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 televisions 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.