only benefit the customer purchasing a new set-top-box, but also reduce the subsidies required by the operators.[928] Applicants contend that "this will all be possible without swapping out set top boxes."[929]

341. JCC counter that, in concluding that set-top-box costs will decrease by $10 per box, Applicants have, erroneously, assumed that News Corp. manufactures its own set-top-boxes. JCC maintain that the third party set-top-box vendors already compete to provide the best technology at the lowest price, and that the proposed transaction will only decrease the number of buyers in that market.[930] EchoStar claims that any savings would flow to News Corp.'s shareholders, and not to consumers.[931]

---

[920] Application at 34.

[921] Application at 34.

[922] *Id.* at 35.

[923] The Applicants' claims concerning economies of scale in set-top boxes are discussed in greater detail in section VI.C.3.d *infra.*

[924] Application at 33-35; News Corp. July 28 Response at 39.

[925] *Id.*

[926] *Id.*

[927] *Id.*, at 35; Giacalone Decl. ¶ 22.

[928] News Corp. July 28 Response at 39.

[929] *Id.* at 39 n.30.

[930] JCC Comments at 70-71.

[931] EchoStar Comment at 45.

342. *Discussion.* To the extent that the proposed transaction enables the parties to combine their R&D efforts and to spread the cost of those R&D efforts over multiple satellite operations, this may increase the merged entity's incentive to innovate, which could result in new products and services that would not have been introduced absent the proposed transaction. To the extent this occurs, such benefits should be taken into account. On the other hand, if the innovations were developed by a third party who could sell its innovation to DBS or DTH providers worldwide (or if, absent the transaction, News Corp. and DirecTV would sell their innovations generally), then, as JCC point out, it is not clear that the proposed transaction would increase the incentive to innovate.

343. Similarly, if the merged entity can secure larger volume discounts from suppliers, and then pass those lower costs through to consumers in the form of lower end-user prices, this likewise would constitute a public interest benefit that should be considered in balancing the potential harms and benefits of the proposed transaction. If, on the other hand, the volume discounts take the form of savings in fixed costs, and those savings are not passed on to consumers, then we would be less inclined to treat such savings as a public interest benefit.

344. Based on the evidence presented by Applicants, we believe that the transaction is likely to enable the merged entity to achieve certain economies of scale and scope, particularly in R&D, that absent the transaction the parties individually could not have achieved. At the same time, it is not clear that all $60 million estimated by Applicants would qualify as a cognizable public interest benefits, either because the savings are not transaction specific (such as when innovations are produced by third parties and sold generally) or because it is not clear that the savings will be flowed through to consumers. Thus, while we believe that the proposed transaction will yield certain transaction-specific, cognizable benefits resulting from economies of scale and scope, we do not accept the total savings estimated by Applicants. Accordingly, while we accept these benefits in theory, we do not give significant weight to them in our balancing of potential public interest harms and benefits.

5. Improved Customer Satisfaction and Reduced Churn

345. Applicants claim that, because the post-transaction entity will offer more and better quality DBS products, customer satisfaction will increase. This in turn should enable DirecTV to increase its subscriber base and reduce churn and generally make it more competitive vis-à-vis other MVPD providers.[932] Applicants also contend that the proposed transaction, by bringing together the conditional access technology owned by News Corp.'s NDS subsidiary, and DirecTV's conditional access technology, will enable the merged entity to reduce signal piracy.[933] Based on Applicants' estimates of incremental new subscribers and its estimates of savings resulting from reduced churn, Applicants project an annual increase in earnings of $450 million to $525 million by 2006.[934] Applicants assert that these revenues will be used for additional initiatives that will produce better products and services.

346. JCC counter that the claim of efficiencies related to increased customer satisfaction is simply a restatement of the claim that News Corp. will bring innovative offerings to DirecTV, and that

[932] Application at 36.

[933] *Id.* at 37.

[934] *Id.* at 36-37.