



PUBLIC NOTICE

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**SUBJECT TO CONDITIONS, COMMISSION APPROVES TRANSACTION
BETWEEN GENERAL MOTORS CORPORATION,
HUGHES ELECTRONICS CORPORATION AND
THE NEWS CORPORATION LIMITED**

The Commission today adopts a Memorandum Opinion and Order (“Order”) approving the joint application (“Application”)¹ of General Motors Corporation (“GM”), Hughes Electronics Corporation (“Hughes”), and the News Corporation Limited (“News Corp.”) (collectively, the “Applicants”) for consent to transfer control of various Commission licenses and authorizations subject to the conditions stated below. These licenses and authorizations include direct broadcast satellite (“DBS”)² and fixed satellite space station, earth station, and terrestrial wireless authorizations held by Hughes and its wholly- or majority-owned subsidiaries to News Corp.³ The Commission ordered that the grant of the approval of the Application with conditions is effective today, December 19, 2003, in accordance with Section 1.103 of the Commission’s rules, 47 C.F.R. §1.103. The Order fully explaining the Commission’s reasoning and the conditions will be issued shortly.

This transaction involves the split-off of Hughes from GM, wherein Hughes will become a separate and independent company, followed by a series of transactions through which News Corp., through its majority-held subsidiary, Fox Entertainment Group (“FEG”), will acquire a 34% interest in Hughes. The remaining 66% interest in Hughes will be held by three GM employee benefit trusts (managed by an independent trustee), which combined will hold an approximately 20% interest in Hughes, and by the general public, which will hold an approximately 46% interest in Hughes.

As a result, News Corp. will hold the single largest block of shares in Hughes, thus providing News Corp. with a *de facto* controlling interest over Hughes and its subsidiaries, including DirecTV

¹ See *Consolidated Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and the News Corporation Limited, Transferee, for Authority to Transfer Control*, May 2, 2003 (“*May 2003 Filing*”). The term, “Application,” refers to the *May 2003 Filing* and the letter from William M. Wiltshire, counsel for News Corp., to Marlene H. Dortch, Secretary FCC (May 30, 2003) (clarification of Application). The Media Bureau placed the Application on public notice on May 16, 2003, DA 03-1725, MB Docket No. 03-124, establishing a comment cycle for this proceeding.

² DBS is the acronym used in the United States to describe the domestic implementation of the satellite service known internationally as the broadcasting satellite service (“BSS”). See 47 C.F.R. § 25.201.

³ The Commission approved the Application and imposed the conditions pursuant to Sections 4(i) and (j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309, and 310(d).

Holdings, LLC (“DirecTV”), a wholly-owned subsidiary of Hughes, which provides DBS service in the United States, as well as Hughes Network Systems, Inc. (“HNS”), a facilities-based provider of very small aperture terminal (“VSAT”) network systems, and PanAmSat Corporation (“PanAmSat”), a global facilities-based provider of geostationary-satellite orbit fixed satellite services (“FSS”).

DirecTV is one of two full-CONUS DBS providers and the second largest MVPD in the U.S, providing service in all 50 states.⁴ It offers more than 825 channels of sports, news, movies, and family programming, including local broadcast channels in 64 television markets, high definition and foreign-language programming to nearly 12 million customers.⁵ News Corp. is a global media corporation owning a wide variety of video programming products from cable and broadcast networks to broadcast television stations which they sell to MVPDs across the country. News Corp.’s stable of cable and broadcast programming assets include the Fox broadcast network, one of only four national broadcast networks, 35 owned and operated (O&O) full-power local television broadcast stations, including two stations in three of the top five and five of the top ten markets, 10 nationally distributed cable networks, 12 owned and managed regional cable networks, a broadcast network.⁶ News Corp.’s cable programming assets include the Fox News Channel, Speedvision, FX, Fox Movie Channel, and the National Geographic Channel. News Corp. also controls a wide array of regional and national sports programming channels, as well as valuable program production assets.⁷ News Corp.’s broadcast stations carry UPN and Fox programming, which includes the World Series and other Major League Baseball post-season games, the 16 National Football Conference (“NFC”) teams and the National Football League (“NFL”), and popular shows like “The Simpsons,” “American Idol” and “Joe Millionaire.”⁸ In addition, News Corp. also controls the national broadcast rights to NFC professional football and MLB games, National Association of Stock Car Auto Racing (“NASCAR”) races, and several major packages of college basketball and football games nationwide.⁹

The Commission’s primary objective in reviewing license transfer applications is to promote the interest of the consumer of video programming—to maximize the variety, quality and innovation of available programming and minimize its price where possible. The mechanism of choice to achieve this goal is generally to encourage a competitive marketplace.

⁴ As of the end of the third quarter, DirecTV had 11.85 million subscribers. *See Hughes Announces Third Quarter Growth of 17% in Revenues and 33% in Operating Profit Before D&A; Operating Profit Quadruples; DirecTV Adds 326,000 Owned and Operated Subscribers in the Quarter, a 58% Increase Over Last Year*, Oct. 14, 2003, available at: http://www.hughes.com/ir/releases/2003_results/q3_2003/default.asp (viewed Nov. 14, 2003). DirecTV has surpassed the total subscribers of Time Warner Cable, Inc., which had 11.4 million subscribers as of September 30, 2003. *See Time Warner Inc. Consolidated Balance Sheet*, available at: http://www.timewarner.com/investors/quarterly_earnings/2003_3q/pdf/3q2003charts.pdf (viewed Nov. 14, 2003). Thus, DirecTV is now second only to Comcast in terms of subscribership.

⁵ Hughes Electronics Corporation, *General Overview* at <http://www.hughes.com/ir/general/default.asp> (visited Nov. 5, 2003).

⁶ Since filing the application for transfer of control, News Corp. has launched an additional network, Fuel, which brings the number of nationally distributed channels to 11.

⁷ Application at Attachment F.

⁸ *See* News Corp. at www.newscorp.com/investor/download/bearstearns03/sld019.gif; Fox Sports at www.newscorp.com/management/foxsports.html.

⁹ *See* Fox Sports Net at www.newscorp.com/management/fsn.html.

The proposed transaction will shift control of one of the two domestic DBS providers from an owner who has made no secret of its desire to get out of the business in recent years to a company that has a proven record of innovation and success in providing DBS services and in competing with cable distribution systems in other markets throughout the world. The Commission finds that the potential improvement in DirecTV's service offerings under News Corp.'s innovative and aggressively competitive management, while inherently difficult to quantify precisely, would be a major public interest benefit. Another tangible benefit that we can ensure will be realized is News Corp.'s commitment to achieve the important public interest benefit of offering increased local channel service.

The Commission also considers whether, as a result of the transaction, the post-transaction entity will have an increased incentive and ability to engage in anticompetitive foreclosure strategies with respect to broadcast television station signals, regional sports cable programming networks, national and non-sports regional cable programming networks, and program-related technologies, including electronic and interactive programming guides. In several areas, no transaction-specific harms were found. In other areas, where the record demonstrates that the proposed transaction is likely to result in anticompetitive harms, the Commission crafted license conditions that are narrowly targeted to address those harms. The Commission concluded that, on balance, the potential public interest benefits of the transaction outweigh the potential harms, as ameliorated by the license conditions.

DISCRIMINATION AGAINST UNAFFILIATED PROGRAMMING

Applicants acknowledge that competitive concerns could arise if a transaction were to create an entity with sufficient market power in the distribution of programming that it would have the incentive and ability to foreclose access to its distribution network by refusing to buy programming that viewers' desire from unaffiliated programmers, but contend that DirecTV lacks such power in the MVPD market.¹⁰ Nonetheless, Applicants offer that, "if the Commission deems it necessary, News Corp. and Hughes have agreed to accept the following enforceable undertaking as a condition of grant of their Application":

- Neither News Corp. nor DirecTV will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage.¹¹

With respect to potential discrimination against broadcast stations, Applicants point to statutory mandatory carriage requirements, which would prevent them from engaging in such a strategy, even if they had the incentive to do so.¹²

As to broadcast programming, the Commission finds it unlikely that, after the transaction, DirecTV could successfully discriminate against competing television broadcast stations. The applicable statutory and regulatory provisions¹³ thoroughly address satellite carriage of broadcast television programming. Television broadcast stations that elect retransmission consent can negotiate the terms and conditions of carriage¹⁴ and in reviewing carriage complaints against any MVPD, we consider any

¹⁰ Application at 49.

¹¹ Application at 53, Attachment G.

¹² Applicants' Reply at 63.

¹³ See, e.g., Satellite Home Viewer Improvement Act of 1999, PL 106-113, 113 Stat. 1501, Appendix I (1999) ("SHVIA").

¹⁴ 47 C.F.R. § 76.65.

unreasonable terms or conditions or negotiating procedures.¹⁵ In any market in which DirecTV offers local-into-local service pursuant to the statutory copyright license, it is required to carry all television broadcast stations within that local market that request carriage.¹⁶ The Commission's rules detail the technical terms of carriage, and the complaint process by which aggrieved parties can seek Commission redress if DirecTV has failed to meet its carriage obligations.¹⁷ A majority could not agree, however, on the legal requirement of SHVIA's non-discrimination provision.

The Commission concludes that Applicants' proposed commitment to allow unaffiliated programmers access to the DirecTV platform on nondiscriminatory terms and conditions, together with existing statutory safeguards, adequately address concerns regarding unaffiliated video programmers' access to the DirecTV platform, and therefore conditions grant of the Application on compliance with this access commitment. The Applicants' proposed commitment is not unlike the nondiscrimination requirement in the Communications Act and the Commission's program carriage rules.¹⁸ Aggrieved programmers and MVPDs may seek relief for any alleged violations of this condition by using the existing enforcement mechanisms found at Section 76.1003 of the Commission's rules.¹⁹

ACCESS TO NATIONAL AND NON-SPORTS REGIONAL NETWORKS

News Corp. has interests in several satellite cable programming networks, including national programming networks offering sports, news, or general entertainment,²⁰ and regional programming networks that do not offer sports.²¹ News Corp's satellite cable programming networks are currently covered by the non-discrimination and unfair practices prohibitions in the program access rules, and will continue to be subject to the rules based on the ownership structure of the post-transaction entity. News Corp. is subject to these rules because it meets the definition of a "satellite cable programming vendor in which a cable operator holds an attributable interest" due to attribution of Liberty Media's interest in News Corp.²² Some of News Corp's regional sports networks are also subject to the program access rules

¹⁵ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 16 FCC Rcd 1918, 1928 (2000).

¹⁶ 47 C.F.R. § 76.66(b)(1).

¹⁷ See 47 C.F.R. § 76.66(i) (channel position); 47 C.F.R. § 76.66(j) (manner of carriage) 47 C.F.R. § 76.66(m) (remedies).

¹⁸ See 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

¹⁹ See 47 C.F.R. § 76.1003.

²⁰ The following is a list of national programming networks affiliated with News Corp. (News Corp.'s ownership share appears in parentheses only if it is less than 100%): Fox News Channel; FX; National Geographic Channel (66 2/3%; remaining 33 1/3% National Geographic Society); Speed Channel; Fox Movie Channel; Fox Sports World; Fox Sports en Espanol (37.8%; remaining 62% Liberty (10.6%) and Hicks Muse (51.6%)); Fox Sports Digital Networks; TV Guide Channel (42.9% indirectly owned through Gemstar, which owns 100%); TV Games Network (42.9% indirectly owned through Gemstar, which owns 100%). See Application at Attachment F.

²¹ The following is a list of non-sports regional programming networks affiliated with News Corp. News Corp. holds a 40% interest in each network, while the remaining interest is held by Rainbow: MSG Metro Guide; MSG Metro Learning; MSG Traffic and Weather. See Application at Attachment F.

based upon either Liberty Media's or another cable operator's direct ownership interest.²³ Applicants acknowledge that a vertical relationship could lead to anti-competitive results in the distribution market if a programmer discriminated against or refused to sell to unaffiliated MVPDs in order to gain competitive advantage for its affiliated MVPD.²⁴ Thus, they offer to accept a series of program access-like undertakings that will remain enforceable even if News Corp. ceases to be subject to the Commission's program access rules.²⁵

The Commission finds no evidence in the record to suggest that News Corp.'s acquisition of a controlling interest in DirecTV is likely to give News Corp. any additional market power with respect to carriage negotiations for its national and non-sports regional cable programming, such that it could use its controlling interest in DirecTV to increase prices for such programming to levels above those that would exist absent the transaction. The Commission accordingly finds that the program access rules, combined with the Applicants' proposed program access conditions, will be sufficient to eliminate any potential for anti-competitive conduct due to the vertical relationship between News Corp.'s satellite cable programming networks and DirecTV's distribution platform with respect to News Corp.'s general national and non-sports regional programming. To ensure that the access and non-discrimination requirements of the program access rules will continue to apply to News Corp.'s national and regional cable programming,²⁶ and to obtain the additional protections encompassed by the Applicants' related commitments, we adopt the following conditions proposed by Applicants:

- News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions.²⁷
- DirecTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.²⁸

²² Under the program access attribution rules, an ownership interest greater than 5% is cognizable. *See* 47 C.F.R. § 501, note 2(a). Liberty Media owns 17.6% of News Corp and 100% of Liberty Cablevision of Puerto Rico which has 119,000 subscribers.

²³ For example, Comcast has a 50% ownership interest in Fox Sports Net New England.

²⁴ Application at 54.

²⁵ Application at Attachment G.

²⁶ In addition to accepting News Corp.'s additional program access commitments with respect to its regional cable programming, we separately address additional competitive concerns raised by News Corp.'s regional sports cable programming in the following section.

²⁷ In committing not to offer its programming services on an exclusive basis, News Corp. voluntarily foregoes the right enjoyed by all other vertically integrated programmers to seek approval of an exclusive programming contract under the public interest standard established in 47 U.S.C. § 548(c)(4).

²⁸ "Affiliated Program Rights Holder" includes (i) a program rights holder in which News Corp. or DirecTV holds a non-controlling "Attributable Interest" (as determined by the FCC's program access attribution rules); and (ii) a program rights holder in which an entity holding a non-controlling Attributable Interest in News Corp. or DirecTV has actual knowledge of such entity's Attributable Interest in such program rights holder. At the present time Liberty Media is the only entity covered by this definition. Nonetheless this commitment goes beyond the program access rules as DBS operators are not included within the exclusivity prohibition. *See* 47 C.F.R. § 1002(c).

- As long as Liberty Media holds an Attributable Interest in News Corp., DirecTV will deal with Liberty Media with respect to programming services it controls as a vertically integrated programmer subject to the program access rules.²⁹
- DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (e.g., NFL Sunday Ticket)
- Neither News Corp. nor DirecTV (including any entity over which either exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.
- These commitments will apply to News Corp. and DirecTV for the later of (1) as long as the FCC deems News Corp. to have an Attributable Interest in DirecTV and the FCC's program access rules are in effect (provided that if the program access rules are modified these commitments shall be modified to conform to any revised rules adopted by the FCC) or (2) if these commitments are embodied in a consent decree or other appropriate order issued by or agreement with the DOJ, FTC or FCC, for the term specified by such consent decree, order or agreement.

Applicants will be bound by these program access conditions so long as the Commission has program access rules applicable to satellite cable programming vendors affiliated with cable operators.³⁰ Additionally, for enforcement purposes, aggrieved MVPDs may bring program access complaints against Applicants using the procedures found at Section 76.1003 of the Commission's rules.³¹

ACCESS TO REGIONAL SPORTS CABLE PROGRAMMING NETWORKS

The Commission has long recognized that sports programming is among the programming services that are "must haves" for MVPDs and subscribers³² based, in part, on the finding that for such programming, there are no readily acceptable close substitutes.³³ The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: regional

²⁹ This condition would only be of significance in the event either Applicant or Liberty Media otherwise ceases to be subject to the Commission's program access jurisdiction.

³⁰ Although *most* of the program access rules will remain applicable unless terminated by Congress, Section 76.1002(c), the prohibition on exclusive contracts, sunsets in October 2007 unless the Commission finds that the prohibition continues to be necessary to protect competition in the distribution of video programming. See 47 C.F.R. § 76.1002(c)(2). In the year prior to the sunset, the Commission will conduct a proceeding to evaluate the circumstances in the video programming marketplace.

³¹ See 47 C.F.R. 76.1003.

³² See *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services*, 5 FCC Rcd 4962, 5027 ¶ 118 (1990); *Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124, 12139 ¶ 34 (2002) ("Program Exclusivity Report and Order").

³³ *Program Exclusivity Report and Order*, 17 FCC Rcd at 121489 ¶ 54 ("the incentive for the vertically integrated regional programmer to foreclose programming, is further increased in situations in which there is no readily acceptable substitute for the programming, such as regional sports programming").

sports networks (“RSNs”) typically purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game.³⁴

Our analysis demonstrates that the primary public interest harm that we believe likely to follow from the unique combination of News Corp.’s RSN programming assets and DirecTV’s nationwide distribution platform is the competitive harm of an across-the-board MVPD price increase resulting from News Corp.’s ability to extract rents or other unfair carriage concessions from MVPDs for carriage of RSN programming through the more frequent use of threats of withholding or actual withholding of RSN programming during a period of temporary foreclosure.

We find that a neutral dispute resolution forum would provide a useful backstop to prevent News Corp. from exercising its increased market power to force rival MVPDs to either accept inordinate affiliate fee increases for access to RSN programming and/or other unwanted programming concessions or potentially to cede critical content to their most powerful DBS competitor, DirecTV. We therefore create a mechanism whereby an aggrieved MVPD may choose to submit a dispute with News Corp. over the terms and conditions of carriage of RSNs to commercial arbitration to constrain News Corp.’s increased incentive to use temporary foreclosure strategies during carriage negotiations for RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN.

By requiring commercial arbitration where negotiations fail to produce a mutually acceptable set of prices, terms and conditions, the Commission reduces the incentives and opportunities for News Corp. to remove programming and thus eliminate the additional credibility of programming withdrawal as a bargaining tool. The Commission’s arbitration condition is also intended to push the parties towards agreement prior to a complete breakdown in negotiations. By choosing “final offer” arbitration, the Commission ensures that the parties have an incentive to present offers that are not out of line with what they expect a final agreement would look like and therefore more likely to reach agreement. Final offer arbitration also has the attractive “ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.”³⁵

Further, because the loss of RSN programming from an MVPD service can lead to significant subscriber dislocation, the arbitration remedy alone is not enough to ensure that the transaction will not result in additional incidents of temporary withholding of RSN programming. Accordingly, upon receiving notice of the intention to submit the dispute to arbitration, pursuant to the procedures described in the following paragraph, News Corp. must allow continued carriage of the RSN under the same terms and conditions of the expired contract, unless the dispute is a first time request for RSN carriage by an MVPD.

In addition, since the Commission concludes that small and medium sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for RSN programming following News Corp.’s acquisition of control of DirecTV, the conditions specify that an MVPD meeting the definition of “small cable company” may choose to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage of regional sports

³⁴ FCC, OPP Working Paper # 37, *Broadcast Television: Survivor in a Sea of Competition* (Sept. 2002) at 125.

³⁵ Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264.

networks with News Corp. and News Corp. may not refuse to negotiate carriage of RSN programming with such an entity.³⁶ The designated collective bargaining entity will have all the rights and responsibilities granted by our arbitration conditions.

The following procedures shall be followed:

Commercial Arbitration Remedy

- An aggrieved MVPD may submit a dispute with News Corp. over the terms and conditions of carriage RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN.
- Following the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify News Corp. within five business days that it intends to request commercial arbitration to determine the terms of the new affiliation agreement.
- Carriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage.
- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued carriage of the network under the same terms and conditions of the expired affiliation agreement as long as the MVPD continues to meet the obligations set forth in this condition.
- *"Cooling Off Period."* The period following News Corp.'s receipt of timely notice of the MVPD's intent to arbitration and before the MVPD's filing for formal arbitration with the American Arbitration Association ("AAA"), shall constitute a "cooling-off" period during which time negotiations are to continue.
- *Formal Filing with the AAA.* The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the RSN contract and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, News Corp. must participate in the arbitration proceeding.
- The AAA will notify News Corp. and the MVPD upon receiving the MVPD's formal filing.
- News Corp. will file a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.
- The MVPD's final offer may not be disclosed until the AAA has received the final offer from News Corp.
- The final offers shall be in the form of a contract for the carriage of the programming for a period of at least three years. The final offers may not include any provision to carry any video programming networks or any other service other than the RSN.

Rules of Arbitration

- The arbitration will be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules, then in effect, of the AAA (the "Rules"), excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in the Order.

³⁶ The Commission has previously defined small cable companies as those with 400,000 or fewer subscribers. We adopt that definition for the purposes of this condition. *Sixth Report and Order and Eleventh Order on Reconsideration in the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 7393 (1995) ("*Sixth Report and Order*").

- The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- The arbitrator is directed to choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- Under no circumstances will the arbitrator choose a final offer that does not permit News Corp. to recover a reasonable share of the costs of acquiring the programming at issue.
- To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession), including, but not limited to:
 - current or previous contracts between MVPDs and RSNs in which News Corp. does not have an interest as well as offers made in such negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
 - evidence of the relative value of such programming compared to the RSN programming at issue (e.g., advertising rates, ratings);
 - contracts between MVPDs and RSNs on whose behalf News Corp. has negotiated made before News Corp. acquired control of DirecTV;
 - offers made in such negotiations;
 - internal studies or discussions of the imputed value of RSN programming in bundled agreements;
 - other evidence (including internal discussions) of the value of RSN programming;
 - changes in the value of non-News Corp. RSN programming agreements;
 - changes in the value or costs of News Corp. RSN programming, or in other prices relevant to the relative value of News Corp. RSN programming (e.g., advertising rates).
- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.
- If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other parties costs and expenses (including attorney's fees) against the offending party.
- Following resolution of the dispute by the arbitrator, to the extent practicable, the terms of the new affiliation agreement will become retroactive to the expiration date of the previous affiliation agreement. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.
- Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission, and does so in a timely manner.

Review of Award by the Commission

- A party aggrieved by the arbitrator's award may file with the Commission a petition seeking de novo review of the award. The petition must be filed within 30 days of the date the award is published.
- The MVPD may elect to carry the programming at issue pending the FCC decision, subject to the terms and conditions of the arbitrator's award.

- In reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- The Commission may award the winning party costs and expenses (including reasonable attorneys' fees) to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorneys' fees) of the arbitration.

No later than 20 business days prior to the expiration of an affiliation agreement with an MVPD for video programming subject to this condition, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order. News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for affiliation.

The markets and technologies used in the provision of MVPD services and video programming continue to evolve over time, rendering accurate predictions of future competitive conditions difficult. Accordingly, this condition will expire six years after the release of the Order.³⁷ In addition, the Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the conditions have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

ACCESS TO LOCAL BROADCAST TELEVISION STATION SIGNALS

The Commission finds that News Corp. currently possesses market power in the designated market areas ("DMAs") in which it has the ability to negotiate retransmission consent ("RTC") agreements on behalf of local broadcast television stations.³⁸ Local broadcast programming is highly valued by consumers, is critical to MVPDs' offerings, and entry into the broadcast station market is difficult. Moreover, we conclude that, absent conditions, News Corp.'s acquisition of DirecTV will enhance this market power, which could result in several public interest harms.

The Commission further finds that News Corp.'s existing control of MVPDs' access to a large number of stations airing highly popular Fox network programming, when combined with ownership of a nationwide DBS platform, will likely increase News Corp.'s incentive and ability engage in temporary foreclosure strategies aimed at increasing its programming fees thereby having the effect of raising rival MVPDs' costs by lowering the costs to News Corp. of engaging in such behavior. News Corp.'s ability to raise rivals' costs would harm consumers in different ways depending on the type of compensation it obtains. If News Corp. can secure carriage of more cable networks and charge higher fees for carriage of its broadcast signal, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates.³⁹ If News Corp. uses withholding or threats of withholding in retransmission consent negotiations to obtain carriage of its affiliated cable networks that the MVPD, absent the threat of foreclosure, would not agree to carry, consumers are harmed because MVPDs are

³⁷ The six year period is parallel to that for the analogous condition on retransmission consent and, given the variation in terms of RSN contracts, should give the Commission sufficient experience and data to evaluate the success and continued need for the condition.

³⁸ Our conclusions also apply to any O&O station as well as any local broadcast stations affiliate on whose behalf News Corp. negotiates retransmission consent agreements.

³⁹ Even if such costs are absorbed by MVPDs, rising costs could affect the MVPDs' ability to afford programming and services that are desired by consumers.

forced to make programming decisions based on News Corp.'s demands, rather than selecting the programming of their choice. In the long term, News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals could make rival MVPDs less viable options for consumers, thus limiting consumer choice. Moreover, during periods of temporary foreclosure, News Corp.'s television broadcast signal is not available to the subscribers of competing MVPDs who then cannot access desired Fox programming, local news and public affairs programming, and other programming available on the affected stations.

To prevent such harms, the Commission imposes several conditions on News Corp. and its owned and operated broadcast television stations. Although today News Corp. does not negotiate retransmission consent agreements on behalf of independently owned network affiliates,⁴⁰ the conditions are extended to apply whenever News Corp. negotiates retransmission consent agreements on behalf of independently owned Fox network affiliates.

In addition, the commitments News Corp. has proposed regarding non-discriminatory access to cable programming networks are extended to any broadcast station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent. This similar prohibition extended to News Corp.'s broadcast stations will counter its market power and make certain that this critical programming is available to MVPDs. In addition, the good faith and exclusivity requirements of SHVIA, due to sunset in 2005, are extended to apply to News Corp. for as long as the program access rules are in effect. Congress prohibited discrimination for satellite programming to ensure this programming was available to competing MVPDs.

The Commission's primary condition to alleviate the public interest harms in the market for broadcast station retransmission consent is to allow MVPDs with 5,000 or more subscribers to elect to submit a dispute with News Corp. over the terms and conditions of carriage of programming subject to retransmission consent to commercial arbitration. We choose this remedy to provide a fair and neutral mechanism by which disputants can quickly resolve retransmission consent disputes. The arbitration mechanism limits News Corp.'s post-transaction incentive and ability to threaten or impose broadcast service interruptions on subscribers of competing MVPDs to extract greater price increases than it obtain under today's conditions.

Further, because the loss of broadcast programming from an MVPD service can lead to large and rapid subscriber losses, the arbitration remedy alone is not enough to ensure that the transaction will not result in additional incidents of temporary withholding of broadcast programming. Accordingly, upon receiving notice of the intention to submit the dispute to arbitration, pursuant to the procedures described in the following paragraph, News Corp. must allow continued retransmission of the broadcast station signal under the same terms and conditions of the expired contract, unless the dispute is a first time request for local broadcast station signal carriage by an MVPD.

We establish the following procedures for arbitration of retransmission consent disputes:

Commercial Arbitration Remedy

- The commercial arbitration condition commences following the expiration of any existing retransmission consent agreement.
- Following such expiration, or 90 days after a first time request for retransmission consent, an

⁴⁰ Applicants' Response to Third Information and Document Request at 1-3.

MVPD may notify News Corp. within five business days that it intends to request arbitration over the terms and conditions of retransmission consent.

- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued retransmission of the broadcast signal under the same terms and conditions of the expired retransmission consent agreement as long as the MVPD continues to meet the obligations set forth in this condition.
- Retransmission of the broadcast signal during the period of arbitration is not required in the case of first time requests for carriage.
- *"Cooling Off Period."* Following the MVPD's notice of intent to submit the dispute to arbitration, but prior to filing for formal arbitration with the American Arbitration Association ("AAA"), the MVPD and News Corp. will enter a "cooling-off" period during which negotiations will continue.
- *Formal Filing with the AAA.* The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the retransmission consent agreement and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, News Corp. must participate in the arbitration proceeding.
- The AAA will notify News Corp. and the MVPD upon receiving the MVPD's formal filing.
- News Corp. will file a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.
- The MVPD's final offer may not be disclosed until the AAA has received the final offer from News Corp.
- The final offers shall be in the form of a contract for the retransmission of the broadcast signal for a period of three years. The final offers may not include any provision to carry any video programming networks or any other service other than the broadcast signal.

Rules of Arbitration

- The arbitration will be decided by a single arbitrator under the expedited procedures of the Rules, excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in the Order.
- The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- The arbitrator is directed to choose the "final offer" of the party which most closely approximates the fair market value of the programming carriage rights at issue.
- To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession), including, but not limited to:
 - current contracts between MVPDs and Fox-affiliated stations on whose behalf News Corp. does not negotiate;
 - current contracts between MVPDs and non-Fox network stations;
 - offers made in the preceding negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
 - evidence of the relative value of Fox programming compared to other network programming (e.g., advertising rates, ratings);
 - contracts between MVPDs and stations on whose behalf News Corp. has negotiated made before News Corp. acquired control of DirecTV as well as offers made in such negotiations;

- internal studies of the imputed value of retransmission consent agreements in bundled agreements;
 - changes in the value of non-Fox retransmission consent agreements;
 - changes in the value or costs of Fox programming or broadcast stations, or in other prices relevant to the relative value of Fox broadcast programming (e.g., advertising rates).
-
- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.
 - If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other parties costs and expenses (including attorney's fees) against the offending party.
 - Following the decision of the arbitrator, and to the extent practicable, the terms of the new retransmission consent agreement, including payment terms, if any, will become retroactive to the expiration date of the previous retransmission consent agreement. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.
 - Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission, and does so in a timely manner.

Review of Award by the Commission

- A party aggrieved by the arbitrator's award may file with the Commission a petition seeking *de novo* review of the award. The petition must be filed within 30 days of the date the award is published.
- The MVPD may elect to continue to retransmit the broadcast signal pending the FCC decision, subject to the terms and conditions of the arbitrator's award.
- In reviewing the award, the Commission will examine the same evidence that was presented to the Arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- The Commission may award the winning party costs and expenses (including reasonable attorneys' fees), to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorneys' fees) of the arbitration.⁴¹

An MVPD meeting the Commission's definition of "small cable company" may appoint a bargaining agent to bargain collectively on its behalf in negotiating with News Corp. for carriage of the programming subject to this condition and News Corp. may not refuse to negotiate with such an entity.⁴² The designated collective bargaining entity will have all the rights and responsibilities granted by these conditions.

The Commission recognizes that the costs of arbitration may overwhelm MVPDs with fewer than 5000 subscribers, thereby providing them with little relief from the harms associated with this transaction.

⁴¹ The Commission has the authority to award attorney fees and costs. *See* 47 C.F.R. §1.6009(b)(3).

⁴² The Commission has previously defined small cable companies as those with 400,000 or fewer subscribers. We adopt that definition for the purposes of this condition. *Sixth Report and Order*, 10 FCC Rcd 7393 (1995).

Accordingly, when dealing with MVPDs with fewer than 5,000 total subscribers, we require News Corp. to either elect “must-carry” status or negotiate retransmission consent for its owned and operated stations without any requirements for cash compensation or carriage of programming other than the broadcast signal.

No later than 20 business days prior to the expiration of a must-carry election or retransmission consent agreement with an MVPD, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order. News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for retransmission consent.

The markets and technologies used in the provision of MVPD services and video programming continue to evolve over time, rendering accurate predictions of future competitive conditions difficult. Accordingly, this condition will expire six years after the release of the Order.⁴³ In addition, the Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the conditions have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

INCREASED OFFERING OF LOCAL-INTO-LOCAL SERVICES

The Commission has long recognized the importance of local broadcast television and its contribution to the Commission’s goal of fostering localism. To the extent that the transaction results in an increase in the amount of local-into-local service offered to subscribers, this should increase competition in MVPD markets and should benefit consumers through increased choice, lower prices, or both. In addition, we find that increasing the number of designated market areas (“DMAs”) in which DirecTV subscribers can receive local broadcast television stations furthers the Commission’s goal of promoting localism.⁴⁴

Applicants have alleged that a benefit of the transaction will be the provision by the end of 2004, by DirecTV of either local channels in an additional 30 DMAs or 30 more channels of HDTV, or a combination of local channels and HDTV channels that have similar bandwidth requirements above and beyond what had been previously funded, projected or planned by Hughes/DirecTV.⁴⁵ In order to ensure that Applicants live up to their commitment to achieve the important public interest benefit of increased local channel service, we require, as a condition of our license transfer approval, that, by year end 2004, Applicants provide local channel service in an additional 30 DMAs beyond what had been previously funded, projected or planned by Hughes/DirecTV. In the event that circumstances beyond DirecTV’s control limit its ability to fulfill this license condition, DirecTV may petition the Commission for waiver pursuant to Commission rules.⁴⁶

⁴³ The six year period is parallel to that for the analogous condition on retransmission consent and, given the variation in terms of RSN contracts, should give the Commission sufficient experience and data to evaluate the success and continued need for the condition.

⁴⁴ 47 U.S.C § 307(b).

⁴⁵ See Letter from William M. Wiltshire, counsel for News Corp., to Marlene H. Dortch (Sept. 22, 2003) (“Applicants’ Sept. 22 Ex Parte”) at 2.

⁴⁶ 47 C.F.R. § 1.3.

**NATIONAL SECURITY, LAW ENFORCEMENT, FOREIGN POLICY AND TRADE
POLICY CONCERNS**

As part of our public interest analysis, we take into consideration concerns relating to national security, law enforcement, foreign policy and trade policy that may present public interest harm, including any issues raised by the Executive Branch. If the Executive Branch raises any concerns, we accord deference to its expertise on such matters.⁴⁷ On November 25, 2003, the U.S. Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”), with the concurrence of the Department of Homeland Security (“DHS”) (collectively the “Executive Agencies”), filed a “Petition to Adopt Conditions to Authorizations and Licenses” along with attachments.⁴⁸

The Executive Agencies advised the Commission that they have no objections to the grant of the Applicants’ transfer of control applications provided that we condition the grant of the transfer of control on: (i) GM causing Hughes to adopt, and Hughes adopting, prior to the closing of the subject transaction, the Hughes By-law Amendment; (ii) the adoption by the Board of Directors of News Corp. of the Proposed Resolutions; and (iii) compliance by Hughes and News Corp., respectively, with the commitments set forth in the Hughes By-laws Amendment, the Proposed Resolutions, and the Letter Agreement.⁴⁹ Accordingly, we adopt this condition as part of the grant of the Application.

MISCELLANEOUS PROVISIONS

The Commission ordered that compliance with all conditions imposed in the Order is a non-severable condition of the grant of the Application.

All references to GM, Hughes and News Corp. in the Order shall also refer to their respective officers, directors, and employees, as well as any affiliated companies, and their officers, directors, and employees, except as otherwise noted.

The Commission denied the Petitions to Deny filed by the Center for Digital Democracy, EchoStar Satellite Corporation, and the National Hispanic Media Coalition, and the Petition to Designate Application for hearing filed by the National Rural Telecommunications Cooperative, and all similar petitions except as otherwise discussed in this public notice.⁵⁰

⁴⁷ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23894 (1997); *Order on Reconsideration*, 15 FCC Rcd 18158 (2000).

⁴⁸ See Petition to Adopt Conditions to Authorizations and Licenses (filed Nov. 25, 2003) (“Petition to Adopt Conditions”).

⁴⁹ See Petition to Adopt Conditions at Appendix E, Exhibit 1 (Hughes By-Laws Amendment), Exhibit 2 (Proposed Resolutions) and Exhibit 3 (Letter Agreement).

⁵⁰ The Commission approved the Application and imposed the conditions pursuant to Sections 4(i) and (j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309, and 310(d).

EFFECTIVE DATE OF THE TRANSACTION APPROVAL

The Commission ordered that the grant of the approval of the Application with conditions is effective today, December 19, 2003, in accordance with Section 1.103 of the Commission's rules, 47 C.F.R. §1.103.

Action by the Commission: Chairman Powell and Commissioner Martin issuing statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

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**PRESS STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control, Order (MB Docket No. 03-124)

This merger with strict conditions ultimately benefits the American public. News Corporation has a history of taking significant risks and introducing new and innovative media services. Enhanced competition will increase pressure to improve service and lower prices for both cable and satellite television subscribers. This is a particularly compelling public interest benefit in light of continued cable rate hikes. Increased availability of local channels over satellite in rural America means access to more local programming in an additional 30 markets by year end 2004. Consumers are the winners.

It should be noted that the Commission has now reviewed two separate license transfer applications involving DirecTV. Unlike the proposed transaction with EchoStar—the first major transaction blocked by the Commission in decades—this transaction between the News Corporation and General Motors as conditioned will yield significant benefits to the public.

As originally proposed, however, this transfer did raise legitimate concerns about market power. Our strict conditions address these concerns. For instance, the Order creates an arbitration mechanism to prevent exorbitant consumer prices or loss of access to valuable programming – such as regional sports coverage – during arguments between programmers and News. Parties will now have the incentive to reach a mutually beneficial agreement while consumers' interests in continuing to see their favorite programming will be protected.

The Order also adopts conditions to ensure that the merged entity does not discriminate against unaffiliated programmers and ensures that News' other programming is offered on a non-discriminatory basis. Cable and satellite customers will continue to have access to programming from a diverse source of media outlets. With these conditions, I believe the transaction serves the public interest.

Facilities-based competition among satellite and cable providers has led to more innovation, more programming and more subscribers. As a result of this transaction, those trends, competitive prices and better quality of service will continue for the American public.

**STATEMENT
OF COMMISSIONER MICHAEL J. COPPS,
DISSENTING**

Re: General Motors Corporation and Hughes Electronics, Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control

Here we go again. Today the Commission demonstrates how serious -- and seriously misguided - it was when it voted on June 2 to eviscerate media concentration protections. Presented with the opportunity to signal whether it intends to protect the important goals of diversity, competition, and localism, or to allow instead ever greater and more threatening levels of media consolidation, the majority flashes the green light for the next great wave of media consolidation.

News Corp was already a media giant:

- In the U.S., News Corp. owns television stations reaching over 44 percent of the country. (WNYW-5, New York; WWOR-TV-9, New York; KTTV-11, Los Angeles; KCOP-13, Los Angeles; WFLD-32, Chicago; WPWR-TV-50, Chicago; WTXF-TV-29, Philadelphia; WFXT-25, Boston; KDFW-4, Dallas; KDFI-27, Dallas; WTTG-5, Washington, DC; WDCA-20, Washington, DC; KMSP-TV-9, Minneapolis; WFTC-29, Minneapolis; WJBK-2, Detroit; WAGA-5, Atlanta; WUTB-24, Baltimore; KRIV-26, Houston; KTXH-20, Houston; WTVT-13, Tampa Bay; WRBW-65, Orlando; WOFL-35, Orlando; WJW-8, Cleveland; KSAZ-TV-10, Phoenix; KUTP-45, Phoenix; KDVR-31, Denver; KTVI-2, St. Louis; WITI-6, Milwaukee; WDAF-TV-4, Kansas City; KSTU-13, Salt Lake City; WBRC-6, Birmingham; WHBQ-TV-13, Memphis; WGHP-8, Greensboro; KTBC-7, Austin; WOGX-51, Ocala).
- In nine markets, it owns more than one television station (New York, Los Angeles, Chicago, Dallas, Washington, DC, Minneapolis, Houston, Orlando and Phoenix).
- It owns a major national broadcast network (Fox).
- It owns numerous cable and DBS channels, including regional sports networks across the country (among them FX, Fox News Channel, Fox Movie Channel, Fox Sports, Fox Sports en Espanol, National Geographic Channel, Speed Channel).
- It owns the most widely used electronic program guide for navigating television content (Gemstar-TV Guide).
- It owns newspapers, magazines, and publishing (including *New York Post*, *The Weekly Standard* and HarperCollins Publishers).
- It owns studios (including Twentieth Century Fox, Searchlight, Fox Television Studios, Twentieth Century Fox Television).
- It will now own a nationwide multi-channel direct broadcast satellite system (DirecTV).
- And it will now also own a major fixed satellite service provider that carries video broadcast and cable programming for delivery to distribution systems (PanAmSat).

- This list constitutes News Corp's major holdings in the United States. This conglomerate also has massive media holdings in other nations spanning the globe.

When is "Big Media" big enough? With spectrum always scarce and diversity hanging by a thread, where is the logic -- where is the public interest benefit -- of giving more and more media power to fewer and fewer players? In the end, it all comes back to this: to putting too much power in one conglomerate's hands and creating opportunities for abuse that accompany such concentrated power. Any public interest benefits that may potentially come about from this huge consolidation of commercial power are vastly outweighed by the potential for significant harm to consumers, the industry and the country. I therefore dissent from allowing this merger to go forward.

The majority seems to recognize that the agreement that the parties presented to the Commission for approval was seriously flawed. But the majority's strategy to apply band-aids in several places to stem what is in fact a public interest hemorrhage did not -- because they could not -- work. This agreement was probably beyond repair. Certainly the band-aids applied by the majority don't fix it.

The Applicants point to several claimed public interest benefits of the proposed merger. Yet, even the majority discounts all but two of these benefits as not supported by the record. The majority relies on the potential public interest benefits of innovative services that will be offered under News Corp.'s management and on additional markets in which DirecTV will provide carriage for local television stations. As to the former, the majority admits it is difficult to quantify, but points to the innovative service offerings available on News Corp.'s satellite systems in other parts of the world which include interactive sports betting and casinos. As to the claimed second benefit, the major DBS providers have already been increasing their local station carriage for competitive reasons and, as several commenters point out, DirecTV is altogether able to expand those offerings without this merger.

The *Order* is even more telling in its handling of potential harms emanating from this transaction. The majority finds that News Corp. has market power in its programming services, that this transaction increases its ability and incentive to use its market power to raise programming costs, and that these increases would ultimately be passed on to consumers. All of the Commissioners appear to agree that, as proposed by the Applicants, the harms of this transaction outweigh the benefits. In addition to my belief that the conditions imposed in this *Order* are not adequate to address the harms acknowledged by the majority, I am further concerned that the majority fails to acknowledge other real and potential harms associated with the merger. These include:

- **Media Concentration:** Although the majority at least attempts to address the harms of vertical integration, it dismisses outright horizontal integration harms that can arise from allowing one company to own broadcast outlets across the country *and* a nationwide multi-channel distribution system -- an unprecedented level of consolidation. Instead, the majority concludes that broadcast outlets do not serve the same market as cable and DBS. The majority further discounts any harms to localism or diversity, finding instead that market forces will ensure adequate sources of information. To trust that in the unforgiving environment of the market, the public interest will somehow magically trump the urge to build power and profit is a leap of faith that this Commissioner, for one, is unprepared to take. The majority ought to know better. This is the same flawed logic we saw in the Commission's June 2 decision. In addition, the majority fails to analyze the impact of this merger on ensuring independent and diverse programming. Alleged economies of scale do precious little to nurture program or viewpoint diversity.

Given the majority's analysis, I am concerned that this merger is merely the beginning of another wave of consolidation. News Corp. has indicated it may continue growing by acquiring additional television duopolies and other properties. Indeed, the majority apparently presumes that additional News Corp. acquisitions of television stations, radio stations, and newspapers is in the public interest under the Commission's new bright-line media ownership rules. And other Big Media conglomerates, encouraged by today's decision, will now feel emboldened or compelled to consolidate further. My service as a Commissioner has taught me that the response to one company's acquisition is almost invariably another company's request to grow bigger so that it can "compete" and "survive."

The majority's conclusion that broadcast stations do not compete in the same market as cable and DBS, along with its unwillingness closely to examine harms to diversity and localism, make clear that this Commission has no intention to slow, or even critically to examine, cross-platform mergers between broadcast stations and cable or DBS systems.

- ***Community Standards and Indecency:*** Some have suggested that there may be a link between increasing consolidation and increasing indecency on our airwaves. As I traveled across this country holding hearings and attending forums earlier this year, I heard time and again that ownership matters when it comes to what is offered up to viewers and listeners, particularly to our children. I am troubled that today's decision comes on the heels of complaints that News Corp. aired indecent material on the *2003 Billboard Music Awards* just last week. This is not the first instance of such viewer complaints against News Corp. Many of the indecency complaints I have seen come into the Commission involve stations owned by large media companies. I raise the issue here not because of any specific broadcast program, but because the Commission has refused to study the possible relationship between indecency and media concentration. I believe such a study is relevant to decisions such as the one we make today and that, indeed, we should not be making these decisions until we have credibly considered the matter. As we allow media conglomerates to grow ever larger, many Americans are concerned that the race to the bottom will accelerate and that broadcaster consideration for local community standards will continue to erode.

Yet, today, before we even consider these complaints or address the impact of increasing consolidation on increasing indecency, we reward News Corp. with a nationwide programming distribution system. And what will be the effect? Will we see even more attempts to air progressively coarser content? As we move towards more interactive programming, will we see gambling intrude itself into our homes on DirecTV as News Corp. provides on its overseas satellite system? Will we see wider distribution of shows that continue to push the envelope of outrageousness even further?

- ***Increasing Consumer Rates:*** Applicants cite economic efficiencies that will result from their agreement and claim that the merger will give them the scale and scope to compete more effectively. There may well be some such efficiencies, although the baleful tale of many recent high visibility corporate mega-mergers does not provide much proof of commercial success. Be that as it may, Applicants did not demonstrate that any of these alleged savings would be passed on to consumers nor did they evince great enthusiasm for so doing. It is telling that Applicants produced so little data as to how this transaction could possibly discipline rising cable rates. The likelihood of its doing so is so remote as to be invisible. Interestingly, just today news reports tell us that our cable bills will be going up again on January 1, rising on average 6.5 percent – this when the nation's inflation rate is 1.8 percent!

Lower prices seldom ensue from industry combinations. When we approve a transaction that further increases concentration in programming production and distribution, it is reasonable to assume that we are setting the stage for upward pressure on cable rates. An entirely plausible outcome of this decision is escalating consumer rates for multi-channel services from both cable systems and DirecTV. When faced with a similar scenario, the Federal Trade Commission in the Time Warner/Turner merger adopted a benchmark price index mechanism. Here, the majority dismisses such an approach, adopting instead so-called baseball arbitration. I am not convinced that arbitration has succeeded in bringing down costs in baseball. More to the point, this is not baseball and it is surely not a game. Although the majority allows the Commission to review the arbitration decisions, it then ties the Commission's hands by requiring us to choose between each party's final offer. This reduces the Commission's obligation to protect the public interest to a multiple choice test. Let's be clear here: what the arbitrators will most often be arbitrating are two companies' proposals to raise rates. The only question to be decided is how much rates will increase. Payment for higher programming license fees will be borne, of course, by consumers.

Moreover, although the majority seems to recognize the possibility of increased consumer rates from this level of consolidation, it inexplicably provides a sunset for these conditions of six years. This sunset is adopted without any explanation of why the majority expects these harms to be resolved within that timeframe.

I am troubled by other aspects of this decision.

I am troubled by the lack of analysis on the foreign ownership implications of the transaction. In section 310(b) of the Act, Congress adopted a broad provision that limits the ability of foreign entities to own or operate parts of our communications system. This foreign ownership restriction applies across a broad range of communications services. For decades, the Commission applied these restrictions to DBS. Last year, with inadequate justification, the Commission determined that the foreign ownership restrictions in 310(b) should not apply to DBS. As a result, the majority, in approving this deal under which News Corp., an Australian company, purchases control of a U.S. DBS licensee, concludes that it need not consider the foreign ownership implications.

I am troubled by the majority's failure to consider the impact of this merger on minority communities. The Congressional Hispanic Caucus in a recent letter raised numerous serious issues related to the negative impact of this merger on the Latino community, on minority-owned independent programmers and on local and Latino-focused programming. The majority fails to do justice to these concerns.

I am troubled that the Commission is approving this merger without resolving issues specific to the Applicants that have been raised regarding service in Alaska and Hawaii. Parties have filed complaints that DirecTV fails to provide reasonably comparable packages of services to Alaska and Hawaii, as required by our rules. If these companies are violating Commission rules, we should address these issues as part of our public interest analysis.

Finally, I am troubled by the failure to clarify that DirecTV, or any other DBS provider, may not discriminate against some local broadcasters by requiring consumers to obtain a second dish to receive those broadcasters. In 1999, Congress passed the Satellite Home Viewer Improvement Act (SHVIA). That Act required that, if a provider carries any local broadcast signals, it must carry all local broadcast signals, and must do so at a nondiscriminatory price and in a nondiscriminatory manner. In 2002,

Commissioner Martin and I issued a joint statement making clear our view that a plan to require consumers to obtain a second dish to receive only some of the local broadcast stations in a market did not comply with the statute or Commission rules.

In sum, I simply cannot support the level of concentration by a single owner that will result from this merger absent compelling public interest circumstances. Unfortunately, I do not find that the potential public interest benefits of this transaction outweigh the real and potential harms. This decision is the wrong decision – wrong for the media industry, wrong for consumers, wrong for democracy in America.

FOR IMMEDIATE RELEASE:
December 19, 2003

News Media Contact:
Catherine Bohigian at (202) 418-2100

**PRESS STATEMENT OF COMMISSIONER KEVIN J. MARTIN
ON GENERAL MOTORS CORPORATION, HUGHES ELECTRONICS CORPORATION, AND
NEWS CORPORATION LIMITED TRANSACTION**

I support the Commission's decision to approve this transaction. While the merger of News Corp. and DirecTV presents potential harms and benefits, I believe that, on balance, the merger as conditioned will benefit consumers, competition, and the public interest.

I write separately to express my disappointment that a majority of my colleagues is unwilling to grant APTS/PBS's request to clarify the requirements under the Satellite Home Viewer Improvement Act ("SHVIA") and specifically require that, in providing local-into-local service pursuant to SHVIA, DirecTV could not place certain local broadcast stations on wing satellites.

As I have stated before, I believe Congress provided that DBS operators would have the opportunity to carry local broadcast stations, but if they choose to do so, they would have to provide consumers with *all* the local broadcast stations.⁵¹ These "carry one, carry all" provisions of SHVIA include a prohibition against discriminatory treatment of the broadcast signals.⁵² As I have explained in detail previously, I believe Congress's non-discrimination provision prevents DBS providers from placing "preferred" broadcasters on a main satellite and relegating certain "disfavored" broadcasters to a second satellite.⁵³ Non-discrimination requires that all broadcast stations be placed on the same dish. APTS/PBS, therefore, is asking no more than to require the merged entity to comply with the governing statute and our rules when rolling out "local-into-local" service to consumers across America. Licensees must *always* comply with the statute and our rules, and I am disappointed that only one of my colleagues was willing to make this clear.

This is an unfortunate day for public television stations, religious broadcasters and Spanish language broadcasters—the stations most often relegated to the second dish. Indeed, over 31 public broadcast stations in 20 markets have been denied carriage on the same dish as other broadcasters. Local religious broadcast stations are almost uniformly placed on the second dish, if they are carried at all. Similarly, Telemundo Group, Inc., Univision Communications, Pappas Telecasting, and Entravision Communications have all documented to the Commission the discriminatory treatment of their Spanish-language stations; most are carried on the second dish, unless they are willing to *pay* for

⁵¹ See, e.g., Statement of Commissioner Kevin J. Martin and Commissioner Michael J. Copps Re: National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order, CSR-5865-Z (Media Bureau, April 4, 2002), April 10, 2002 ("Two-Dish Statement"). See also 47 U.S.C. § 338(a)(1).

⁵² See 47 U.S.C. § 338(d).

⁵³ See Two-Dish Statement. To the extent any Media Bureau decisions have been inconsistent with this interpretation of the statute, they have not been affirmed by the Commission and I believe they are in error.

placement on the main satellite. Recent reports have shown that very few consumers bother to acquire the second dish, which has meant that very few consumers can access these stations. Consumers and broadcasters deserve better, and the statute requires it.

It is important to emphasize that a DBS operator's roll-out of local-into-local stations need not be at the expense of public television, religious and Spanish language broadcasters. SHVIA does not hinder a DBS provider from expanding the markets – including rural markets – in which it carries local broadcast signals. The use of a second dish is a spectrum allocation issue. If DBS providers choose to use a “two-dish” solution to provide local broadcast service to more communities, compliance with the non-discrimination provision simply requires that all the local stations be treated similarly, whether they are placed on the main or wing satellite.

I, along with my colleague Commissioner Copps, continue to believe that this is a vital issue to all public, religious and Spanish-language broadcasters. I am disappointed that we were the only Commissioners willing to vote to clarify that DBS operators must place all broadcasters – or at least all public broadcasters – on the same dish. I also am disappointed that not one other Commissioner was even willing to address this fundamentally unfair policy and to clarify that these broadcasters are entitled to equal treatment under the law.

Finally, I note that a clarification of the legal requirements of SHVIA's non-discrimination provision here would be the industry-wide solution that some have called for. So, I fail to see why any Commissioner supportive of such a solution would not vote for that resolution when presented with that opportunity here.

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STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN,
DISSENTING

Re: General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, MB 03-124

Deciding whether a fox should guard a hen house is a far more serious exercise than this Order reflects. Granted, the birds in this case are not hens but valuable satellites with a national footprint from which nearly 12 million people receive video programming through DirecTV. And the Fox in this case is already one of the world's largest media conglomerates, with a vast array of global content and distribution assets. The acquisition of Hughes Electronics Corporation by News Corporation (News Corp.) will result in unprecedented control over local and national media properties in one global media empire. Its shockwaves will undoubtedly recast our entire media landscape.

Never before has a single corporation been armed with a national video distribution platform; a major broadcast network; television stations in nearly every major media market – reaching more than 44 percent of the country – with guaranteed carriage rights on other distribution platforms; multiple cable networks (11 national and 22 regional, including sports networks with exclusive rights); a major film and television studio; newspaper, magazine and book publishing operations; significant video programming and broadcasting satellite backhaul capacity; and the leading program guide and programming-related technologies to facilitate a consumer's viewing experience. With this unprecedented combination, News Corp. could be in a position to raise programming prices for consumers, harm competition in video programming and distribution markets nationwide, and decrease the diversity of media voices. I wish the full dangers of this combination would have been more thoroughly examined and confronted.

This Order makes a mockery of the Commission's public interest test. Consumers have absolutely no assurance of benefiting in any way from the merger's claimed synergies, yet they potentially suffer great harm. From the onset, I have had grave concerns about this transaction, yet I have sought to impose meaningful conditions to make the Order better than it otherwise would have been. Unfortunately, not all of those conditions were imposed, and I do not believe that any supposed public interest benefits of this transaction outweigh its very real harms.

It has long been a goal of mine, and many other policymakers, to ensure that every community in America can get all of their local television signals directly from their satellite provider. That is why I am so disappointed that this Order does nothing to even hold News Corp. to the shallow promises they made to the Commission to provide local channels to consumers in all 210 television markets across the country. Instead, it limply adopts the requirement that DirecTV provide service to the top 130 markets by the end of 2004, leaving the smaller markets in Rural America high and dry.

I felt strongly that the Commission should require DirecTV to provide real local-into-local service, meaning every local broadcast television signal, over satellite to all 210 television markets across the country by 2006. It is especially critical to have required a firm date by which DirecTV must uplink and offer local broadcast signals for every television markets in America, from the largest to the smallest. Consumers living in rural areas deserve the same benefits as their more urban counterparts.

Instead, I learned in the process of reviewing this matter that News Corp. has no intention of ever providing real local-into-local satellite service to every market in the country. A close examination of their commitments revealed them to mean that they consider it enough to offer some reasonably close local station as part of an undefined "local channel package", or simply add a digital tuner in the box in

smaller markets and hope the customer can receive a signal. For those who live in outlying rural areas, tough luck. What could have been the most important public interest benefit of this merger turns out to be nothing more than a sham, and the Commission is going along with it, no questions asked.

It is especially demoralizing to know that my home town of Rapid City, South Dakota, television market #175, may never get its own local broadcasters beamed down from space. The loss to the citizens of Rapid City is emblematic of the problems of so many communities will face for the foreseeable future. They may never receive high-quality satellite signals of their local news, weather, sports and other locally-based programming. Most importantly, people living in outlying areas like Kadoka, South Dakota, who cannot otherwise receive Rapid City broadcasts, will never receive them by satellite, and slapping an antenna on their dishes will offer them nothing.

We hear a lot of talk about localism. Here, we had the opportunity to do something about it. Instead, we let News Corp. gain all the benefits of this merger while asking them to do nothing in return for Rural America, or anyone else, for that matter. We abandoned Rural Americans to the fickle exigencies of the marketplace, with every assurance that it will fail to provide them the same quality of service enjoyed by their more urban counterparts.

By today's action, the FCC allows the ever-expanding tide vertical and horizontal media concentration to intensify. It signals, yet again, the FCC's unwillingness to take a hard look at media consolidation. It vests more control of our nation's media in the hands of an already powerful media conglomerate. And it raises the compulsion for other companies to follow suit, to, so-to-speak, "keep up with the Murdochs."

This unprecedented combination could dramatically impact News Corp.'s programming and distribution rivals. It fundamentally alters the relationship of News Corp. to its rivals, as it now becomes a vertically integrated competitor to all other MVPDs in every single MVPD market, and the first of only two nationwide programming platforms to have its own programming. It increases the incentive and ability to act anticompetitively with respect to all rivals.

News Corp. is now in a position to distribute programs or sporting events either on its broadcast network, cable networks, regional networks, television stations, or even over pay-per-view. Imagine the increased bargaining power of News Corp. as it sits at various negotiating tables in these interconnected industries, finding itself on all sides at once, and with an increased arsenal of weapons against rival programmers or distributors. News Corp. will be in a position to demand higher programming fees or demand concessions without fear of losing distribution.

The Order does contain some useful protections. When a nationwide distributor merges with such a large programmer, there rightly should be consumer protections to prevent the vertically integrated company from withholding programming from rivals or offering it on discriminatory prices, terms or conditions. The parties' commitments, including abiding by our program access rules and other nondiscrimination safeguards, are positive steps which I am pleased are included as express conditions of approval.

The Order properly finds public interest harm involving even temporary foreclosure of retransmission consent of News Corp.'s broadcast television properties or contractual rights to carry Fox-controlled regional sports networks. The addition of DirecTV's nationwide platform increases the likelihood that News Corp. can capitalize on a strategy of withholding consent to carry these programs,

even temporarily. Small and medium sized cable operators and other distributors are particularly vulnerable to News Corp.'s enhanced bargaining power.

News Corp.'s bargaining clout is even more heightened for its regional sports networks, for which few, if any, competitive alternatives exist. In both the U.K. and Australia, News Corp. employs a strategy of seizing key sporting rights and using them to secure favorable carriage terms. Indeed, as early as 1996, Rupert Murdoch made clear his intention to use his company's formidable sports programming assets as a "battering ram" to squeeze out concessions from his rivals.

For this reason, the order appropriately adopts a fair and neutral mechanism to resolve disputes, requiring News Corp. to agree to undertake binding arbitration with its distribution rivals. Any mitigation of harm that this arbitration condition brings, however, would be thwarted if News Corp. has the ability during the pendency of the arbitration to deny its rival the right to carry the disputed programming. So it is absolutely critical that the Order prevents News Corp. from yanking sports programming during the arbitration process. This may save consumers not only their viewing of popular programming, but the cost and other savings from what News Corp. could have otherwise battered out of its rivals and their customers. Empirical evidence in the record shows that dropping such programming harms viewers, leads to higher prices and results in significant losses to the competing multichannel video programming distributor.

Yet, the benefits of these conditions disappear without a trace after six years. I would have explicitly left room to extend these protections for up to six additional years, for a total of twelve years, and required the Commission to undertake a full review of the continued need for these conditions through a notice and comment proceeding. Given the duration of some of today's contracts, and the possibility that the identified harms of capitalizing on DirecTV's status persist, a mere six-year term does not suffice. The requirement for the Commission to undertake a full notice and comment proceeding would have provided the Commission valuable information to assess any harms of this merger, and would have kept a check on News Corp.'s incentive to use its new leverage to harm consumers.

In addition, to account for possible overall rate increases, I would have established a benchmarking process or pricing index mechanism to evaluate whether the merging parties are raising prices at a more accelerated pace than their historic pattern. Such a mechanism has been implemented in the past for vertical relationships between programmers and distributors. This benchmarking process would have ensured that rates not rise too quickly for all distributors, and would have been a better way to address the merger-specific harms identified in the Order.

I am deeply worried that with this extraordinary combination, News Corp. will be in a position to raise rates for all of its programming, thus driving up MVPD prices around the country and harming consumers. At the same time that it is competing with cable and other distributors for subscribers, it could raise the costs to those distributors for the underlying programming, or could pressure the companies for other benefits such as favorable channel placement. None of the merger's protections address the likelihood that News Corp. engages in profit maximizing behavior and raises programming prices for all distributors. In fact, in some ways, the merger conditions could be used to send valuable signals to other MVPDs about the prices, terms and conditions of programming carriage or the consequences of resisting News Corp.'s demands. Without quantifiable benchmarks or pricing standards, there is insufficient assurance to the public that this transaction will not result in increased prices for all.

I have many other concerns with this transaction. The merger furthers concentration in local media markets by consolidating ownership over local media outlets under one global media

conglomerate. In major media markets across the country, it combines one, sometimes two, local television stations, with one of typically three major multichannel video programming distributors. In New York, for example, it combines a television duopoly, a newspaper, and a DBS operator. In Puerto Rico, some cable subscribers are served by a system owned by Liberty Media, a significant investor in News Corp. who stands to benefit from DirecTV's gains. The Commission should have conducted a specific market-by-market review of the effects of consolidation on competition, localism and diversity in particular local media markets. Moreover, under the Commission's relaxed media ownership rules, News Corp. would be free to acquire additional duopolies, radio stations and newspapers in those same local media markets, furthering their control over what local viewers see, hear and read.

This merger also threatens disruptive effects for competing programmers, particularly independent programmers and producers. Even without the merger, through the use of retransmission consent, News Corp. has been able to expand its cable networks faster than any other cable programmer. I will continue to monitor closely whether News Corp. provides opportunities for both established and new networks, particularly new entrants, to negotiate carriage on fair and reasonable terms on DirecTV. New Spanish-language networks, for example, have reached agreement with cable providers and are attempting to negotiate carriage on DirecTV. Given DirecTV's history of promoting a diversity of programming, I would be concerned if its acquisition by News Corp. resulted in a loss of diverse, independent or minority-owned programming to an eager public in order to favor networks it owns.

I am also concerned with News Corp.'s ability to leverage its program guide and interactive holdings. Gemstar-TV Guide, with a leading position in electronic and interactive program guides, recently gave DirecTV use of its intellectual property, technology and brand. I expect this same flexible licensing approach to continue to be made available to others on a timely and fair basis.

News Corp. has a history of taking risks, and the Applicants have committed to launching several new interactive services on the DirecTV platform in 2004, using a new DirecTV user interface and middleware licensed or provided by News Corp. subsidiaries. Provided this "enhanced viewing experience" moves beyond the more rudimentary interactive gaming services offered today, this promises to benefit consumers in significant ways. With the prospect of interactive services more imminent, the Commission must be cognizant of the ways in which a distributor or particular middleware or program guide vendor could favor affiliated programming to the detriment of non-affiliated programmers. I would be concerned if News Corp. stood as a gatekeeper to interactive services and features or demanded from rival distributors exclusive use of particular EPG, IPG, interactive middleware or security software or systems during its carriage negotiations. While the software solutions for interactivity are still emerging, DirecTV gives News Corp.'s subsidiaries an increased incentive and ability to discriminate in software and applications, or to endure losses in one business unit for the greater good of the corporate whole. Should problems emerge, they could be addressed through general rulemakings or through recourse to the nation's antitrust authorities.

I sympathize with my colleagues who seek to resolve the placement of local broadcast stations on second satellite dishes under the Satellite Home Viewer Improvement Act. I believe this can be accomplished through a general rulemaking, and I have been assured by the Chairman that the Commission will resolve this issue early next year.

I caution that as a large and prominent global media conglomerate, it is incumbent on News Corp. to lead in serving the overall public interest and modeling appropriate behavior for the industry. "Take it or leave it" bargaining tactics would not convince me of a corporate commitment to good faith negotiation. With respect to diversity opportunities within its business units and in its programming, I

urge continued efforts to promote diversity within the Fox Entertainment Group's employment, management and executive ranks. I am pleased to see a commitment by the companies to increase the amount of programming on DirecTV targeted at culturally, ethnically, and linguistically diverse audiences. Given the increased concentration in local media markets, I also expect to see such diversity reflected in the coverage of issues of concern to local communities or minority groups across the country. Diversity in viewpoints should be encouraged everywhere in our media.

I am troubled by reports that Fox's independent affiliates are having difficulty maintaining their independence in decisions involving programming or the use of their digital spectrum. Local control over programming is required by law and vital to our system of American broadcasting. It is the local stations, after all, that are accountable to the FCC for their community's standards of broadcasting.

These many concerns call for a more serious examination of the concentration resulting from the merger, or other more comprehensive structural or behavioral conditions. While this Order does contain some important protections, not all the effects on consumers and competition have been fully analyzed or remedied to assure fair competition and protection of consumer interests. I dissent.