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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
NEWS CORPORATION and THE DIRECTV GROUP, INC., Transferors,	)	MB Docket No. 07-18
	)	
and	)	
	)	
LIBERTY MEDIA CORPORATION, Transferee,	)	
	)	
For Authority to Transfer Control		

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MEMORANDUM OPINION AND ORDER

Adopted: February 25, 2008 **Released: February 26, 2008**

By the Commission: Commissioner Copps concurring and issuing a statement; Commissioner Adelstein approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. In this Order, we approve, subject to conditions, the application[1] of News Corporation ("News Corp."), The DIRECTV Group, Inc. ("DIRECTV") and Liberty Media Corporation ("Liberty Media") (collectively, the "Applicants") for consent for the transfer of control of various Commission licenses and authorizations, including direct broadcast satellite ("DBS")[2] licenses and authorizations, held by DIRECTV and its subsidiaries (collectively, DIRECTV), from News Corp. to Liberty Media.[3] The

[1] Consolidated Application for Authority to Transfer Control, News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee (Jan. 29, 2007) ("Application"). After filing their Application, the Applicants submitted a letter informing the Commission of a transaction Liberty Media entered into to acquire a television station in Green Bay, Wisconsin and its satellite station in Escanaba, Michigan. *See* Letter from Robert L. Hoegle, Nelson Mullins Riley & Scarborough LLP, Counsel to Liberty Media, to Marlene H. Dortch, Secretary, FCC (Feb. 16, 2007) ("Supplement to Application"). For purposes of our review of this transaction, we associate this supplementary information with the Application. *See* Supplement to Application at 2 (asking the Commission to associate the supplementary letter with the Application). The Media Bureau placed the Application on public notice on February 21, 2007, establishing a comment cycle for this proceeding. *See News Corporation, The DIRECTV Group Inc., and Liberty Media Corporation Seek Approval to Transfer Control of FCC Authorizations and Licenses,* Public Notice, 22 FCC Rcd 3493 (MB 2007) ("*Public Notice*").

[2] Direct Broadcast Satellite Service is a radio communication service in which signals are transmitted or retransmitted by space stations for direct reception by communities or individuals. *See* 47 C.F.R. § 25.201.

Application is filed pursuant to section 310(d) of the Communications Act of 1934, as amended ("Communications Act" or "Act").[4] As discussed more fully below, the Applicants assert that approval of the Application would result in a number of public interest benefits, would not create any anticompetitive effects, and would be fully consistent with Commission rules and policies.

2. Approval of the Application is necessary to permit consummation of the Share Exchange Agreement between Liberty Media and News Corp., pursuant to which Liberty Media will exchange all of its 16.3 percent ownership interest in News Corp. for all of News Corp.'s ownership interest in DIRECTV, three Regional Sports Networks ("RSNs"), and approximately $550 million in cash.[5] Upon completion of the transaction, Liberty Media will have a 40.36 percent interest in DIRECTV, making it the largest stockholder by far.[6] By virtue of this interest, Liberty Media will have *de facto* control over DIRECTV which, through its subsidiaries, is the largest DBS service provider in the United States and a provider of DBS service to Latin America.[7] Liberty Media also will appoint three representatives to DIRECTV's 11-member Board of Directors to replace resigning News Corp. directors.[8] Chase Carey will remain as the President, Chief Executive Officer, and a member of the Board of Directors of DIRECTV.[9]

3. The Applicants state that the transaction will benefit the public because it will: (1) eliminate the vertical integration of News Corp. and DIRECTV, and thus alleviate the Commission's concern, expressed in the *News Corp.-Hughes* proceeding, that the combination of News Corp.'s programming interests and its ownership of DIRECTV, could increase News Corp.'s incentive and ability to threaten to withhold or actually withhold programming from competing multi-channel video programming distributors ("MVPDs");[10] (2) reduce media concentration by separating the interests of

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[3] Application at 1-2, Exhibit 3 ("List of FCC Licenses and Authorizations Controlled by DIRECTV Group, Inc."). The Applicants also request a waiver of our "cut-off" rules with respect to all pending applications filed by DIRECTV for additional space and earth station authorizations, to the extent that those applications are subject to the Commission's processing rules. *See* Application at 26-27; *see also* 47 C.F.R. § 25.116(b)(4) & (d).

[4] 47 U.S.C. § 310(d).

[5] Application at 2-3. The RSNs to be transferred are Fox Sports Net Northwest, LLC; Fox Sports Net Pittsburgh, LLC; and Fox Sports Net Rocky Mountain, LLC (collectively, the "Fox RSNs"). The Fox RSNs do not hold any licenses or authorizations and are not included in any of the transfer applications.

[6] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 15. Because DIRECTV has repurchased shares of its own stock since the Application was filed with the Commission, the percentage of DIRECTV shares that Liberty Media will acquire has increased to 40.36 percent from 38.4 percent, although the number of shares Liberty Media will acquire remains the same as in the Agreement. *Id.* Pursuant to the Agreement, Liberty will acquire from News Corp. beneficial ownership of 470.4 million shares of DIRECTV common stock. News Corp. will acquire from Liberty 324.6 million shares of News Corp. Class A common stock and 188 million shares of News Corp. Class B common stock. Application at 13.

[7] The Commission found that the acquisition of a 34 percent interest in Hughes Electronics Corporation by News Corp. would make it owner of the single largest block of shares in Hughes, thus providing News Corp. with a *de facto* controlling interest over Hughes and its subsidiaries, including wholly-owned subsidiary DIRECTV. *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473 ¶¶ 1-2 (2004) ("*News Corp.-Hughes Order*").

[8] *See* Application at 13-14.

[9] *Id.* at 13.

[10] *Id.* at i-ii, 16-18 (citing *News Corp.-Hughes Order*, 19 FCC Rcd at 551-556 ¶¶ 169-179; *Applications for Consent to the Assignment And/Or Transfer of Control of Licenses Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (And Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast* (continued....)

Liberty Media and News Corp.;[11] and (3) make Liberty Media's expertise in the areas of interactive television, broadband access, and interactive commerce more available to DIRECTV.[12] In addition, to address potential Commission concerns arising from the Application, Liberty Media agrees to be bound by the conditions established by the Commission for News Corp. when News Corp. acquired its interest in DIRECTV.[13]

4. To obtain Commission approval, the Applicants must demonstrate that the proposed transaction will serve the public interest, convenience, and necessity pursuant to section 310(d) of the Communications Act.[14] The Commission's review of the Application includes an assessment of whether the proposed transaction complies with the specific provisions of the Communications Act, other statutes, and the Commission's rules.[15] If the transaction would not violate a statute or rule, the Commission next considers whether the transactions could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.[16] The Commission generally weighs any potential public interest harms of proposed transactions against any potential public interest benefits.[17] The Applicants have the burden of proving that the proposed transaction, on balance, serves the public interest by a preponderance of the evidence.[18]

5. As discussed more fully below, based on the record before us, we find that our grant of the Application, as conditioned, serves the public interest. We find that the proposed transaction will comply with all applicable statutes and Commission rules. However, we also find that the proposed transaction would increase the likelihood of harms to competition and diversity absent remedial conditions. These potential harms largely result from the combined ownership and positional interests that John Malone and other officers and directors of Liberty Media would hold after the consummation of the transaction. In addition, combining Liberty Media's ownership of programming services, including regional sports networks and broadcast television stations, with its ownership of DIRECTV, presents potential public interest harms similar to those the Commission sought to mitigate when it conditionally approved News Corp.'s acquisition of an interest in DIRECTV. As the Commission did in approving that transaction, we grant the instant Application subject to certain conditions to address our concerns. Specifically, we require the Applicants to abide by program access, program carriage, RSN arbitration, and retransmission consent arbitration conditions modeled on the conditions imposed in the News Corp.-Hughes proceeding. In addition, we require that within one year of the date this Order is adopted, all of the attributable interests connecting DIRECTV-Puerto Rico and Liberty Cablevision of Puerto Rico, Ltd. ("LCPR") be

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Corporation (Subsidiaries), Assignees and Transferees, 21 FCC Rcd 8203, 8273-77 ¶¶ 155-165 (2006) ("*Adelphia Order*")).

[11] *Id.* at 19-20.

[12] *Id.* at 20-21.

[13] Application at ii-iii, 17-18; Supplement to Application at 1-2; Liberty Media Opposition of Apr. 9, 2007 at 6.

[14] *See* 47 U.S.C. § 310(d); *see also Adelphia Order*, 21 FCC Rcd at 8217 ¶ 23; *News Corp.-Hughes Order*, 19 FCC Rcd at 485 ¶ 18; *Application of EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation, (Transferors), and EchoStar Communications Corporation, (Transferee)*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002).

[15] *See Adelphia Order*, 21 FCC Rcd at 8217 ¶ 23; *News Corp.-Hughes Order*, 19 FCC Rcd at 484 ¶ 16.

[16] *See infra* at paras. 22-26.

[17] *News Corp.-Hughes Order*, 19 FCC Rcd at 477 ¶ 5.

[18] *Id.* at 483 ¶ 15.

severed.[19] Severing the ties between these two companies is necessary to prevent the potential competitive harms that would arise from the effective reduction of competitors from three to two in areas of the Puerto Rico MVPD market served by LCPR. It will help ensure that the firms will continue to compete vigorously throughout Puerto Rico and devote the requisite competitive resources to that market. We also find that the transaction will result in certain public interest benefits. More specifically, we find that the transaction is likely to reduce media concentration and vertical integration by decoupling the interests of News Corp. from the interests of Liberty Media and DIRECTV. We find that the potential public interest harms of the proposed transaction, as conditioned, are outweighed by the potential public interest benefits. Therefore, on balance, we find that the public interest will be served by approval of the Application subject to the conditions we adopt in this Order.[20]

II. DESCRIPTION OF THE PARTIES

A. The DIRECTV Group, Inc.

6. DIRECTV through its subsidiaries, offers direct-to-home ("DTH") satellite service in the United States and Latin America.[21] Its subsidiary, DIRECTV Enterprises LLC, operates nine geostationary satellites serving more than 16 million subscribers nationwide, making it the largest provider of DTH satellite TV services and the second largest provider in the MVPD industry in the United States.[22] DIRECTV also owns DIRECTV Latin America Holdings, Inc., a group of companies that includes DIRECTV's wholly owned subsidiary, DIRECTV Latin America, LLC ("DIRECTV Latin America").[23] In turn, DIRECTV Latin America provides DTH satellite TV service to more than 2.8 million subscribers in 27 countries in Latin America and the Caribbean, including Puerto Rico, through DIRECTV-Puerto Rico.[24]

7. DIRECTV offers a wide variety of programming services, distributing to its subscribers more than 1,650 digital video and audio channels. In particular, DIRECTV offers approximately 180

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[19] *See* Section V.C.1., discussing compliance requirements.

[20] The conditions in this Order are set forth in Appendix B.

[21] DIRECTV was traded on the New York Stock Exchange under ticker symbol DTV until December 3, 2007, when DIRECTV switched to the NASDAQ Global Select Market under the same ticker symbol, DTV. *See* DIRECTV, *The DIRECTV Group Announces Switch to The Nasdaq Stock Market*, Press Release (Nov. 15, 2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=1078547&highlight= (visited Dec. 16, 2007). Formerly known as Hughes Electronics Corporation, the company changed its name to The DIRECTV Group, Inc. in 2004, following its acquisition by News Corporation, Ltd. *See* DIRECTV, *SEC Form 8-K*, filed March 16, 2004.

[22] As of June 30, 2007, DIRECTV had 16.3 million subscribers and was the second largest MVPD, after Comcast, which had 24.1 million video subscribers. EchoStar's Dish network had 13.6 million subscribers and Time Warner Cable had 13.4 million subscribers as of June 30, 2007. *See* DIRECTV, *SEC Form 10-Q for the Quarter Ended June 30, 2007*, at I-2, 26; Comcast Corporation and Subsidiaries, *SEC Form 10-Q for the Quarter Ended June 30, 2007*, at I-2, 24; EchoStar DBS Corporation, *SEC Form 10-Q, for the Quarter Ended June 30, 2007*, at I-2, 22; Time Warner Inc., *SEC Form 10-Q for the Quarter Ended June 30, 2007*, at I, 3.

[23] The Applicants state that DIRECTV has an 86 percent ownership interest in DIRECTV Latin America. Application at 6. However, in January 2007, DIRECTV acquired the remaining 14 percent interest in DIRECTV Latin America, giving it 100 percent ownership. DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2006*, at 11.

[24] *See* DIRECTV, *SEC Form 10-Q for the Quarter Ended March 31, 2007*, at 23-24; DIRECTV, *SEC Form 8-K*, filed May 9, 2007, at Exhibit 99.1 (total number of DIRECTV subscribers in Latin America increased to 2.80 million from 1.66 million). In the Application, the Applicants state that DIRECTV Latin America has more than 1.7 million subscribers. Application at 6.

basic entertainment channels, 31 premium movie channels, 35 regional and specialty sports networks, more than 1,100 local broadcast channels, more than 45 pay-per-view "movie and event choices," and more than 85 Spanish and other foreign language special interest channels."[25] DIRECTV's offerings include exclusive content such as NFL Sunday Ticket and NCAA Mega March Madness.[26]

B. Liberty Media Corporation

8. Liberty Media Corporation, through its ownership interests in subsidiaries and other companies, is primarily engaged in video and online commerce, media, communications, and entertainment industries in North America, Europe, and Asia.[27] Liberty Media is structured as a holding company consisting of two business groups, the Interactive Group and the Capital Group. Neither group is a separate legal entity, and therefore neither can own assets, issue securities, or enter into legally binding agreements. Currently, the economic performance of each group is reflected separately by two tracking stocks, Liberty Interactive Common Stock and Liberty Capital Common Stock.[28] After consummation of the Share Exchange Agreement, Liberty Media intends to further split the Liberty Capital Group into two tracking stocks, Liberty Capital and Liberty Entertainment.[29]

9. The Interactive Group and the Capital Group are assigned separate businesses, assets, and liabilities. Each business in the Interactive Group and the Capital Group is separately managed, and each requires different technologies, distribution channels, and marketing strategies.[30] The Interactive Group includes Liberty's interests in businesses that are engaged in video and on-line commerce, such as QVC; Inc., IAC/InterActive Corp. ("IAC"); Expedia, Inc.; Provide Commerce, Inc.; and BuySeasons, Inc.[31]

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[25] Application at 6-7.

[26] DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2006*, at 4. DIRECTV has also launched The 101, a channel dedicated to broadcasting exclusive content. *Id.*; DIRECTV, *SEC Form 10-Q for the Quarter Ended March 31, 2007*, at 8 n.4, 24.

[27] Application at 8; Liberty Media, *SEC Form 10-K for the Year Ended December 31, 2006*, at II-43.

[28] The Liberty Media tracking stocks are publicly traded as LINTA and LINTB on the NASDAQ. Liberty Capital Common Stock may be converted into Liberty Interactive Common Stock, and Liberty Interactive Common Stock may be converted into Liberty Capital Common Stock. Liberty Media, *SEC Form 10-K for the Year Ended December 31, 2006*, at II-43. A tracking stock is a type of common stock that the issuing company intends to reflect or "track" the economic performance of a particular business or "group," rather than the economic performance of the company as a whole. Holders of tracking stocks have no direct claim to the issuing company's stock or assets and are not represented by separate boards of directors. Instead, holders of tracking stock are stockholders of the issuing company, with a single Board of Directors and subject to all of the risks and liabilities of the issuing company. *See* What is a Tracking Stock?, http://www.libertymedia.com/faq/default.htm#02 (visited Jan. 16, 2008); *see also* Iacobucci and Triantis, ECONOMIC AND LEGAL BOUNDARIES OF FIRMS, 93 Va. L. Rev. 515, 536, 539-541, 542 (May 2007) (stating that tracking stocks uniformly provide that tracking stockholders are entitled to share in the value of the entire firm and that holders of tracking stock voting rights, if any, must vote for directors of a unitary board as a practical if not a legal matter).

[29] Liberty Media, *SEC Form 8-K*, filed October 24, 2007 at 2. If the reclassification is implemented, the Liberty Entertainment common stock would be intended to track the economic performance of a newly designated Entertainment Group, which would hold subsidiaries Starz Entertainment, LLC; FUN Technologies, Inc.; GSN, LLC; and WildBlue Communications, Inc.; approximately $500 million in cash and cash equivalents; and a $551 million principal amount (as of June 30, 2007) of Liberty Media's publicly traded debt. In addition, Liberty Media plans to include in this new group its interest in DIRECTV, the three RSNs, and the cash it would acquire in the instant transaction. Liberty Media, *SEC Form S-4*, filed September 7, 2007, at i-ii.

[30] Liberty Media, *SEC Form 10-K for the Year Ended December 31, 2006*, at II-82.

[31] Application at 8-9. QVC, a wholly owned subsidiary, markets a wide variety of consumer products in the United States and foreign countries, primarily through the QVC networks and the Internet through its domestic and (continued....)

The Capital Group holds Starz Entertainment, LLC; Starz Media, LLC; TruePosition, Inc.; and FUN Technologies, Inc. In addition, the Capital Group holds Liberty Media's interests in GSN, LLC; WildBlue Communications, Inc.; Time Warner Inc.; and Sprint Nextel Corporation.[32] The Capital Group also owns the Atlanta Braves baseball team.[33] Liberty Media also holds interests in Crown Media United States, LLC and Viacom Inc.[34] John Malone is the Chairman of the Board of Liberty Media.[35] He holds approximately 32.3 percent of Liberty Media's voting shares and 5.2 percent of Liberty Media's

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international websites. Liberty Media, *SEC Form S-4*, filed January 25, 2007. IAC is an interactive commerce company consisting of brands such as Ticketmaster, Lending Tree, HSN, and Ask Jeeves, Inc. (now Ask.com). It transacts business worldwide via the Internet, television, and the telephone. Expedia, Inc. was incorporated under Delaware law in April 2005 to hold substantially all of IAC's travel and travel-related businesses, and completed its spin-off from IAC in August 2005. *Id.* Liberty Media has a 20 percent equity interest and 52 percent voting interest in Expedia, and a 22 percent equity and 54 percent voting interest in IAC. Barry Diller, as Chairman of the Board and CEO of IAC, and Chairman of the Board and Senior Executive of Expedia, is entitled to direct the vote of Liberty Media's shares of IAC and Expedia, "subject to certain limitations." Application at 10 nn. 8, 10. Provide Commerce's online e-commerce stores sell grower-shipped flowers, gourmet fruit baskets, steaks, and other gifts via the Internet. BuySeasons, Inc. is an online retailer of costumes, accessories and Halloween products. *See* http://www.libertymedia.com/ir/asset_list.htm (visited Oct. 3, 2007). On November 5, 2007, the IAC Board of Directors voted to split itself into five independent companies, with all shares of the new companies to be distributed to current IAC shareholders. IAC, *SEC Form 8-K*, filed November 5, 2007 at 2.

[32] Application at 8-9. Starz Entertainment, LLC, a wholly owned, consolidated subsidiary included in the Capital Group, provides premium programming distributed throughout the United States by cable operators, DTH satellite providers, other distributors, and the Internet. *See* Liberty Media, *SEC Form 10K for the Year Ended December 31, 2006*, at II-82. Starz Media, LLC is a creator and distributor of animated and live-action programming, creator of content under contract for other media companies, and leading independent home video/DVD entertainment company. True Position, Inc. develops and implements advanced wireless location products, services, and devices in a cross-carrier environment, including the potential for use in connection with social networks, mobile gaming companies, search companies, mobile advertisers, and providers of music, comedy, and entertainment content to wireless devices. Liberty Media owns 100 percent of these three companies. FUN Technologies, Inc. provides online and interactive casual gaming systems to distribution partners worldwide. On June 21, 2007, Liberty Media made an offer to purchase the 47 percent of FUN Technologies, Inc. that it did not own. On December 19, 2007, the shareholders of FUN Technologies, Inc. approved Liberty Media's offer and on December 28, 2007, the transaction was consummated after a Canadian court approved the transaction. Liberty Media has a 50 percent interest in Game Show Network, LLC, which operates GSN, a cable television channel featuring multi-platform interactive game programs, and GSN.com, an Internet gaming site; a 32 percent equity interest in WildBlue Communications, Inc., a provider of two-way broadband Internet access via satellite to homes and small businesses in rural markets underserved by terrestrial broadband alternatives; an approximately 2.8 percent interest in Time Warner Inc., whose businesses include filmed entertainment, interactive services, television networks, cable systems, music and publishing; and a 3 percent interest in Sprint Nextel Corporation, a communications services provider. Liberty Media, *SEC Form 10-K for the Year Ended December 31, 2006*, at II-44; "Liberty Media Corporation Investment Summary (as of June 30, 2007)," at http://www.libertymedia.com/ir/asset_list.htm (visited Oct. 3, 2007); "Liberty Media Completes Atlanta Braves Purchase," May 17, 2007, at http://uk.reuters.com/article/partiesNews/idUKWEN819520070517 (visited Oct. 18, 2007).

[33] Liberty Media, *SEC Form 8-K*, filed May 21, 2007 at 2. Liberty Media received a Time Warner Inc. subsidiary that held the Atlanta Braves (and certain of the Braves' minor league teams), Leisure Arts, Inc., and approximately $960 million in cash in exchange for approximately 68.5 million shares of Time Warner Inc. common stock. *Id.*

[34] Application at 9-10. Liberty Media has an 11 percent interest in Crown Media United States, LLC, owner/operator of the Hallmark Channel and the Hallmark Movie Channel, and a 1 percent interest in Viacom Inc. *Id.*

[35] Application at 11-12.

outstanding equity.[36]

10. *Liberty Global, Inc.* Liberty Global Inc. ("Liberty Global") operates broadband communications networks and media and programming businesses in Puerto Rico and outside the United States.[37] Liberty Global also owns LCPR, a cable system serving approximately 130,000 subscribers in central Puerto Rico.[38] John Malone is the Chairman of the Board of Liberty Global,[39] and is one of two members of the Executive Committee.[40] Malone owns approximately 31.4 percent of Liberty Global's voting shares and 5.0 percent of Liberty Global's outstanding equity.[41] Additionally, four members of Liberty Media's Board of Directors, including Malone, sit on Liberty Global's 10-person Board of Directors.[42]

11. *Discovery Holding Company.* In July 2005, Liberty Media completed the spin-off of Discovery Holding Company ("Discovery Holding"),[43] which included Liberty Media's interest in Discovery Communications, Inc. ("Discovery"), an operator of video programming networks, including several digital tier networks.[44] Discovery is an information-based media company reaching more than 1.5

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[36] Specifically, John Malone holds 32.4 percent of the voting stock of Liberty Interactive and 32.02 percent of the voting stock of Liberty Capital for a combined voting interest in Liberty Media of 32.34 percent. Malone also holds 5.21 percent of the equity of Liberty Interactive and 5.18 percent of Liberty Capital, for a combined equity interest in Liberty Media of 5.2 percent. The voting and equity percentages include currently exercisable options to acquire Liberty Media shares. If such options are excluded, Malone's voting interest is 30 percent and his equity percentage is 4.7 percent. Liberty Media Oct. 23, 2007 Response to Information and Document Request at 8 and n.9; *see also* Liberty Media, *SEC Form S-4*, filed Sept. 7, 2007 at 28.

[37] Application at 11. Liberty Global was formed by the union of UnitedGlobalCom, Inc., and Liberty Media International ("LMI"). LMI was formed by Liberty Media in 2004 as part of a plan to spin off some of its international television and programming assets. *See* Liberty Media Oct. 23, 2007 Response to Information and Document Request at 8 n. 11.

[38] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 4.

[39] Application at 11-12; *see also* Liberty Media Oct. 23, 2007 Response to Information and Document Request at 9.

[40] Liberty Global, *Fact Sheet*, +http://www.lgi.com/fact.html (visited Feb. 13, 2008); Liberty Global, *SEC Form DEF14-A – Other definitive proxy statements*, filed Apr. 30, 2007, at 14.

[41] The equity and voting percentages include currently exercisable options to acquire Liberty Global shares. Excluding such options, the equity percentage is 4.0 percent, and the voting interest is 25.6 percent. Liberty Media Oct. 23, 2007 Response to Information and Document Request at 9 and n.14.

[42] Application at 12. The overlapping directors and their equity interests are: Paul A. Gould (Liberty Media, 0.09 percent; Liberty Global, 0.11 percent); David E. Rapley (Liberty Media, 0.00 percent; Liberty Global, 0.01 percent); and Larry E. Romrell (Liberty Media, 0.01 percent; Liberty Global, 0.01 percent). Liberty Media Oct. 23, 2007 Response to Information and Document Request at 9 and n.13. When the Application was filed, Liberty Media owned less than 0.10 percent of Liberty Global's voting shares. Liberty Media subsequently sold all of those shares. Liberty Media Oct. 23, 2007 Response to Information and Document Request at 6 (citing Liberty Media July 10, 2007 Response to Information and Document Request at 9); *see also* Application at 11.

[43] Discovery Holding's shares are traded on the NASDAQ under the symbols DISCA and DISCB.

[44] Application at 11-12. Discovery Communications Holding, LLC is the successor reporting entity to Discovery Communications, Inc. The ownership structure is unchanged. At the time of the spin-off of Discovery Holding from Liberty Media, Discovery Holding owned 50 percent of Discovery Communications, Inc. Currently, Discovery Holding holds a 66.6 percent interest and Advance/Newhouse Programming Partnership ("Advance/Newhouse") holds a 33.3 percent interest of Discovery Communications Holding, LLC. Discovery Holding Company, *SEC Form 10-K for Year Ended December 31, 2007* at I-1. In September 2007, Discovery Holding and Advance/Newhouse engaged in preliminary discussions concerning an exchange of (continued....)

billion subscribers in more than 170 countries. Through TV and digital media, Discovery's 100-plus worldwide networks include Discovery Channel, TLC, Animal Planet, Discovery Health, The Science Channel, and Discovery HD Theater. Discovery is owned by Discovery Holding, Advance/Newhouse Programming Partnership ("Advance/Newhouse"), and John S. Hendricks, Discovery's founder and chairman.[45]

12. Although Liberty Media no longer owns the stock of Discovery Holding, John Malone, Liberty Media's Chairman, owns common stock representing 31.08 percent of "the overall voting power" of Discovery Holding and 5.47 percent of all outstanding shares.[46] Malone is also Discovery Holding's Chairman of the Board, Director, and Chief Executive Officer. Additionally, four members of Liberty Media's Board of Directors, including Malone, are on Discovery Holding's five-member Board of Directors.[47] Discovery Holding (2/3 interest) and Advance/Newhouse (1/3 interest) effectively each have negative control of Discovery because significant transactions, in addition to Discovery's annual business plan, require approval by an 80 percent majority of Discovery's capital stock.[48] Finally, Liberty Media provides management services to Discovery Holding.[49]

C. News Corporation

13. News Corporation ("News Corp.") is a diversified international media and entertainment company whose enterprises include filmed entertainment, television, cable network programming, DBS service, magazines and inserts, newspapers, and book publishing.[50] News Corp.'s wholly owned

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Advance/Newhouse's interests in Discovery Communications Holding LLC for shares of Discovery Holding. Those discussions included "matters relating to valuation and governance." *See* Discovery Holding, *SEC Form 8-K*, filed Sept. 21, 2007 at 1. On December 13, 2007, Discovery Holding announced that it had signed a non-binding letter of intent with Advance/Newhouse pursuant to which Discovery Holding and Advance/Newhouse will combine their stakes in Discovery Communications. Immediately after spinning-off Ascent Media Group, Discovery Holding will combine with a new holding company, and existing Discovery Holding stockholders will receive shares of common stock of the new publicly traded holding company. As part of the same plan, Advance/Newhouse will combine its interests in Discovery Communications and Animal Planet with the new holding company in exchange for preferred stock that, immediately after the closing of the transactions, will be convertible into shares representing one-third of the outstanding shares of common stock of the new holding company. The preferred stock held by Advance/Newhouse will entitle it to elect two members of the new holding company's board of directors and to "exercise approval rights with respect to the taking of specified actions by the new holding company and Discovery Communications." *See* Discovery Holding, *Discovery Holding Company Announces Agreement-in-Principle with Advance/Newhouse to Combine Their Stakes in Discovery Communications*, http://ir.discoveryholding.com/phoenix.zhtml?c=191960&p=irol-newsArticle&ID=1087104&highlight= (visited Dec. 16, 2007). In this Order, we refer to Discovery Communications, Inc. and Discovery Communications Holding, LLC as "Discovery."

[45] *See* Discovery Communications, *Discovery Consolidates Media Operations*, http://corporate.discovery.com/news/press/07q3/globalmedia082707.html (press release), Aug. 27, 2007). In addition to its interest in Discovery, Discovery Holding has two wholly owned operating subsidiaries, Ascent Media Group, LLC, and AccentHealth, LLC. Discovery Holding, *SEC Form 10-Q, Quarterly Report for Period Ended March 31, 2007*, at I-5.

[46] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 14. Major Holders of Class A Common Stock include John Malone, Paul A. Gould, David J.A. Flowers, Charles Y. Tanabe, and David Wargo. Major Holders of Class B Common Stock include John Malone and Paul A. Gould.

[47] Application at 10-11.

[48] *Id.*

[49] *See infra* para. 78.

[50] Application at 7.

subsidiary, Fox Entertainment Group, Inc. ("FEG"), owns approximately 41 percent of DIRECTV's outstanding common stock.[51]

14. FEG develops, produces, and distributes worldwide feature films and TV programs, and TV broadcasting and cable network programming. Among FEG's programming and distribution interests is FOX Broadcasting Company, which programs the FOX Network, MyNetworkTV, Fox Television, and related subsidiaries (collectively, "FTS"); Fox Cable Networks; Fox News Channel; Twentieth Century Fox Film; and Twentieth Century Fox Television.[52]

15. FEG's programming interests also include Fox Sports Net, Inc. ("FSN"). FSN is the largest regional sports network ("RSN") programmer in the United States, focusing on live professional and major collegiate home team sports events.[53] FSN's sports programming business consists primarily of ownership interests in 16 RSNs (the "FSN RSNs") and in National Sports Programming, which operates Fox Sports Net ("Fox Sports Net"), a national sports programming service. Fox Sports Net provides its affiliated RSNs with 24-hour national sports programming, featuring original and licensed sports-related programming and live and replay sporting events.[54] In addition to 16 RSNs that News Corp. currently owns or controls, FSN is also affiliated with an additional five RSNs through Fox Sports Net. Together, these RSNs reach approximately 81 million U.S. households, according to Nielsen Media Research, and have rights to telecast live games of U.S. professional sports teams in Major League Baseball ("MLB"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL"), as well as the games of numerous collegiate conferences and individual college and high school sports teams.[55]

III. THE PROPOSED TRANSACTION

A. Description

1. The Share Exchange Agreement

16. On December 23, 2006, News Corp. and Liberty Media entered into an agreement to exchange Liberty Media's 16.3 percent ownership interest in News Corp. for News Corp.'s approximately 40.36 percent ownership in DIRECTV, News Corp.'s 100 percent interest in three regional sports networks (Fox Sports Net Rocky Mountain, LLC; Fox Sports Net Pittsburgh, LLC; and Fox Sports Net Northwest, LLC, collectively, "RSN Subsidiaries"), and approximately $550 million in cash.[56]

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[51] News Corp., *SEC Form 10-Q, Quarterly Report for Period Ended December 31, 2007*, at 12.

[52] Application at 7-8. A list of News Corp.'s national and regional cable programming interests in the United States can be found at Cable, http://www.newscorp.com/operations/cable.html (visited Jan. 15, 2008).

[53] News Corp., *SEC Form 10-K for the Year Ended June 30, 2007*, at 11.

[54] *Id.*

[55] *Id.* In April 2006, News Corp. acquired Turner Regional Entertainment Networks, Inc. ("TRENI"), and its wholly owned, Atlanta-based, regional sports and entertainment network, Turner South, from Time Warner. In that transaction, News Corp. also acquired TRENI's rights to televise certain games of MLB's Atlanta Braves, the NBA's Atlanta Hawks and the NHL's Atlanta Thrashers. News Corp., *SEC Form 10-K for the Year Ended June 30, 2006*, at 10. On August 30, 2007, in partnership with The Big Ten Conference, Inc., News Corp. launched The Big Ten Network, a 24-hour national programming service devoted to the Big Ten Conference and Big Ten athletics, academics, and related programming. The network is available to all cable and satellite carriers and television distributors nationwide, with most programs offered in HD. Big Ten Network, *Big Ten Network Launch Arrives*, http://www.bigtennetwork.com/corporate/PR8302007.asp (visited Sept. 12, 2007).

[56] Application at 12; Liberty Media Oct. 23, 2007 Response to Information and Document Request at 15. The Application contains a List of Licenses and Authorizations Controlled by DIRECTV Group, Inc. (Exhibit 3); (continued....)

17. Pursuant to a Share Exchange Agreement and "other ancillary agreements," Liberty Media will exchange its 16.3 percent equity stake in News Corp. for all of the capital stock of Greenlady Corp. ("Splitco"), a wholly owned subsidiary of News Corp.[57] Before the exchange is effected, News Corp. will contribute to Splitco its 40.36 percent interest in DIRECTV, its 100 percent interest in the three RSN Subsidiaries, and approximately $550 million in cash.[58] Liberty Media will acquire the capital stock of Splitco through its indirect wholly owned subsidiaries that hold Liberty Media's 16.3 percent equity stake in News Corp. Each Liberty Media subsidiary that holds shares of News Corp. common stock will acquire a pro-rata interest in Splitco, in exchange for a proportionate number of News Corp. common stock shares that it holds.[59]

2. Resulting Ownership and Management Structure of DIRECTV

18. As a result of its purchase of Splitco from News Corp., Liberty Media will become the largest stockholder of DIRECTV, acquiring approximately 40.36 percent of DIRECTV common stock.[60] The Applicants acknowledge that Liberty Media will have *de facto* control over DIRECTV "for purposes of the Communications Act."[61] As a result of its sale of Splitco to Liberty Media, News Corp. will acquire from Liberty Media its approximately 16.3 percent equity stake in News Corp., and will divest all of its interests in DIRECTV.[62]

19. After the transaction is consummated, the DIRECTV Board of Directors will consist of 11 members. Upon consummation of the exchange, the three directors representing News Corp. on the DIRECTV Board of Directors will resign after proposing that they be replaced by three directors to be appointed by Liberty Media. DIRECTV has agreed to support the appointment of John Malone, Gregory B. Maffei, and one other person.[63] Chase Carey will remain as President, Chief Executive Officer, and member of the Board of Directors of DIRECTV.[64]

(Continued from previous page)
Transfer of Control Applications for Licenses Controlled by DIRECTV Group, Inc (Exhibit 7); and a List of Pending FCC Applications filed by DIRECTV Group, Inc. or its Subsidiaries (Exhibit 8).

[57] *See* Application at Exhibit 4 (copy of Share Exchange Agreement).

[58] "The cash amount is subject to adjustment based upon, among other things, the working capital of the RSNs as of the closing of the Exchange." Application at 12.

[59] *See* Application at Exhibit 5 and n.18. In addition to approval from the Commission, other regulatory approvals, a ruling from the Internal Revenue Service, and News Corp. stockholder approval are required. Application at 13 (citing Share Exchange Agreement at Art. VII).

[60] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 15.

[61] Application at 15 and n.21.

[62] Application at 13-15, 20. News Corp. will receive approximately 324.6 million shares of News Corp. Class A common stock and 188 million shares of News Corp. Class B common stock.

[63] Application at 14; DIRECTV Oct. 23, 2007 Response to Information and Document Request at 2; *see also* Liberty Media July 10, 2007 Response to Information and Document Request at LMC I.A. 0000213-216 [REDACTED]. Maffei is President and Chief Executive Officer of Liberty Media. News Corp. is represented on the DIRECTV Board of Directors by K. Rupert Murdoch, Peter F. Chernin, and David F. DeVoe.

[64] Application at 13. DIRECTV's current directors are listed in the Application at Exhibit 6. The Applicants also state that the Audit Committee will review and approve all related-party transactions as determined by the Audit Committee's Related Party Transactions Policies and Procedures, including any transactions between DIRECTV and Liberty Media. Application at 14. A related-party transaction is a transaction or series of transactions, including indebtedness, since the beginning of the company's last fiscal year, or any currently proposed transaction in which the company was or is to be a participant, in which the amount involved exceeds $120,000, and in which any related person had or will have a direct or indirect material interest. The term "related person" includes (continued....)

B. Application and Review Process

1. Commission Review

20. On January 29, 2007, News Corp., DIRECTV, and Liberty Media filed a consolidated application with the Commission seeking consent to transfer control of various Commission licenses and authorizations held by DIRECTV and its subsidiaries from News Corp. to Liberty Media, pursuant to section 310(d) of the Communications Act of 1934.[65] The Commission released a *Public Notice* on February 21, 2007, accepting the application for filing and establishing the pleading cycle for public comment or petitions to deny.[66] Petitions to deny were filed by EchoStar Satellite L.L.C. ("EchoStar"), North Dakota Broadcasters ("NDB"), and the Hispanic Information and Telecom Network ("HITN").[67] On July 10, 2007, the Media Bureau requested additional information from the Applicants.[68] The Applicants' separately filed responses to those requests are included in the record.[69]

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directors, director nominees, executive officers, 5 percent stockholders and their respective immediate family members and other persons sharing their households. *See* 17 C.F.R. § 229.404 ("Item 404 Transactions with related persons, promoters and certain control persons.").

[65] *See* 47 U.S.C. § 310(d); Application at 1.

[66] The *Public Notice* established March 23, 2007, as the deadline for filing comments and/or petitions to deny, and April 9, 2007, as the deadline for filing responses to comments and/or oppositions to the petitions.

[67] *See* EchoStar Petition; NDB Petition; HITN Petition. HITN withdrew its Petition on June 6, 2007. *See infra* n. 382 and para. 120.

[68] On May 21, 2007, the Media Bureau adopted a Protective Order under which third parties were allowed to review confidential or proprietary documents submitted by the Applicants. *See* News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, Protective Order, DA 07-2116 (rel. May 21, 2007) (*"First Protective Order"*). On June 15, 2007, the Bureau issued a request for information from Liberty Media and News Corp. *See* Letter from Monica Shah Desai, Chief, Media Bureau, FCC, to Robert L. Hoegle, Timothy J. Fitzgibbon, Thomas F. Bardo, Nelson Mullins Riley & Scarborough LLP, Counsel for Liberty Media (June 15, 2007); Letter from Monica Shah Desai, Chief, Media Bureau, FCC, to Ellen S. Agress and Maureen A. O'Connell, News Corp., John C. Quale and Jared S. Sher, Skadden, Arps, Slate, Meagher & Flom LLP, Counsel for News Corp., Susan Eid and Stacy Fuller, DIRECTV, William M. Wiltshire, Michael Nilsson, and S. Roberts Carter III, Harris, Wiltshire & Grannis LLP, Counsel for DIRECTV (June 15, 2007). On June 22, 2007, the Bureau issued an initial request for information from Discovery and Liberty Global. *See* Letter from Monica Shah Desai, Chief, Media Bureau, FCC, to Craig Troyer, Assistant General Counsel, Discovery Holding Company (June 22, 2007); Letter from Monica Shah Desai, Chief, Media Bureau, FCC, to Christopher Ottele, Holme, Roberts and Owen, Counsel for Liberty Global (June 22, 2007). On July 10, 2007, the Bureau issued a further Protective Order regarding the protection of highly confidential competitively sensitive documents. *See* News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, Protective Order, DA 07-3106 (rel. July 10, 2007) (*"Second Protective Order"*). On July 20, 2007, the Bureau issued a supplemental Protective Order partially granting Liberty Global's request to extend the protections granted in the *Second Protective Order* to certain portions of Liberty Global's submissions. *See* News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, Supplemental Protective Order, DA 07-3328 (rel. July 20, 2007) (*"Supplemental Protective Order"*); Letter from Lynn R. Charytan, WilmerHale, Counsel for Liberty Global, to Monica Shah Desai, Chief, Media Bureau, FCC (July 16, 2007). On various dates, the Applicants, Liberty Global, and Discovery Holding also responded to the Bureau's requests for additional information. Responses to these requests were filed in MB Docket No. 07-18.

[69] In this Order, "[REDACTED]" indicates confidential or proprietary information, or analysis based on such information, submitted pursuant to the *First Protective Order*, the *Second Protective Order*, and/or the *Supplemental Protective Order*. The unredacted version of this Order will be available upon request to qualified persons who execute and file with the Commission the signed acknowledgements required by the protective orders in this proceeding. *See First Protective Order*, App. A – Acknowledgement of Confidentiality; *see also Second Protective* (continued....)

2. Department of Justice Review

21. In addition to Commission review, the proposed transaction is subject to review by the U.S. Department of Justice ("DOJ"). The DOJ reviews communications mergers and transactions pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition in any line of commerce.[70]

IV. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

22. Pursuant to section 310(d) of the Communications Act, we must determine whether the Applicants have demonstrated that the proposed transfers of control to Liberty Media of the licenses and authorizations held by DIRECTV will serve the public interest, convenience, and necessity.[71] In making this assessment, we first assess whether the proposed transaction complies with the specific provisions of the Act,[72] other applicable statutes, and the Commission's rules.[73] If the transaction does not violate a statute or rule, we next consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.[74] We then employ a balancing process, weighing any potential public interest harms of the proposed transactions against any potential public interest benefits.[75] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.[76] If we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, we would designate the application for hearing under section 309(e) of the

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Order, App. A – Acknowledgment of Confidentiality. Any party seeking access to the Stamped Highly Confidential Documents or Highly Confidential Information subject to the *Supplemental Protective Order* shall request access pursuant to the terms of the *Supplemental Protective Order* and the *Second Protective Order* issued in this proceeding.

[70] 15 U.S.C. § 18.

[71] 47 U.S.C. § 310(d).

[72] Section 310(d) requires that the Commission consider the applications as if the proposed transferee were applying for the licenses directly. 47 U.S.C. § 310(d). *See SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) ("*SBC-AT&T Order*"); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18442-43 ¶ 16 (2005) ("*Verizon-MCI Order*"); *Applications of Nextel Communications, Inc. and Sprint Corporation*, 20 FCC Rcd 13967, 13976 ¶ 20 (2005) ("*Sprint-Nextel Order*"); *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, 17 FCC Rcd 23246, 23255 ¶ 26 (2002) ("*Comcast-AT&T Order*").

[73] *See, e.g., SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18442-43 ¶ 16; *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC*, 19 FCC Rcd 2570, 2580-81 ¶ 24 (2004); *EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp., and EchoStar Communications Corp., Hearing Designation Order*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) ("*EchoStar-DIRECTV HDO*").

[74] *See SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20.

[75] *See SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26.

[76] *See SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

Act.[77]

23. *The Commission's public interest evaluation necessarily encompasses the* "broad aims of the Communications Act,"[78] which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets;[79] accelerating private sector deployment of advanced services,[80] ensuring a diversity of information sources and services to the public;[81] and generally managing the spectrum in the public interest. This public interest analysis may also entail assessing whether a transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.[82] In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.[83]

24. Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.[84] The Commission and the DOJ each have independent authority to examine communications mergers, but the standards governing the

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[77] 47 U.S.C. § 309(e); *see also News Corp.-Hughes Order,* 19 FCC Rcd at 483 n.49; *EchoStar-DIRECTV HDO,* 17 FCC Rcd at 20574 ¶ 25.

[78] *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522, 21544 ¶ 41 (2004) ("*Cingular-AT&T Wireless Order*"); *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 27; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575 ¶ 26; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee,* 15 FCC Rcd 9816, 9821 ¶ 11 (2000) ("*AT&T-MediaOne Order*"); *Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, and VoiceStream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees*, 15 FCC Rcd 3341, 3346-47 ¶ 11 (2000); *AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications*, 14 FCC Rcd 19140, 19146 ¶ 14 (1999) ("*AT&T Corp.-British Telecom. Order*"); *Application of WorldCom, Inc., and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18030 ¶ 9 (1998) ("*WorldCom-MCI Order*").

[79] 47 U.S.C. § 521(6) (one purpose of statute is to "promote competition in cable communications and minimize unnecessary regulation"); 47 U.S.C. § 532(a) (purpose of section is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems"); *see also Applications for Consent to the Transfer of Control of Licenses and Authorizations by Time Warner, Inc. and America Online, Inc. to AOL Time Warner Inc.*, 16 FCC Rcd 6547, 6555-56 ¶ 22 (2001) ("*AOL-Time Warner Order*").

[80] *See, e.g.,* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 § 706 (1996) (providing for the deployment of advanced telecommunications capabilities).

[81] 47 U.S.C. § 521(4); *see also* 47 U.S.C. § 532(a).

[82] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

[83] *See Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

[84] *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42; *News Corp.-Hughes Order*, 19 FCC Rcd at 484 ¶ 17; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575 ¶ 27; *Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Authorizations and Application to Transfer Control of a Submarine Landing License*, 15 FCC Rcd 14032, 14046 ¶ 23 (2000) ("*Bell Atlantic-GTE Order*"); *Comcast-AT&T Order*, 17 FCC Rcd at 23256 ¶ 28; *WorldCom-MCI Order*, 13 FCC Rcd at 18033 ¶ 13.

Commission's review differ from those of the DOJ.[85] The Antitrust Division of the DOJ reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition.[86] The Antitrust Division's review is limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations.

25. The Commission, on the other hand, is charged with determining whether the transfer of control serves the broader public interest. In the communications industry, competition is shaped not only by antitrust law, but also by the regulatory policies that govern the interactions of industry players.[87] In addition to considering whether a transaction will reduce existing competition, therefore, we also must focus on whether the transaction will decrease the market power of dominant firms in the relevant communications markets and the transaction's effect on future competition.[88] Our analysis also recognizes that a proposed transaction may lead to both beneficial and harmful consequences. For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, or create opportunities to disadvantage rivals in anticompetitive ways.[89]

26. Finally, the Commission's public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.[90] Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, which may be necessary to carry out the provisions of the Act.[91] Indeed, our public interest authority enables us to rely upon our extensive regulatory and

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[85] *See, e.g.*, *Verizon-MCI Order*, 20 FCC Rcd at 18444, ¶ 18; *SBC-AT&T Order*, 20 FCC Rcd at 18302, ¶ 18; *Rainbow DBS Company LLC, Assignor, and EchoStar Satellite L.L.C., Assignee, Consolidated Application for Consent to Assignment of Space Station and Earth Station Licenses, and Related Special Temporary Authorization*, 20 FCC Rcd 16868, 16874, ¶ 12 (2005); *Sprint-Nextel Order*, 20 FCC Rcd at 13978, ¶ 22; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575, ¶ 27. *See also Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

[86] 15 U.S.C. § 18.

[87] *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42; *Comcast-AT&T Order*, 17 FCC Rcd at 23256 ¶ 28; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 10.

[88] *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 23; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19147-48 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23256 ¶ 28.

[89] *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42; *AOL-Time Warner Order*, 16 FCC Rcd at 6550, 6553 ¶¶ 5, 15.

[90] *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047-48 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19148 ¶ 15; *see also WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (stating that the Commission may attach conditions to the transfers); *Applications of VoiceStream Wireless Corp., Powertel Inc. and Deutsche Telekom AG for Consent to Transfer Control of Licenses and Authorizations*, 16 FCC Rcd 9779, 9782 (2001) (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

[91] 47 U.S.C. § 303(r). *See Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that section 303(r) permits the Commission to order a cable company not to carry broadcast signal beyond station's primary market); *United Video*, (continued....)

enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits.[92] Despite this broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)[93] and that are reasonably related to the Commission's responsibilities under the Communications Act and related statutes.[94]

V. ANALYSIS OF POTENTIAL HARMS IN THE RELEVANT MARKETS

A. Introduction

27. We discuss below the potential public interest harms that are likely to result from the transaction. We consider specifically whether the transaction will increase the Applicants' incentive or ability to engage in anticompetitive behavior that is likely to harm competition, diversity, or localism. As in *News Corp.-Hughes,* we examine the transaction's likely impact on the MVPD market and the programming market. We conclude that, absent conditions, the transaction is likely to harm competition and diversity in both markets.

B. Relevant Markets

28. In general, the level of competition in a market depends heavily on the ability and willingness of consumers to substitute one product for another in the event of an increase in price. If consumers have such choices, a single firm cannot raise its product's price above competitive levels because consumers would respond by switching to a substitute product. The level of competition depends on what products are substitutes (the "product market"), where those substitute products are available (the "geographic market"), what firms produce them ("market participants"), and what other firms might be able to produce substitutes if the price were to rise ("market entrants"). To evaluate the impact of proposed transactions on competition, we examine the characteristics of competition in the relevant product and geographic markets and the ease with which new firms could enter those markets, and determine the impact of the transactions on market participants and consumers. Transactions raise competitive concerns when they reduce the availability of substitute choices (*i.e.*, increase market concentration) to the point that the acquiring firm has a significant incentive and ability to raise prices or reduce output. Economic theory describes how such anticompetitive actions can harm consumers and how to measure the magnitude of the harm.[95]

29. In analyzing MVPD transactions, the Commission has generally examined two separate but related product markets: (1) the distribution of programming to consumers ("the distribution market") and (2) the acquisition of programming ("the video programming market"). The Applicants are significant participants in both of these product markets, and we therefore examine whether the conditions

(Continued from previous page)
Inc. v. FCC, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (affirming syndicated exclusivity rules adopted pursuant to section 303(r) authority)).

[92] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *News Corp.-Hughes Order*, 19 FCC Rcd at 477 ¶ 5; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047-48 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18034-35 ¶ 14.

[93] *Sprint-Nextel Order*, 20 FCC Rcd at 13978-79 ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545-46 ¶ 43; *News Corp.-Hughes Order*, 19 FCC Rcd at 534 ¶ 131; *Comcast-AT&T Order*, 17 FCC Rcd at 23302 ¶ 140; *AOL-Time Warner Order*, 16 FCC Rcd at 6550 ¶¶ 5-6.

[94] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545-46 ¶ 43; *AOL-Time Warner Order*, 16 FCC Rcd at 6609-10 ¶¶ 146-47.

[95] *See* Kip Viscusi, John Vernon, and Joseph Harrington, ECONOMICS OF REGULATION AND ANTITRUST Ch. 7 (3d ed. 2000).

offered by Liberty Media adequately address any potential adverse effects the transaction may have on MVPD competition and diversity and on the flow of video programming to consumers.[96]

1. MVPD Distribution

a. Product Market

30. MVPDs include cable operators, DBS providers, and "overbuilders."[97] MVPDs bundle programming networks into groups of channels or "tiers" and sell this programming to consumers, deriving revenues from subscription fees and the sale of advertising time that they receive through their carriage agreements. MVPDs sometimes seek exclusive access to certain programming to attempt to make their offerings more attractive than those of their direct competitors.[98]

31. We define the MVPD product market according to the analytical framework and principles outlined by the U.S. Department of Justice and the Federal Trade Commission in the *Horizontal Merger Guidelines*. The Guidelines define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider of the products could profitably impose at least a "small but significant and non-transitory price increase," presuming no change in the terms of sale of other products.[99] Thus, when one product is a reasonable substitute for the other in the eyes of a sufficiently large number of consumers, it is included in the relevant product market even though the products themselves are not identical.[100] In the EchoStar-DIRECTV proceeding, which concerned the proposed merger of the two DBS firms, the Commission determined that the relevant product market was no broader than the entire MVPD market, but may well be narrower.[101]

b. Geographic Market

32. The Commission has determined in the past that the relevant geographic market for MVPD services is local because consumers subscribe to MVPD services based on the choices available to them at their residences. They are unlikely to change residences to avoid a small but significant increase in the price of MVPD service.[102] To simplify the analysis, however, we aggregate consumers that face the same choice in MVPD products into larger relevant geographic markets, as we have done in the past.[103]

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[96] These goals are embodied in various statutory provisions, including sections 613(f), 616, and 628 of the 1992 Act, 47 U.S.C. §§ 533, 536, 548.

[97] The term "overbuilders" refers to MVPDs, other than DBS providers, that compete against cable incumbents in their local franchise areas.

[98] *Comcast-AT&T Order*, 17 FCC Rcd at 23257-58 ¶ 33; *see also Commission's Cable Horizontal and Vertical Ownership Limits*, 20 FCC Rcd 9374, 9412-13 ¶¶ 67-70 (2005) (discussing and requesting comment on the Commission's definition of the programming market).

[99] *Horizontal Merger Guidelines*, 57 Fed. Reg. 41552 (Sept. 10, 1992), revised, 4 Trade Reg. Rep. (CCH) ¶ 13104 at § 1.11 (Apr. 8, 1997) ("*Horizontal Merger Guidelines*").

[100] *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 400 (1956) (relevant product market is composed of products that have reasonable interchangeability); *see also United States v. Microsoft*, 253 F.3d 34, 52-54 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001) (in determining reasonable substitutes, the court excluded "middleware" software from the definition of the relevant product market because of its present non-interchangeability with Windows notwithstanding its long-term future potential).

[101] *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20609 ¶ 115.

[102] *See News Corp.-Hughes Order*, 19 FCC Rcd at 505 ¶ 62; *Comcast-AT&T Order*, 17 FCC Rcd at 23282 ¶ 90; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20610 ¶ 119.

[103] *See News Corp.-Hughes Order*, 19 FCC Rcd at 505 ¶ 62.

Because the major MVPD competitors in most areas are the local cable operator and the two DBS providers, and consistent with the Commission's approach in prior license transfer proceedings, we conclude that the franchise area of the local cable operator is the relevant geographic market for purposes of our analysis.[104]

2. Video Programming

a. Product Markets

33. Firms that own cable or broadcast programming networks both produce their own programming and acquire programming produced by others. They package and sell this programming as a network or networks to MVPD providers for distribution to consumers.[105] To provide multichannel video services to subscribers, MVPDs combine broadcast television signals and cable programming networks (non-over-the-air programming) with distribution on their cable, satellite, or wireless distribution networks.[106]

34. Owners of cable programming networks are compensated in part through license fees that are based on the number of subscribers served by the MVPDs that carry the networks. These license fees are negotiated based on "rate cards"[107] that specify a top fee, but substantial discounts are negotiated based on the number of MVPD subscribers and on other factors, such as placement of the network on a particular programming tier.[108] Most cable programming networks and MVPDs also derive revenue by selling advertising time during the programming.[109]

35. Video programming differs significantly in terms of characteristics, focus, and subject matter. Programming is offered by over-the-air broadcast stations; regional sports networks; national cable networks, including news, entertainment and hobby networks; and various non-sports regional networks.[110] The record shows that neither MVPDs nor their subscribers view these networks as perfect substitutes for each other. We find that markets that include video programming are classic differentiated product markets.[111] We also note that at least a certain proportion of MVPD subscribers view certain

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[104] *News Corp.-Hughes Order*, 19 FCC Rcd at 505 ¶ 62.

[105] *Comcast-AT&T Order*, 17 FCC Rcd 23258 ¶ 34.

[106] *News Corp.-Hughes Order*, 19 FCC Rcd at 502 ¶ 54; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20653 ¶ 248.

[107] Such rate cards are not publicly available.

[108] *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20654 ¶ 249 (citing *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312, 17322 ¶¶ 10-11) (2001) ("*Cable Ownership Further Notice*"); *News Corp.-Hughes Order*, 19 FCC Rcd at 502 ¶ 55.

[109] *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20654 ¶ 249 (citing *Cable Ownership Further Notice*, 16 FCC Rcd at 17322 ¶¶ 10-11); *News Corp.-Hughes Order*, 19 FCC Rcd at 502 ¶ 55. Broadcast television station signals carried by MVPDs already contain advertising sold by the station owner, the network with which the station is affiliated (if any), or other program suppliers. FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 11 (2002), *at* http://www.fcc.gov/osp/workingp.html (broadcast networks, broadcast stations, and syndicators sell time to national advertisers; broadcast stations also sell time to local advertisers).

[110] *News Corp.-Hughes Order*, 19 FCC Rcd at 504 ¶ 59.

[111] Differentiated products are products that are similar in many respects but nonetheless differ in one or more significant respects and that are viewed as imperfect substitutes by consumers. *See* Dennis W. Carlton and Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 281 (2d ed. 1991). Most consumer goods are differentiated products.

types of programming as so vital or desirable that they are willing to change MVPD providers in order to gain or retain access to that programming.[112]

36. Nothing in the record suggests a need for us to define rigorously all the possible relevant product markets for video programming networks. For purposes of our discussion, we will separate the video programming products offered by the Applicants into three broad categories: (1) national and non-sports regional cable programming networks; (2) regional sports networks; and (3) local broadcast television programming.

b. Geographic Market

37. We have found it reasonable to approximate the relevant geographic market for video programming by looking to the area in which the program owner is licensing the programming.[113] For national cable programming networks, the relevant geographic market therefore is at least national in scope. Such networks are generally licensed to MVPDs nationwide, and, in some cases, they are licensed internationally. In contrast, with respect to RSNs and other regional networks, we conclude, as we did in the *News Corp.-Hughes* and *Adelphia* transactions, that the relevant geographic market is regional.[114] In general, contracts between sports teams and RSNs limit the distribution of the content to a specific "distribution footprint," usually the area in which there is significant demand for the specific teams whose games are being transmitted.[115] MVPD subscribers outside the footprint are unable to view many of the sporting events that are among the most popular programming offered by RSNs. We thus find it reasonable to define the relevant geographic market for regional networks as the "distribution footprint" established by the owner of the programming.[116]

C. Analysis of Potential Public Interest Harms

1. Potential Horizontal Harms

38. *Overview.* As a result of the transaction, two of the three competitors serving LCPR's territory will be commonly controlled. Liberty Media, which is controlled by Malone, is acquiring a *de facto* controlling interest in DIRECTV, which provides MVPD services to Puerto Rico through its DIRECTV Latin America division.[117] Liberty Global, which is also controlled by Malone,[118] provides

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[112] *See News Corp.-Hughes Order*, 19 FCC Rcd at 633, App. D; *see also Adelphia Order*, 21 FCC Rcd 8270-71 ¶ 46.

[113] *News Corp.-Hughes Order*, 19 FCC Rcd at 506 ¶ 64.

[114] *Id.*, 19 FCC Rcd at 506 ¶ 66.

[115] *See, e.g.*, DIRECTV, *Blackout Information*, http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId=1000007 (visited Feb. 10, 2008).

[116] In the case of broadcast television programming, it is reasonable to use DMAs to define the relevant geographic market for each individual broadcast station. *See News Corp.-Hughes Order*, 19 FCC Rcd at 506 ¶ 65.

[117] *See supra* para. 2 (stating that the proposed transaction, if approved will result in Liberty Media holding the single largest block of shares in DIRECTV by far). The Commission has previously determined that News Corp. possesses *de facto* control of DIRECTV, an interest which Liberty Media would assume if we approve this transaction. *See News Corp.-Hughes Order*, 19 FCC Rcd at 476, 483 ¶¶ 2, 14. We note our determination of News Corp.'s *de facto* control was based in part upon News Corp. obtaining a 34 percent *de jure* interest in Hughes, whereas Liberty would obtain more than a 40 percent *de jure* interest in DIRECTV as a result of this transaction. *See News Corp.-Hughes Order*, 19 FCC Rcd at 481 ¶ 9; *supra* note 6; *see also* DIRECTV, *SEC Form 10-K for the Fiscal Year Ended Dec. 31, 2007* at 30 (stating that DIRECTV expects that, just as is the case with News Corp. currently, Liberty Media will have "significant influence over [DIRECTV] management and actions that require (continued....)

cable television services in portions of Puerto Rico through LCPR.[119] EchoStar is the other MVPD in the areas served by both LCPR and DIRECTV-Puerto Rico.[120]

39. Post-transaction, LCPR and DIRECTV-Puerto Rico could be expected to compete less vigorously with each other. Diminished competition could serve to increase both firms' revenues. *Shareholders would benefit from such an outcome, while consumers would be harmed. Diminished* competition could take various forms. For example, as sister companies rather than true rivals, LCPR and DIRECTV-Puerto Rico would have little incentive to undercut the other's price and could even be expected to match the other's price increase or quality reduction. Likewise, each firm could be expected to scale back promotional and marketing activities or service improvements designed to lure away the other firm's subscribers. Moreover, neither firm would have to explicitly communicate this strategy to the other in order for it to be effective. Rather, the mere fact of common ownership and the prospect of increased revenues for each firm due to less vigorous competition would be sufficient to induce the problematic, yet profitable, behavior. The only constraint on such behavior would be subscribers' defection to EchoStar, LCPR's and DIRECTV-Puerto Rico's common rival. Yet, as we discuss below, we do not believe that EchoStar is a sufficiently strong competitor in Puerto Rico to prevent LCPR and DIRECTV-Puerto Rico from profitably increasing prices or reducing service quality in LCPR's territory. As a result, the transaction could reduce competition in those portions of Puerto Rico that are served by LCPR, leading to higher prices, lower quality service or both. Regardless of whether the firms increase profits by raising additional revenue through a price increase or lowering costs by reducing programming and promotions, consumers in Puerto Rico will be worse off.

40. We explain below how the corporate entanglements between Liberty Media and Liberty Global set the stage for this competitive outcome, and we address the Applicants' contentions that our concerns are unfounded. Ultimately, we conclude that a remedial condition is necessary to mitigate the public interest harm that is likely to arise from the transaction.

41. *Discussion.* LCPR's ownership history and the relationship between Liberty Global and Liberty Media provide the context for our concern about the transaction's potentially adverse competitive effects. LCPR was originally a subsidiary of Liberty Media. In June of 2004, Liberty Media was split into two publicly traded companies, with LCPR being part of the assets that made up what is now known as Liberty Global.[121]

42. Today, although Liberty Media and Liberty Global are nominally independent and have separate shareholders, Malone owns approximately 5 percent of the equity and 30 percent of the voting

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stockholder approval" and that "the proposed interests of Liberty [Media] may differ from the interests of other holders of [DIRECTV] common stock"). In addition, News Corp. has agreed to support the election of John Malone, Greg Maffei, and another unidentified director representing Liberty Media's interests to the DIRECTV board of directors. *See supra* note 63.

[118] *See infra* note 122.

[119] In addition, Liberty Global [REDACTED]. *See* Liberty Global Oct. 23, 2007 Response to Information and Document Request at 2.

[120] Liberty Media July 10, 2007 Response to Information and Document Request at 11; *see also* DIRECTV Sept. 14, 2007 Response to Information and Document Request II.H at DTV-II.H.049983 (demonstrating that [REDACTED]). DIRECTV Sept. 4, 2007 Response to Information and Document Request II.G at DTV-II.G.005774 (showing that [REDACTED]).

[121] *See* Liberty Media, *Liberty Media Corporation Completes Spin Off of Liberty Media International, Inc.* (press release), June 7, 2004; *see also* Liberty Global Dec. 13, 2007 Response to Information and Document Request at LGI.Sup.000093 (demonstrating that [REDACTED]).

power of both companies.[122] In addition, he is Chairman of the Board of both corporations, which gives him the power to hire and fire management, and sits on the Executive Committees of both companies.[123] Moreover, Malone also possesses the authority, among other things, to act on behalf of each corporation.[124] In public filings, Liberty Global concedes that Malone "has significant influence over the outcome of any corporate transaction or other matters submitted to our stockholders for approval, including the election of directors, mergers, consolidations and the sale of all or substantially all of our assets."[125] In addition, although the Compensation Committee is comprised of independent directors and therefore does not include Malone, Malone has made recommendations to Liberty Media's Compensation Committee concerning the compensation policies and compensation of individual executives and [REDACTED].[126] Malone is one of two persons who sits on Liberty Global's Executive Committee.[127]

[122] As of June 30, 2007, John Malone held 5.2 percent of the outstanding shares that track Liberty Media. These shares represented 32.34 percent of the voting power of the outstanding shares that track Liberty Media. Liberty Media Oct. 23, 2007 Response to Information and Document Request at 13-14. As of Aug. 10, 2007, John Malone held 5.0 percent of the outstanding shares of Liberty Global. These shares represented 31.4 percent of the voting power of the outstanding shares. Liberty Media Oct. 23, 2007 Response to Information and Document Request at 14; *see also* DIRECTV Sept. 4, 2007 Response to Information and Document Request II.G at DTV-II.G-006512 ([REDACTED]).

[123] Liberty Media Dec. 17, 2007 Response to Information and Document Request, Ex. A at 23 (Liberty Media Bylaws); *see also* Liberty Global, *SEC Form 8-K* (June 15, 2005), Ex. 3.2, at 22 (Liberty Global Bylaws).

[124] The bylaws of Liberty Media and Liberty Global each provide that "the Chairman of the Board, or the President or any Vice President or their designees shall have full power and authority on behalf of the Corporation to attend and to vote upon all matters and resolutions at any meeting of stockholders of any corporation in which this Corporation may hold stock, and may exercise on behalf of this Corporation any and all of the rights and powers incident to the ownership of such stock at any such meeting, whether regular or special, and at all adjournments thereof, and shall have power and authority to execute and deliver proxies and consents on behalf of this Corporation in connection with the exercise by this Corporation of the rights and powers incident to the ownership of such stock, with full power of substitution or revocation." *Id.*

[125] *See* Liberty Global *Schedule to Tender Offer Statement* (Aug. 10, 2007) at 13, *available at* http://ccbn.10kwizard.com/xml/download.php?repo=tenk&ipage=5106794&format=PDF (visited Feb. 19, 2008); *see also* DIRECTV Nov. 19, 2007 Response to Information and Document Request at DTV-SUPP-00067 (stating that [REDACTED]); *id. at* DTV-SUPP-00194 ([REDACTED]); Liberty Media Nov. 19, 2007 Response to Information and Document Request at LMC SUPP.00397 (noting that [REDACTED]) *id.* at LMC.SUPP.00117 (a chart depicting [REDACTED]).

[126] *See* Liberty Media Dec. 17, 2007 Response to Information and Document Request at 3; Liberty Global Dec. 20, 2007 Response to Information and Document Request at 1. We believe that the Compensation Committees may be pressured to adopt John Malone's recommendations whether he affirmatively participates in a meeting or from his mere presence when his incentives and desires are known. The Compensation Committee of another Malone-controlled entity, Discovery Holding, adopted Malone's recommendation of granting share options to Robert Bennett, a Liberty Media Director. Discovery Holding Dec. 17, 2007 Response to Information and Document Request at 2. Our concern here is similar to the conclusion we made in the *News Corp.-Hughes Order* regarding Robert Murdoch's News Corp.'s influence over DIRECTV where we found that "News Corp.'s influence is likely to be such that an independent director will be cautious before taking any step that could cause offense to News Corp. for fear that he or she might be ousted." *News Corp.-Hughes Order,* 19 FCC Rcd at 519 ¶ 97.

[127] *See* Liberty Media Oct. 23, 2007 Response to Information and Document Request at 9 (Liberty Global's Executive Committee currently consists of John Malone and Michael T. Fries). Notably, members of the Liberty Global Board have [REDACTED]. *See* Liberty Global Dec. 13, 2007 Response to Information and Document Request at LGI.Sup.000062 ([REDACTED]).

A person has *de facto* control when he possesses the ability to dominate the corporation's affairs.[128] Based on this evidence, we conclude that John Malone has *de facto* control of both Liberty Media and Liberty Global.[129]

43. In addition to Malone's control of both Liberty Media and Liberty Global, the boards of both corporations also exhibit substantial overlap. The boards of the two corporations share four members (John Malone, Paul A. Gould, David E. Rapley, and Larry E. Romrell).[130] These individuals constitute half of Liberty Media's board of directors and 40 percent of Liberty Global's board of directors. In addition, Malone has substantial professional and business relationships with several of the directors of the two companies. For example, Paul Gould (Liberty Media and Liberty Global boards), Robert "Dob" Bennett (Liberty Media board), M. LaVoy Robison (Liberty Media board), and David J. Wargo (Liberty Global board) also sit with Malone on the board of Discovery Holding.[131] Malone has the

[128] *See In re Benjamin L. Dubb*, 16 FCC 274, 289 (1951) (stating that the chief factor in determining whether *de facto* control exists by virtue of a particular minority stock interest is the power to dominate the management of the corporate affairs); *see also generally Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120*, 1 FCC Rcd 3 (1986); *In re Baker Creek Communications*, 13 FCC Rcd 18709 (1998); *In re News International*, 97 FCC 2d 349, 357 ¶ 20 (1984); *In re Paramount Television Prods., Inc.*, 17 FCC 264, 339-343 (1953).

[129] It appears that DIRECTV and Liberty Global likewise recognize Malone's influential position over Liberty Media, Liberty Global, and Discovery. *See* DIRECTV Nov. 19, 2007 Response to Information and Document Request at DTV-SUPP-00067 ([REDACTED]) *and* Liberty Media Nov. 19, 2007 Response to Information and Document Request at LMC.SUPP.00120 ([REDACTED]); *see also supra* note 122.

[130] Liberty Media July 10, 2007 Response to Information and Document Request I.B., Schedule 3 at 2-7.

[131] Discovery Holding Dec. 17, 2007 Response to Information and Document Request at 2-3 (listing Paul Gould, M. Lavoy Robison, and David Wargo as independent directors). We note that DIRECTV, Liberty Media, and Liberty Global follow NASDAQ's rules for establishing the qualifications of independent directors. *See* NASDAQ, Rule 4350(c), *available at* http://www.complinet.com/nasdaq/display/display.html?rbid=1705&element_id=13 (requiring that a majority of the board consist of independent directors for all NASDAQ-listed companies) (visited Feb. 1, 2008). DIRECTV, Liberty Global, and Liberty Media are all NASDAQ-listed companies. *See supra* notes 27 and 42. *See also* DIRECTV Oct. 23, 2007 Response to Information and Document Request at 1 (stating that the majority of the DIRECTV board consists of independent directors); Liberty Global Oct. 23, 2007 Response to Information and Document Request at 2 (stating that the majority of Liberty Global board consists of independent directors); Liberty Media Oct. 23, 2007 Response to Information and Document Request at 7 (stating that the majority of Liberty Media board consists of independent directors). Although certain directors may satisfy the NASDAQ rules regarding director independence, the NASDAQ definition of "independent director" requires only an opinion of the Board of Directors that the director does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. *See* The NASDAQ Stock Market, Inc. Corporate Governance, http://www.nasdaq.com/about/CorporateGovernance.pdf (visited Dec. 20, 2007) *and* NASDAQ, Rules 4200(a)(15) *and* IM-4200 (defining "Independent Director"), *available at* http://www.complinet.com/nasdaq/display/display.html?rbid=1705&element_id=13 (visited Feb. 1, 2008). Even if we were persuaded that the NASDAQ standard for director independence is sufficiently effective in this case, we generally question the standard's relevance to the Commission's *de facto* control analysis under the Communications Act. For example, even if Paul Gould were to qualify as an independent director under the NASDAQ rules, as Liberty Media asserts, we do not believe that we could disregard other substantial evidence relevant to his independence as a director when assessing the scope of John Malone's *de facto* control of Liberty Media, Liberty Global, and Discovery Holding. In addition to sitting on each of Liberty Media's, Liberty Global's, and Discovery Holding's Boards of Directors, Paul Gould sits on each of Liberty Media's Board of Directors committees, [REDACTED], and shares ownership of two race horses in Ireland with John Malone. *See* Liberty Media Dec. 17, 2007 Response to Information and Document Request at 6-7; Liberty Media Corp, Investor Relations – Corporate Governance, http://www.libertymedia.com/ir/Board-of-Directors.htm (visited Feb. 7, 2008); (continued....)

ability to exert influence over the nominally independent directors on each company's board because he socializes with independent directors and shares ownership interests with them in various assets, including an airplane, Irish race horses, Colorado commercial real estate, and an Alaskan hunting lodge.[132]

44. The evidence before us indicates that DIRECTV-Puerto Rico and LCPR are each other's primary competitors. According to the Applicants, across all of Puerto Rico as of year-end 2006, DIRECTV-Puerto Rico had approximately 177,000 subscribers whereas EchoStar had [REDACTED] subscribers.[133] Focusing on LCPR's territory, the Applicants report that LCPR has 130,000 subscribers and DIRECTV-Puerto Rico has approximately 73,000 subscribers.[134] Based on the Applicants' own evidence, therefore, [REDACTED].[135] Moreover, LCPR's internal documents reveal that "[REDACTED]."[136] Based on this evidence, we conclude that DIRECTV-Puerto Rico and LCPR are each other's primary competitors. This finding heightens our concern regarding competitive harm in Puerto Rico because we conclude that EchoStar is not a sufficiently strong competitor in Puerto Rico to prevent LCPR and DIRECTV-Puerto Rico from profitably increasing prices or reducing service quality in LCPR's territory. Notably, EchoStar also raises competitive concerns regarding the impact of the transaction in Puerto Rico and urges the Commission to require divestiture of LCPR.[137]

45. In the absence of any conditions, the strategic directions of two of the primary three competitors in LCPR's service territory would be controlled by the same person, John Malone, and would be significantly influenced by three other persons who sit on both boards. Among the strategic decisions that these individuals likely would be asked to decide would be whether to upgrade LCPR's cable system or the addition of new services and programming.[138] Moreover, Malone and others would be evaluating the performance of each firm's officers and determining their compensation. In short, with Malone and common directors controlling both Liberty Media and Liberty Global, there is a substantial likelihood that DIRECTV-Puerto Rico and LCPR would cease acting as rivals and view themselves as sister companies

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Liberty Media Nov. 19, 2007 Response to Information and Document Request at LMC.SUPP.00191-00208 ([REDACTED]).

[132] *See* Liberty Media Dec. 17, 2007 Response to Information and Document Request at 6-7 (describing nominally independent directors' historical business relationships with John Malone, socialization with John Malone, and joint ownership of property with John Malone); *see also* Liberty Media Nov. 19, 2007 Response to Information and Document Request at LMC.SUPP.00508 (discussing his business strategy, [REDACTED]).

[133] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 4 (DIRECTV-Puerto Rico subscribers); DIRECTV Sept. 14, 2007 Response to Information and Document Request II.H at DTV.II.H.049983 (EchoStar subscribers).

[134] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 4.

[135] While there is evidence that [REDACTED]. *See* DIRECTV Sept. 14, 2007 Response to Information and Document Request II.H at DTV-II.H-049983.

[136] Liberty Global July 26, 2007 Response to Information and Document Request II.H at LGI.II.H 002013 ([REDACTED]); *see also supra* note 120 (demonstrating that [REDACTED]).

[137] EchoStar Petition to Deny at 24-26 (arguing that divestiture "appears the only measure that is adequate to alleviate the competitive harm in this case").

[138] *See* Liberty Global Dec. 20, 2007 Response to Information and Document Request at 1 (stating that the Board of Directors must make all major strategic commercial decisions [REDACTED]); Liberty Media Dec. 17, 2007 Response to Information and Document Request at 4-5; Liberty Media Dec. 17 Response to Information and Document Request, Ex. A at 21 (Liberty Media Bylaws); Liberty Global, Inc. *SEC Form 8-K* (June 15, 2005), Ex. 3.2, at 20 (Liberty Global Bylaws).

under common control. Just as Liberty Media, DIRECTV-Puerto Rico, and Liberty Global would benefit from a reduction in competition between DIRECTV-Puerto Rico and LCPR via an explicit combination of DIRECTV-Puerto Rico and LCPR, so they would benefit from a reduction in competition via the instant transaction.[139] However, unlike a formal combination, the coordination between DIRECTV-Puerto Rico and LCPR would not generate any cost savings due to integration of their operations.

46. Liberty Media asserts that the LCPR franchise areas are unlike most areas in the U.S. and that, even with coordinated action, LCPR and DIRECTV would be unable to raise prices. They claim that fewer than half of all homes in LCPR franchise areas subscribe to any MVPD service and that any concerted efforts to raise MVPD prices in Puerto Rico would adversely affect subscribership levels.[140] This argument is based on faulty reasoning regarding the incentives to raise prices. The present market share of MVPD services is based upon the degree of competition among the firms in the market and the resulting prices. In the case of Puerto Rico, low incomes may serve to limit the number of households that purchase service. However, it does not follow that the firms cannot raise rates for those individuals who do subscribe. The ability of the firms to raise prices following the transaction depends upon the reactions of those individuals who are currently purchasing service, not on the number of individuals who have not purchased services at existing prices. Crucial to this analysis is information regarding the behavior of existing customers regarding price increases and which of the competing services are the closest substitutes for customers. [REDACTED].[141] [REDACTED].[142] This illustrates LCPR's acknowledgement, as highlighted above, that its [REDACTED].[143] DIRECTV Puerto Rico is clearly the closest substitute for LCPR cable service and further increases our concern over the profitability of coordinated action by the two firms.

47. Liberty Media also argues that LCPR customers are more likely to drop service for financial reasons such as an inability to pay rather than because of a better competitive offer from a competitor.[144] We do not find this information convincing, and internal studies by LCPR indicate that [REDACTED].[145] Examination of the cited document indicates that [REDACTED].[146] [REDACTED].[147]

48. Liberty Media contends that a recent price increase by LCPR [REDACTED] and that this is indicative of an inability of LCPR to profitably raise prices.[148] Even assuming that Liberty Media is correct, LCPR's inability to profitably increase prices on its own is beside the point. Our concern is that approval of this transaction will enable LCPR and DIRECTV-Puerto Rico to jointly increase prices. As

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[139] *See United States v. Dairy Farmers of America*, 426 F.3d 850, 861 (6th Cir. 2005) (holding that a transaction could result in anticompetitive effects where one corporation acquires partial interests in two competitors).

[140] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 3-4.

[141] Liberty Global July 26, 2007 Response to Information and Document Request II.H at LGI.II.H 001782.

[142] *Id.* An additional [REDACTED]. *See id.*

[143] *See supra note* 136

[144] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 4.

[145] *Id.* (citing Liberty Global July 26, 2007 Response to Information and Document Request II.H at LGI.II.H 002482).

[146] *See* Liberty Global July 26, 2007 Response to Information and Document Request II.H at LGI.II.H 002482. [REDACTED].

[147] Liberty Global July 26, 2007 Response to Information and Document Request II.H at LGI.II.H 001782.

[148] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 4 (citing Liberty Global July 26, 2007 Response to Information and Document Request II.H at LGI.II.H 018499-500 and LGI.II.H 002269).

discussed in paragraph 44, [REDACTED].

49. Liberty Media argues that LCPR and DIRECTV-Puerto Rico have a *de minimis* overlap of operations and therefore there is no opportunity or incentive to engage in conduct that would impair competition in Puerto Rico.[149] Furthermore, they contend, LCPR and DIRECTV-Puerto Rico constitute such a small portion of the operations of the parent companies that there would be no financial incentives to engage in any type of anticompetitive conduct.[150] We disagree. LCPR and DIRECTV compete to provide service to 337,000 households, which is 27 percent of all households in Puerto Rico.[151] The volume of revenue that Liberty Global and DIRECTV derive from Puerto Rico is not insignificant.[152] This is by no means a *de minimis* overlap. Certainly, the increased rates due to coordinated action of two of the three MVPDs in the LCPR franchise areas will not be *de minimis* for the affected households. We also place no credence on Liberty Media's argument that there are no incentives to engage in anticompetitive activities, even if the activities are profitable, because Puerto Rico is such a small portion of the parent companies' revenues. Under this reasoning, all anticompetitive transactions would receive approval as long as the acquiring firms were of a sufficiently large size and/or the anticompetitive harms were a small part of the overall transaction. We reject this notion.[153]

50. This reduction in competition between DIRECTV-Puerto Rico and LCPR might not adversely impact consumers, however, if the remaining firms in the market could maintain enough competitive pressure on DIRECTV-Puerto Rico and LCPR to prevent any attempt to increase prices or reduce service quality following the transaction from being profitable. In this case, however, in the areas served by both LCPR and DIRECTV-Puerto Rico, there is only one other firm – EchoStar – [REDACTED].[154]

51. In the EchoStar-DIRECTV transaction, the Commission examined the combination of two

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[149] Liberty Media Oct. 23, 2007 Response to Information and Document Request at 2-4.

[150] *Id.* at 5.

[151] *Id.* at 3-4; U.S. Census Bureau, *2006 Puerto Rico Community Survey, available at* http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US72&-context=adp&-ds_name=ACS_2006_EST_G00_&-tree_id=306&-_lang=en&-_caller=geoselect&-format= (visited Feb. 8, 2008).

[152] According to the Applicants, DIRECTV-Puerto Rico's 2006 revenues were [REDACTED], of which the Applicants indicate that [REDACTED] is from LCPR's territory. LCPR's 2006 revenues were [REDACTED]. *See* Liberty Media Response to Information and Document Request Oct. 23, 2007 at 5; *see also* Liberty Global *SEC Form 10-K for the Fiscal Year Ended Dec. 31, 2006*, at II-164.

[153] Moreover, while the Applicants focus exclusively on Puerto Rico in making their *de minimis* argument, we note that Puerto Rico is not the only area where there is a competitive overlap between DIRECTV and Liberty Global. Indeed, DIRECTV Latin America and Liberty Global compete throughout certain countries in Latin America, which increases the magnitude of the harm and also increase incentives to coordinate. Liberty Global owns cable systems that pass more than 2.7 million homes in Puerto Rico, Brazil, Chile, and Peru. *See* Liberty Global, *SEC Form 10-K for the Fiscal Year Ended Dec. 31, 2006*, at I-9. These operations of Liberty Global comprise approximately 10 percent of the homes passed by operations owned by Liberty Global. DIRECTV Latin America provides service throughout Latin America. The DIRECTV, *SEC Form 10-K for the Fiscal Year Ended Dec. 31, 2006*, at 3. DIRECTV owns 74 percent of Sky Brasil Servicos Ltda, which provides service to Brazil. *Id.* Even if Puerto Rico is a small part of the companies' operations, the transaction will create additional points of competitive contact across Latin America that will affect the incentives to reduce competition in Puerto Rico. Moreover, because DIRECTV customers in Puerto Rico receive service from the same satellites as the DIRECTV customers in areas of Latin America that are also served by Liberty Global, any decisions regarding the quality of service could be easily implemented across a broad area. *Id.* at 12

[154] *See supra* note 120.

firms that were, in many areas, the two smallest firms in the market. The Commission had sufficient concern over the effect on competition that it designated the EchoStar-DIRECTV transaction for a hearing before an administrative law judge. The Commission found that a reduction of competitors in a market from three to two raised significant competitive concerns that were not mitigated by the presence of a third competitor.[155] In that case, the third competitor was the incumbent franchised cable operator.[156] Even in the presence of such a strong competitor, the Commission determined that "[s]uch a drastic reduction in the number of competitors and concomitant increase in concentration create a strong presumption of significant anticompetitive effects."[157]

52. By contrast, this transaction involves the effective combination of the two strongest competitors in the relevant markets.[158] Indeed, even DIRECTV notes that EchoStar is a [REDACTED].[159] Just as in *EchoStar-DIRECTV*, the transaction reduces the number of independent competitors in the market from three to two. The overall effect of the transaction, therefore, would be to reduce the level of competition,[160] which ultimately would lead to higher prices and lower quality services in Puerto Rico.[161] We find nothing in the record that would cause us to be less concerned about the reduction of competition here than was the case in *EchoStar-DIRECTV*.

53. In response to anticipated concerns regarding Malone's dual status as Chairman of the Board of both Liberty Media and Liberty Global, the Applicants initially proposed that Malone recuse himself from all decisions concerning LCPR or the operations of DIRECTV-Puerto Rico.[162] We do not believe that such recusal is sufficient to alleviate potential competitive concerns, because the boards of directors of Liberty Media and Liberty Global will continue to have three members in common that would not be covered by the recusal.[163] Because Liberty Media will be the controlling shareholder of DIRECTV, these common directors will continue to have opportunities to influence decisions on issues regarding Puerto Rico. Moreover, Malone would continue to control both companies and would remain Chairman of both boards.

54. In response to concerns about their recusal proposal, the Applicants submitted a revised "insulation" proposal that included the creation of a Special Market Committee of the DIRECTV Board

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[155] *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20604 ¶ 99.

[156] *Id.* at 20612-13 ¶ 127.

[157] *Id.* at 20604 ¶ 99.

[158] *See supra* note 120 (demonstrating that [REDACTED]).

[159] DIRECTV Sept. 14, 2007 Response to Information and Document Request II.H at DTV-II.H-049983.

[160] EchoStar alleges that "in the absence of divestiture, the Commission would also be required to reverse its prior finding of effective competition" for LCPR's territory because such finding "relied on the market share of a then independent DIRECTV." EchoStar Petition at n.61 (citing *Liberty Cablevision of Puerto Rico*, Memorandum Opinion and Order, 21 FCC Rcd 11995, 11996, ¶ 5 (2006)). Our remedy addresses EchoStar's concern. Moreover, the local franchising authority in Puerto Rico, the Telecommunications Regulatory Board of Puerto Rico, is free to file for recertification with the Commission should it believe that the competitive circumstances have changed and the finding of effective competition is no longer warranted.

[161] *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20604, 20608, 20612-13, 20614 ¶¶ 101, 113, 127, 132.

[162] Application at 24-25.

[163] EchoStar raised similar concerns regarding the firewall proposed by the parties in their application. *See* EchoStar Petition at 26 ("In this case, the proposed 'firewall' for Dr. Malone will certainly be ineffective in preventing coordinated action between DIRECTV and LCPR.").