

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

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

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 25, 2008**

**Released: February 26, 2008**

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

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## I. INTRODUCTION

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

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

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

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

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

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

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

<sup>4</sup> 47 U.S.C. § 310(d).

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

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

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

<sup>8</sup> *See* Application at 13-14.

<sup>9</sup> *Id.* at 13.

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

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

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

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

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

<sup>11</sup> *Id.* at 19-20.

<sup>12</sup> *Id.* at 20-21.

<sup>13</sup> Application at ii-iii, 17-18; Supplement to Application at 1-2; Liberty Media Opposition of Apr. 9, 2007 at 6.

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

<sup>15</sup> See *Adelphia Order*, 21 FCC Rcd at 8217 ¶ 23; *News Corp.-Hughes Order*, 19 FCC Rcd at 484 ¶ 16.

<sup>16</sup> See *infra* at paras. 22-26.

<sup>17</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 477 ¶ 5.

<sup>18</sup> *Id.* at 483 ¶ 15.

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

## II. DESCRIPTION OF THE PARTIES

### A. The DIRECTV Group, Inc.

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

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

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<sup>19</sup> See Section V.C.1., discussing compliance requirements.

<sup>20</sup> The conditions in this Order are set forth in Appendix B.

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

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

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

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

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

## B. Liberty Media Corporation

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

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

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<sup>25</sup> Application at 6-7.

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

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

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

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

<sup>30</sup> Liberty Media, *SEC Form 10-K for the Year Ended December 31, 2006*, at II-82.

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

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

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

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

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

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

<sup>35</sup> Application at 11-12.

outstanding equity.<sup>36</sup>

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

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

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

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

<sup>38</sup> Liberty Media Oct. 23, 2007 Response to Information and Document Request at 4.

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

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

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

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

<sup>43</sup> Discovery Holding’s shares are traded on the NASDAQ under the symbols DISCA and DISCB.

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



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

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

### C. News Corporation

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

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

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

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

<sup>47</sup> Application at 10-11.

<sup>48</sup> *Id.*

<sup>49</sup> See *infra* para. 78.

<sup>50</sup> Application at 7.

subsidiary, Fox Entertainment Group, Inc. (“FEG”), owns approximately 41 percent of DIRECTV’s outstanding common stock.<sup>51</sup>

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

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

### III. THE PROPOSED TRANSACTION

#### A. Description

##### 1. The Share Exchange Agreement

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

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<sup>51</sup> News Corp., *SEC Form 10-Q, Quarterly Report for Period Ended December 31, 2007*, at 12.

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

<sup>53</sup> News Corp., *SEC Form 10-K for the Year Ended June 30, 2007*, at 11.

<sup>54</sup> *Id.*

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

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

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

## 2. Resulting Ownership and Management Structure of DIRECTV

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

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

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

<sup>57</sup> See Application at Exhibit 4 (copy of Share Exchange Agreement).

<sup>58</sup> “The cash amount is subject to adjustment based upon, among other things, the working capital of the RSNs as of the closing of the Exchange.” Application at 12.

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

<sup>60</sup> Liberty Media Oct. 23, 2007 Response to Information and Document Request at 15.

<sup>61</sup> Application at 15 and n.21.

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

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

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

## B. Application and Review Process

### 1. Commission Review

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

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

<sup>65</sup> See 47 U.S.C. § 310(d); Application at 1.

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

<sup>67</sup> See EchoStar Petition; NDB Petition; HITN Petition. HITN withdrew its Petition on June 6, 2007. See *infra* n. 382 and para. 120.

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

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

## 2. Department of Justice Review

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

## IV. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

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

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

<sup>70</sup> 15 U.S.C. § 18.

<sup>71</sup> 47 U.S.C. § 310(d).

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

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

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

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

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

Act.<sup>77</sup>

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

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

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

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

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

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

<sup>81</sup> 47 U.S.C. § 521(4); *see also* 47 U.S.C. § 532(a).

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

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

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

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

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

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

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

<sup>86</sup> 15 U.S.C. § 18.

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

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

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

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

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

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

## V. ANALYSIS OF POTENTIAL HARMS IN THE RELEVANT MARKETS

### A. Introduction

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

### B. Relevant Markets

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

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

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

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

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

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

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



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

## 1. MVPD Distribution

### a. Product Market

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

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

### b. Geographic Market

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

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

<sup>97</sup> The term “overbuilders” refers to MVPDs, other than DBS providers, that compete against cable incumbents in their local franchise areas.

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

<sup>99</sup> *Horizontal Merger Guidelines*, 57 Fed. Reg. 41552 (Sept. 10, 1992), revised, 4 Trade Reg. Rep. (CCH) ¶ 13104 at § 1.11 (Apr. 8, 1997) (“*Horizontal Merger Guidelines*”).

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

<sup>101</sup> *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20609 ¶ 115.

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

<sup>103</sup> See *News Corp.-Hughes Order*, 19 FCC Rcd at 505 ¶ 62.

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

## 2. Video Programming

### a. Product Markets

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

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

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

<sup>104</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 505 ¶ 62.

<sup>105</sup> *Comcast-AT&T Order*, 17 FCC Rcd 23258 ¶ 34.

<sup>106</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 502 ¶ 54; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20653 ¶ 248.

<sup>107</sup> Such rate cards are not publicly available.

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

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

<sup>110</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 504 ¶ 59.

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

types of programming as so vital or desirable that they are willing to change MVPD providers in order to gain or retain access to that programming.<sup>112</sup>

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

#### b. Geographic Market

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

### C. Analysis of Potential Public Interest Harms

#### 1. Potential Horizontal Harms

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

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

<sup>113</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 506 ¶ 64.

<sup>114</sup> *Id.*, 19 FCC Rcd at 506 ¶ 66.

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

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

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

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

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

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

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

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

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

<sup>118</sup> *See infra* note 122.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>130</sup> Liberty Media July 10, 2007 Response to Information and Document Request I.B., Schedule 3 at 2-7.

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

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

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

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

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

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

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

<sup>134</sup> Liberty Media Oct. 23, 2007 Response to Information and Document Request at 4.

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

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

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

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

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

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

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

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

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

<sup>140</sup> Liberty Media Oct. 23, 2007 Response to Information and Document Request at 3-4.

<sup>141</sup> Liberty Global July 26, 2007 Response to Information and Document Request II.H at LGI.II.H 001782.

<sup>142</sup> *Id.* An additional [REDACTED]. See *id.*

<sup>143</sup> See *supra* note 136

<sup>144</sup> Liberty Media Oct. 23, 2007 Response to Information and Document Request at 4.

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

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

<sup>147</sup> Liberty Global July 26, 2007 Response to Information and Document Request II.H at LGI.II.H 001782.

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



discussed in paragraph 44, [REDACTED].

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

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

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

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<sup>149</sup> Liberty Media Oct. 23, 2007 Response to Information and Document Request at 2-4.

<sup>150</sup> *Id.* at 5.

<sup>151</sup> *Id.* at 3-4; U.S. Census Bureau, *2006 Puerto Rico Community Survey*, available at [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=04000US72&-context=adp&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-tree\\_id=306&-\\_lang=en&-caller=geoselect&-format=](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US72&-context=adp&-ds_name=ACS_2006_EST_G00_&-tree_id=306&-_lang=en&-caller=geoselect&-format=) (visited Feb. 8, 2008).

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

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

<sup>154</sup> See *supra* note 120.

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

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

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

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

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<sup>155</sup> *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20604 ¶ 99.

<sup>156</sup> *Id.* at 20612-13 ¶ 127.

<sup>157</sup> *Id.* at 20604 ¶ 99.

<sup>158</sup> *See supra* note 120 (demonstrating that [REDACTED]).

<sup>159</sup> DIRECTV Sept. 14, 2007 Response to Information and Document Request II.H at DTV-II.H-049983.

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

<sup>161</sup> *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20604, 20608, 20612-13, 20614 ¶¶ 101, 113, 127, 132.

<sup>162</sup> Application at 24-25.

<sup>163</sup> EchoStar raised similar concerns regarding the firewall proposed by the parties in their application. *See* EchoStar Petition at 26 (“In this case, the proposed ‘firewall’ for Dr. Malone will certainly be ineffective in preventing coordinated action between DIRECTV and LCPR.”).

of Directors (“Special Committee”).<sup>164</sup> The Special Committee, which would be comprised solely of independent directors, would “review, consider and approve (or disapprove)” matters relating to DIRECTV Latin America or DIRECTV-Puerto Rico to the extent that such matters would ordinarily be decided upon by the DIRECTV Board.<sup>165</sup> The Applicants’ proposal also includes measures intended to limit Malone’s influence over LCPR and DIRECTV-Puerto Rico.<sup>166</sup> For example, the proposal would prohibit DIRECTV from revealing non-public DIRECTV-Puerto Rico information to Malone, Liberty Media, or the Liberty Media-designated directors.<sup>167</sup> Finally, the Special Committee would submit an annual written certification to the Commission regarding compliance by DIRECTV during the prior year.<sup>168</sup>

55. In *News Corp.-Hughes*, we reviewed a similar proposal. There, the applicants proposed to have the Audit Committee, which, like the Special Committee, was comprised of independent directors, review related-party contracts and ensure that they were negotiated at arm’s length.<sup>169</sup> In that case, the applicants submitted the proposal to address concerns that News Corp. would raise its programming prices to DIRECTV, which would then set a benchmark that other MVPDs would have to accept unless they were willing to lose the right to carry News Corp.’s programming.<sup>170</sup> The Commission found that the independent directors would be subject to News Corp.’s influence, notwithstanding their nominal independence, because they would fear being ousted if they took a step that displeased News Corp., DIRECTV’s controlling shareholder.<sup>171</sup> Although the applicants argued that News Corp. was not a controlling shareholder and therefore could not oust directors solely by exercising its votes, the Commission was not persuaded, concluding that a sufficient number of additional shareholders might follow the leadership of an influential stakeholder, like News Corp.<sup>172</sup> Finally, the Commission observed that the existing directors controlled the nominating committee, which in turn selected the independent director slate. Based on general corporate trends, the Commission found that the nominating committee would likely nominate to the Audit Committee those directors with a financial interest in the corporation or, in the least, a personal relationship with News Corp. or Rupert Murdoch.<sup>173</sup> Accordingly, the Commission concluded that there exists “a significant risk that unfair self-dealing transactions may occur and go uncorrected” despite related-party contract review being delegated to the Audit Committee.<sup>174</sup>

56. Just as the Commission deemed the Audit Committee in *News Corp.-Hughes* to be an inadequate remedy to protect against related-partied transactions between News Corp. and DIRECTV, we believe the Special Committee and other measures proposed herein are inadequate to protect against

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<sup>164</sup> Letter from William M. Wiltshire, Harris Wiltshire & Grannis LLP, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Dec. 21, 2007) (“DIRECTV Dec. 21, 2007 Ex Parte”).

<sup>165</sup> *Id.*, Attachment (Special Market Committee Charter) at III.

<sup>166</sup> *Id.*, Attachment (Proposal) at II (Liberty Media Corp.’s Undertakings), and III (John C. Malone’s Undertakings).

<sup>167</sup> *Id.*, Attachment (Proposal) at IV (DIRECTV Group, Inc.’s Undertakings). Similar restrictions would not apply, however, to Liberty Media, Liberty Global or any other common director.

<sup>168</sup> *Id.*

<sup>169</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 515 ¶ 89.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 518-19 ¶ 97.

<sup>172</sup> *Id.* at 519 ¶ 98.

<sup>173</sup> *Id.* at 519 ¶ 100.

<sup>174</sup> *Id.*

concerns regarding competitive harm in Puerto Rico. Most notably, the proposal does not adequately curtail the influence of Malone, or Liberty Media over DIRECTV-Puerto Rico's or LCPR's activities. Even if such influence were addressed, the fact that the proposal fails to include the other common directors or Liberty Global, lacks any compliance or enforcement provision, and terminates automatically upon notice to the Commission, renders it inadequate to address our competitive concerns.

57. First, as we determined in *News Corp.-Hughes* with respect to the Audit Committee and its functions, the mere fact that directors are nominally independent is not necessarily adequate to protect against undue influence with respect to the issues before us. In *News Corp.-Hughes*, the Commission found that using the NYSE standard for independence was inadequate because that standard did not provide for the independent directors' independence from the company's controlling shareholder.<sup>175</sup> Here, the proposal's definition of "independent director" mainly relies on the NASDAQ definition, which is similarly lacking in any protection from controlling shareholder influence.<sup>176</sup> Although the proposal's definition of "independent director" is slightly supplemented by inclusion of a provision that would preclude the service of a person who, within the past five years, was a director, officer, employee, agent or partner of any Affiliated Entity,<sup>177</sup> or has had, within the preceding five years any business or financial relationship with Malone, that provision does not alleviate our concerns. We remain skeptical of the directors' independence because nothing appears to prohibit those persons who may have had, or are continuing to have, business dealings with DIRECTV or who hold equity, debt, or other interests in DIRECTV, from serving as independent directors. Such persons would have a vested interest in preserving the business relationship that they currently have with DIRECTV by not acting counter to Malone's interests, and/or voting in a manner that would facilitate coordinated behavior by DIRECTV-Puerto Rico and LCPR, if doing so would maximize DIRECTV's value.<sup>178</sup>

58. Second, the independence of the Special Committee is further compromised because the nominations for "independent" directors are typically controlled by the nomination committee, which is composed of existing directors.<sup>179</sup> As discussed in *News Corp.-Hughes*, nomination of a person by the

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<sup>175</sup> *Id.* at 518 ¶ 97.

<sup>176</sup> DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at I.G. For NASDAQ's standard for independence, see Rules of NASDAQ, 4200(a)(15), IM-4200 (defining "Independent Director") and 4350(c) (requiring independent directors), available at [http://www.complinet.com/nasdaq/display/display.html?rbid=1705&element\\_id=13](http://www.complinet.com/nasdaq/display/display.html?rbid=1705&element_id=13) (visited Feb. 1, 2008).

<sup>177</sup> An "Affiliated Entity" means "Liberty Media Corporation and its subsidiaries, Liberty Global, Inc. and its subsidiaries, and any other entity which is, or during the preceding five years has been, an 'affiliate' (as determined in accordance with the applicable rules and regulations of the Securities and Exchange Commission) of Dr. Malone, but excluding DIRECTV." DIRECTV Dec. 21, 2007 Ex Parte at Attachment (Proposal) at I.A. We are also concerned that the proposal relies upon the Securities and Exchange Commission's definition of "affiliate" rather than the Commission's definition of such term.

<sup>178</sup> Indeed, the relationships of the current Liberty Media and Liberty Global independent directors leave us with little comfort regarding the independence of the Special Committee. See Liberty Media Nov. 19, 2007 Response to Information and Document Request at LMC.SUPP.00191-00208 [REDACTED]; *supra* note 131. We also note that while the definition of "Independent Director" prohibits individuals who have had any business or financial relationship with Malone in the preceding five years, nothing likewise prohibits any such relationships with any Affiliated Entity. It is therefore possible that individuals who hold equity, debt, or other interests in an Affiliated Entity, could serve as independent directors on the Special Committee. See DIRECTV Dec. 21, 2007 Ex Parte at Attachment (Proposal) at I.G.

<sup>179</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 519 ¶ 99 (quoting Clarke, *Corporate Law* § 5.4 at 183). The Applicants have proposed that the initial composition of the Special Committee be Ralph P. Boyd, Jr. (Chairman), Neil Austrian, and Peter Lund. However, the members of the Special Committee are elected by a majority of the (continued....)

nominating committee virtually ensures their election by the shareholders, and the “persons nominated are . . . often friends of the chief executive or other insiders.”<sup>180</sup> In fact, the composition of Liberty Global’s and Liberty Media’s Board of Directors exemplifies this conclusion – its independent directors have long-standing and close ties with Malone.<sup>181</sup> Accordingly, we remain skeptical of the Special Committee’s effectiveness since its members would have been selected by, and likely reflect the interests of, directors whose interests are closely aligned with those of Malone.

59. Third, John Malone currently controls approximately 30 percent of the votes in Liberty Global and Liberty Media, and Liberty Media will control approximately 40 percent of the votes on DIRECTV’s Board.<sup>182</sup> As we found in *News Corp.-Hughes*, “we do not think that it is far-fetched to suggest that a sufficient number of shareholders might follow the lead of the largest single stockholder” and vote the way Liberty Media voted.<sup>183</sup> Should any of the independent directors displease Malone, he could exercise his influence over Liberty Media or Liberty Global and cause them to change their business relationship with that person, or any entities that person is involved in, and/or introduce a resolution to the DIRECTV Board to terminate or not re-elect that independent director.<sup>184</sup> Again, as we found in *News Corp.-Hughes*, the threat of such action “is likely to be . . . that an independent director will be cautious before taking any step that could cause offense . . . for fear that he or she might be

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independent directors, and this initial slate of directors can be changed simply by a Board resolution. DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at IV.B.1.

<sup>180</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 519 ¶ 99.

<sup>181</sup> *See supra* para 43.

<sup>182</sup> *See supra* note 6.

<sup>183</sup> *See News Corp.-Hughes Order*, 19 FCC Rcd at 519 ¶ 98.

<sup>184</sup> A recent example of Malone’s influence (even absent voting rights) is demonstrated in the pending litigation between Liberty Media and IAC regarding IAC’s proposal to separate the company into five publicly traded companies – an action that Malone does not support but IAC does. Liberty Media (including Malone) is unable to vote any IAC shares because, pursuant to an irrevocable proxy agreement, all of Liberty Media’s shares are voted by Chairman and CEO of IAC Barry Diller. As a result, Diller controls approximately 63.4 percent of the voting power of IAC (which includes all of Liberty Media’s voting rights), and has the power to control seven of twelve seats on IAC’s Board of Directors. Diller supported IAC’s recent proposal to separate the company into five publicly traded companies over Malone’s objections. In response, on January 28, 2008, Liberty Media sued to remove Diller and replace six other directors on the IAC Board with Liberty nominees (for a total of seven directors). Liberty’s complaint states that Diller is required under the proxy agreement “to vote against . . . [any] Contingent Matter . . . unless Liberty . . . [has] consented.” Liberty Request for Relief Pursuant to 8 Del. C. § 225(a), filed Jan. 28, 2008 at ¶ 45. This dispute illustrates Liberty Media and Malone’s influence even when they lack any voting power. Analysts note that Diller is “using his proxy over Malone’s votes to create something that Malone objects to” and “Liberty sees the move [by Diller] as an illegal effort to destroy its super voting rights.” *See* Geraldine Fabrikant and Brooks Barnes, *A Battle of the Moguls Over IAC*, NEW YORK TIMES, Feb. 4, 2008, at [http://www.nytimes.com/2008/02/04/business/media/04diller.html?\\_r=1&8dpc&oref=slogin](http://www.nytimes.com/2008/02/04/business/media/04diller.html?_r=1&8dpc&oref=slogin) (visited Feb. 5, 2008); Oliver Staley and Sophia Pearson, *IAC Shares Rise Over Skepticism of Malone Board Plan*, BLOOMBERG.COM, Jan. 29, 2008, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=agVM1XaRfSLk&refer=home> (visited Jan. 30, 2008); Louis Hau, *Liberty Seeks Ouster from IAC Board*, FORBES.COM, Jan. 28, 2008, at [http://www.forbes.com/2008/01/28/iac-liberty-court-biz-cx\\_lh\\_0128bizi.html](http://www.forbes.com/2008/01/28/iac-liberty-court-biz-cx_lh_0128bizi.html) (visited Jan. 30, 2008); *Malone’s Liberty Media Moves to Oust Diller from IAC Board*, BROADCASTING & CABLE, Jan. 28, 2008, at <http://www.broadcastingcable.com/article/CA6526545.html> (visited Jan. 30, 2008); Geraldine Fabrikant, *Liberty Asks for Power to Push Out Diller at IAC*, NEW YORK TIMES, Jan. 29, 2008, at [http://www.nytimes.com/2008/01/29/business/media/29liberty.html?\\_r=1&ref=todayspaper&oref=slogin](http://www.nytimes.com/2008/01/29/business/media/29liberty.html?_r=1&ref=todayspaper&oref=slogin) (visited Jan. 30, 2008).

ousted.”<sup>185</sup>

60. Moreover, the proposal contains other deficiencies that render it inadequate to address the competitive harms. Foremost, the proposal’s provisions regarding the actions of John Malone do not apply to Liberty Global,<sup>186</sup> but instead are commitments by Malone. Similarly, the proposal does not cover any of the other three common directors, who, as noted above, have long-standing business and personal ties with Malone.<sup>187</sup> In addition, the proposal’s communication ban works only in one direction and is limited to a prohibition on the sharing of information regarding DIRECTV Latin America and DIRECTV-Puerto Rico.<sup>188</sup> Nothing in the proposal would likewise ban the sharing of information about LCPR.<sup>189</sup>

61. The scope of the Special Committee’s responsibilities is also extremely limited. The Special Committee would handle only those matters normally handled by the DIRECTV Board of Directors unless the Special Committee determines that it wants additional oversight responsibility. [REDACTED].<sup>190</sup> [REDACTED], a result that fails to address our competitive concerns.

62. Moreover, the proposal contains no audit provision, no penalties for noncompliance, and no enforcement mechanism should a violation occur. There is no compliance program or compliance officer to ensure that Malone and the other entities are complying with the commitments, nor is there any means for the Commission to investigate whether the annual certification is accurate. Further, the termination provision is wholly inadequate: the restrictions would terminate automatically 10 days after the parties provide the Commission with written notice that one of several events triggering termination has occurred. The proposal contains no mechanism for the Commission to determine whether the qualifying events have in fact occurred or that termination is appropriate. For example, the proposal would permit termination if LCPR ceases to be a direct or indirect subsidiary of Liberty Global but neglects to include other entities attributed to Liberty or Malone.<sup>191</sup> Based on the foregoing, it is clear that the proposal contains numerous deficiencies that render it inadequate to address the competitive harms that could result from the transaction.<sup>192</sup>

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<sup>185</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 519 ¶ 97.

<sup>186</sup> While Liberty Media makes commitments, they are extremely narrow. For example, Liberty Media does not propose to create any Special Committee of the Board nor does Liberty Media even commit to submit an annual certification to the Commission. See DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at II.

<sup>187</sup> See *supra* para. 43.

<sup>188</sup> Even this one-way communication ban has exceptions because the definition of DIRECTV Latin America “exclude[s] operations and entities in Mexico and Brazil.” See DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at I.E.

<sup>189</sup> Malone has agreed to recuse himself from Liberty Global meetings that involve LCPR. See DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at III.B.

<sup>190</sup> See DIRECTV Dec. 21, Ex Parte, Attachment (Proposal) at IV.B.3; DIRECTV Jan. 4, 2008 Response to Information and Document Request, at Attachment B.

<sup>191</sup> See DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at V. The definition of LCPR also excludes “successors,” so it may be possible for Liberty Global to trigger termination by spinning off LCPR into a new entity. *Id.* at I.J.

<sup>192</sup> Liberty Media has cited Commission decisions to argue that the insulation proposals submitted by Applicants include all of the protections of insulation remedies that the Commission has approved as well as additional safeguards. See Liberty Media Oct. 23, 2007 Response to Information and Document Request at 10-11. Liberty Media specifically has cited *Applications of Viacom*, Memorandum Opinion and Order, 9 FCC Rcd 1577 (1994), *Applications of McCaw and AT&T*, Memorandum Opinion and Order, 9 FCC Rcd 5836 (1994), and *Applications of* (continued....)

63. Accordingly, we find that the recusal and insulation options proposed by the Applicants would fail to alleviate the competitive harms that are likely to arise as a result of this transaction. To mitigate these potential competitive harms, we require, as a condition of our approval of this transaction, that all of the attributable interests connecting DIRECTV-Puerto Rico and LCPR be severed within one year of the date on which this Order is adopted, either by divestiture or by otherwise making the interests non-attributable.<sup>193</sup> Specifically, within one year of the adoption date of this Order, the Applicants must certify either that they have complied with this condition or that they have filed all necessary applications for regulatory approval to do so. As part of the certification of compliance, the Applicants must explain with sufficient detail precisely how they came into compliance with this condition or how any filed applications would result in compliance, and they must identify all remaining direct or indirect relationships between DIRECTV-Puerto Rico and LCPR and their parent companies, including all indirect or direct subsidiaries, whether or not those relationships are attributable under our rules (e.g., equity or debt holdings or interests (including stock options), management roles of officers or directors, shared resources or personnel, and so forth).<sup>194</sup> We find that severing all of the attributable interests between DIRECTV-Puerto Rico and LCPR is the only effective remedy to the potential harms to consumers that would arise from the effective reduction of competitors from three to two in LCPR's territory and should help ensure that the firms will continue to compete vigorously in Puerto Rico and devote the requisite competitive resources to that market.

## 2. Potential Vertical Harms

64. In this section, we consider whether, as a result of the transaction, the Applicants would have an increased incentive and ability to engage in anticompetitive foreclosure strategies with respect to national and non-sports regional programming networks, RSNs, and broadcast television station signals. In addition, we evaluate whether the Applicants' proffered conditions would be sufficient to mitigate such harms.

65. We find that the vertical integration of Liberty Media with DIRECTV would increase the merged firm's incentive and ability to engage in anticompetitive conduct with respect to its affiliated broadcast and non-broadcast programming. More specifically, the transaction would increase the likelihood that the merged firm could successfully implement a temporary foreclosure strategy with respect to access to its RSN and broadcast programming. Thus, we accept the conditions that the

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*Telemundo Group, Debtor In Possession and Telemundo Group*, Memorandum Opinion and Order, 10 FCC Rcd 1104 (1994). We find that each of these cases is inapposite. At most, the cases stand for the proposition that the Commission has permitted insulation remedies where the entity that is subject to Commission regulation represents only a small part of the overall operations of a multi-faceted corporation and where the duties and responsibilities of the director(s) at issue were naturally severable from the regulated entity's operations. In this transaction, by contrast, there are no severable business units; each business unit of the companies has a media-industry focus; John Malone controls each company with more than 30 percent of the aggregate voting power; and the media expertise of Malone, among other directors, is integral to the operation of the overall businesses.

<sup>193</sup> If the Applicants choose to comply with the condition by making the connecting interests non-attributable, we will apply the Commission's cable attribution standards set forth in 47 C.F.R. § 76.1000(b). We note that determining whether a particular interest is attributable is a fact-intensive inquiry, and, even where an interest may appear non-attributable under the bright-line attribution rules, the Commission retains the discretion to review individual cases that present unusual issues. Such would be the case where there are combined interests that are so extensive that they raise an issue of significant influence notwithstanding the fact that the interests do not come within the parameters of a particular attribution rule. *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12581 ¶ 44 (1999).

<sup>194</sup> Within nine months of the adoption of this Order, the Applicants shall submit to the Commission a description of their plan for complying with this condition to ensure that their proposal satisfies the public interest concerns underlying the condition.

Applicants have offered to mitigate these harms and craft modifications to those conditions as appropriate. Finally, we recognize the potential concerns that may arise from a merger of a major program supplier with an MVPD and therefore accept the Applicants' offer to comply with a condition forbidding discrimination with respect to program carriage.

**a. Access to Affiliated Programming**

66. *Background.* The potential for a vertically integrated firm, as the result of a transaction, to foreclose downstream competitors from important inputs (*e.g.*, programming) is the subject of substantial economic literature. Theoretically, where a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals' costs either by raising the price at which it sells the input to downstream competitors or by withholding supply of the input from competitors.<sup>195</sup> By doing so, the integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete.

67. One way by which vertically integrated firms can raise their rivals' costs is to charge higher programming prices to competing MVPDs than to their affiliated MVPDs. The Commission's program access rules, which apply to cable operators but not to DBS firms, prohibit price discrimination by programming networks that are vertically integrated with a cable operator unless the price discrimination is based on market conditions.<sup>196</sup>

68. A vertically integrated firm could also attempt to disadvantage its rivals by engaging in a foreclosure strategy, *i.e.*, by withholding a critical input from them. The economic literature suggests that an integrated firm will engage in permanent foreclosure only if the increased profits it earns in the downstream market (*e.g.*, the MVPD market) as the result of foreclosure exceed the losses it incurs from reduced sales of the input in the upstream market (*e.g.*, the programming market).<sup>197</sup> The Commission's program access rules generally prohibit exclusive dealing by programming networks that are vertically integrated with cable operators.

69. If an integrated firm calculates that permanent foreclosure would be unprofitable, or if such foreclosure is prohibited by our rules, it nevertheless might find it profitable to engage in temporary foreclosure in certain markets. For temporary foreclosure to be profitable in the context of MVPDs' access to programming, there must be a significant number of subscribers who would switch MVPDs to obtain the integrated firm's programming and would not immediately switch back to the competitor once the foreclosure has ended. In markets exhibiting consumer inertia,<sup>198</sup> temporary foreclosure may be profitable even where permanent foreclosure is not. The profitability of this strategy in the MVPD context derives not only from subscriber gains, but also from the potential to extract higher prices in the long term

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<sup>195</sup> See Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L. J. 513, 527-38 (1995) ("*Riordan and Salop*"); see also Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209, 234-38 (1986).

<sup>196</sup> For example, satellite cable programming vendors may establish "different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming . . ." 47 C.F.R. § 76.1002(b)(2).

<sup>197</sup> See, *e.g.*, *Riordan & Salop* at 528-31. For foreclosure (either permanent or temporary) to be profitable, the withdrawal of the input subject to foreclosure must cause a change in the characteristics of the downstream product, causing some customers to shift to competing downstream products.

<sup>198</sup> Consumer inertia can cause demand to adjust slowly to changes in the price or quality of a product. For example, consumers may be slow to adjust their purchasing behavior when significant cost or effort is required to find and purchase alternative sources of supply. See Roy Radner, *Viscous Demand*, 112 J. ECON. THEORY 189 (2003).



from MVPD competitors.<sup>199</sup> Specifically, by temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier.<sup>200</sup> In order for a vertically integrated firm successfully to employ temporary foreclosure or the threat of temporary foreclosure as a strategy to increase its bargaining position, there must be a credible risk that subscribers would switch MVPDs to obtain the programming for a long enough period to make the strategy profitable.<sup>201</sup>

70. In *News Corp.-Hughes*, the Commission concluded that the vertical integration of News Corp. with DIRECTV could increase the likelihood of anticompetitive behavior toward DIRECTV's rivals. Therefore, the Commission adopted program access-type commitments to alleviate any concern that the transaction would increase News Corp.'s incentive and ability to permanently withhold programming or to engage in price discrimination.<sup>202</sup> Although Liberty Media's common ownership interests in News Corp. and LCPR rendered News Corp. a "satellite cable programming vendor in which a cable operator holds an attributable interest" subject to the program access rules, the Commission adopted the conditions in the event Liberty Media divested those interests and was no longer subject to the rules.<sup>203</sup> The condition ensured that the operative elements of the program access rules would apply to News Corp.'s programming even if News Corp. were no longer affiliated with a cable operator via Liberty Media's common interests in News Corp. and LCPR.

71. The Commission also determined that News Corp.'s acquisition of DIRECTV would increase its incentive to temporarily withhold News Corp. RSNs and local broadcast signals from its competitors, behavior that would not be constrained by the program access rules or rules governing the carriage of local broadcast signals.<sup>204</sup> It therefore imposed arbitration conditions to mitigate that harm. Under the terms of the arbitration conditions, an MVPD may choose to submit a dispute to commercial arbitration when negotiations fail to produce a mutually acceptable set of price, terms, and conditions for carriage of an RSN or for a retransmission consent agreement.<sup>205</sup> The arbitration remedy encourages parties to come to agreement prior to the expiration of programming carriage agreements. Moreover, if disputes are not resolved prior to termination of an agreement, the remedy prohibits the program rights holder from withholding the programming while the dispute is being resolved, provided that the MVPD seeking access has elected to use the arbitration remedy. This ensures that the parties make serious efforts to resolve their dispute in a timely manner, and it protects consumers from disruptions in service if disputes are referred to arbitration.

**(i) Non-Broadcast Programming Generally**

**(a) Program Access Condition**

72. Commenters raise concerns about potential harms that could flow from the vertical

<sup>199</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 511-12 ¶80.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 511-12 ¶¶ 79-80.

<sup>202</sup> *Id.* at 529-533 ¶¶ 124-28. The Commission also considered and rejected an insulation remedy concerning programming negotiations. *Id.* at 528-29 ¶¶ 122-24.

<sup>203</sup> *Id.* at 531-32 ¶ 127 n.379.

<sup>204</sup> *Id.* at 551, 568 ¶¶ 169, 209.

<sup>205</sup> *Id.* at 551, 677, 680 ¶ 173, App. F(III)-(IV). A dispute related to contract renewal may be submitted to arbitration only after the existing agreement has expired. *Id.*

integration of Liberty Media's programming networks and DIRECTV.<sup>206</sup> Several commenters ask us to impose broad program access conditions on all entities affiliated with either Liberty Media or John Malone, including Discovery Communications.<sup>207</sup> We conclude that the program access rules, combined with the proffered program access conditions, arbitration conditions, and other requirements that we adopt in this Order, will eliminate any potential for anticompetitive conduct due to the vertical relationship between Liberty Media's satellite cable programming networks and DIRECTV's distribution platform with respect to all Liberty Media and Discovery programming. Accordingly, we adopt the proffered conditions with the additional protections described below.

73. *Background.* In enacting the program access provisions of the 1992 Cable Act, Congress found that extensive vertical integration between cable operators and cable programming vendors created an imbalance of power, both between cable operators and programming vendors and between incumbent cable operators and their multichannel competitors.<sup>208</sup> Congress determined that this imbalance of power limited both the development of competition among MVPDs and consumer choice.<sup>209</sup> Congress expressed its concern that unaffiliated MVPDs faced difficulties gaining access to programming required to provide a viable alternative to cable.<sup>210</sup> Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators.<sup>211</sup> In response, Congress imposed specific conduct restrictions, including limits on exclusive contracts, to ensure that market entrants could gain access to all vertically integrated satellite cable programming.<sup>212</sup>

74. In our 2007 order extending the prohibition against exclusive programming contracts for vertically integrated programming for another five years, we found that competitive MVPDs must have access to vertically integrated programming to remain viable substitutes to the incumbent cable operator in the eyes of consumers.<sup>213</sup> In addition, we concluded that there are frequently no good substitutes for satellite-delivered vertically integrated programming, and that ensuring access to such programming is necessary to maintain for viable competition in the video distribution market.<sup>214</sup> The Commission also

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<sup>206</sup> Commenters also raise concerns about Liberty by alleging that TCI engaged in anticompetitive conduct under the leadership of John Malone. *See* EchoStar Petition at 2-5, 7, 22 (alleging that Liberty Media, when vertically integrated with TCI, operated "ruthlessly" in acquiring and creating programming, to the detriment of unaffiliated MVPDs). *Id.* at 3. Liberty Media was previously integrated with cable operator TCI. TCI was sold to AT&T, and eventually, to Comcast. *See News Corp.-Hughes Order*, 19 FCC Rcd at 486 ¶ 23. We find that these generalized criticisms about a predecessor-in-interest are insufficient to raise concerns with respect to our public interest analysis. We also note that these generalizations are tangential to the issues related to potential harms presented by the vertical integration of Liberty and DIRECTV or are not transaction specific.

<sup>207</sup> EchoStar Petition at 14-15; ACA Comments at 7-9; ACA Reply Comments at 8; CU Comments at 5-7; HITN Petition at 6.

<sup>208</sup> 1992 Cable Act § 2(a)(5).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *See* 47 U.S.C. § 548.

<sup>213</sup> *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(C)(5) of the Communications Act: Sunset of Exclusive Prohibition, Renewal of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, 17794, 17814 ¶¶ 3, 37 ("2007 Program Access Order and NPRM").

<sup>214</sup> *See id.* at 17811 ¶ 30.

concluded that competition and diversity in the distribution of video programming would not be preserved and protected without a prohibition against exclusive programming because vertically integrated programmers continue to have the ability and incentive to favor their affiliated cable operators over competitive MVPDs.<sup>215</sup> The Commission explained that there is “a continuum of vertically integrated programming, ‘ranging from services for which there may be substitutes (the absence of which from a rival MVPD’s program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD’s program lineup would have a substantial negative impact).’”<sup>216</sup> The Commission further explained that national programming networks such as The Discovery Channel provide some of the most popular programming currently available.<sup>217</sup> Based on the evidence in the record, the Commission decided to retain the prohibition on exclusive contracts for another five years because MVPDs’ ability to compete otherwise would be impaired significantly by the inaccessibility of popular vertically integrated programming for which no good substitute exists.<sup>218</sup>

75. In *News Corp.-Hughes*, the Commission addressed the potential harms posed by vertical integration of DIRECTV and another entity’s (in that case News Corp.’s) programming networks. Liberty Media’s investment in News Corp. then, combined with its ownership of LCPR, brought News Corp.’s programming within the ambit of the rules, just as Liberty Media’s investment in DIRECTV does now. News Corp., however, volunteered to subject its programming to the program access rules in the event it were no longer subject to the rules by virtue of affiliation with a cable operator, and the conditions imposed in *News Corp.-Hughes* were intended to alleviate concerns about News Corp.’s ability and incentive to favor DIRECTV in that event.<sup>219</sup> The conditions applied to programming owned by News Corp. as well as programming owned by Liberty Media.<sup>220</sup>

76. *Positions of the Parties*. Commenters’ concerns regarding fair and non-discriminatory access to Liberty Media’s and Discovery’s cable programming echo the competitive concerns addressed in Section 628(c)(2) of the Communications Act and the Commission’s implementing rules. Liberty Media has conceded that the program access rules apply to it by virtue of its relationship with LCPR and has agreed to remain subject to the conditions applicable to News Corp. even if the program access rules otherwise would cease to apply because its ties to LCPR are severed.<sup>221</sup> EchoStar, RCN Telecom

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<sup>215</sup> See *id.* at 17810 ¶ 29.

<sup>216</sup> See *id.* at 17816 ¶ 38 (quoting *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(C)(5) of the Communications Act*, 17 FCC Rcd 12124, 12139 ¶ 33 (2002) (“2002 Program Access Order”).

<sup>217</sup> See *2007 Program Access Order and NPRM*, 22 FCC Rcd at 17815 ¶ 37.

<sup>218</sup> See *id.* at 17792, 17817 ¶¶ 1, 39.

<sup>219</sup> See *News Corp.-Hughes Order*, 19 FCC Rcd at 476-77 ¶ 4.

<sup>220</sup> See *id.* at 523, 531-32 ¶¶ 107, 127 & n.378 (stating that the conditions covered not only the programming agreements between DIRECTV and News Corp. networks but also agreements between DIRECTV and “Affiliated Program Rights Holders,” a term that applied expressly to Liberty Media).

<sup>221</sup> Liberty Global owns 100 percent of LCPR. As discussed above, Liberty Media shares half of its directors with Liberty Global, and Malone chairs both boards. Although Liberty Media spun off Liberty Global in 2004, Liberty Media is subject to the program access rules by virtue of Malone’s board membership and ownership interests. See *Application* at 23-25, n.44; see also Proxy Statement of Liberty Media at A-14 (September 7, 2007), [http://www.libertymedia.com/ir/pdfs/LibertyMediaCorpProxy\\_09072007.pdf](http://www.libertymedia.com/ir/pdfs/LibertyMediaCorpProxy_09072007.pdf) (“Although we no longer own Liberty Cablevision of Puerto Rico Ltd. (‘LCPR’), FCC rules continue to attribute an ownership interest in LCPR to us, thereby subjecting us and satellite-delivered programming services in which we have an interest to the program access rules”).

Services, Inc. (“RCN”), American Cable Association (“ACA”), and other commenters insist that the conditions should apply not only to Liberty Media’s programming but also to Discovery’s networks.<sup>222</sup> They reason that John Malone will have attributable interests not only in DIRECTV and Liberty Media but also in Discovery by virtue of his interests in its parent, Discovery Holding.<sup>223</sup> Cautioning that the Applicants’ proposed program access commitments would apply only to programming owned by Liberty Media, EchoStar would have the Commission define “Liberty” to include any entities in which Liberty Media or its principal shareholder, John Malone, hold an attributable interest. EchoStar states that this class would include Liberty Global, Discovery Holding, their respective subsidiaries, and any other similarly situated company.<sup>224</sup> The Applicants and Discovery oppose application of program access conditions to Discovery.<sup>225</sup> Discovery argues that application of the conditions to Discovery is unnecessary because it already is subject to the program access rules and in any event would not have an incentive to discriminate in favor of DIRECTV.<sup>226</sup>

77. *Discussion.* Commenters’ concerns regarding fair and non-discriminatory access to Liberty Media’s and Discovery’s cable programming echo the competitive concerns addressed in Section 628(c)(2) of the Communications Act, as amended, and the Commission’s rules.<sup>227</sup> Liberty Media has

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<sup>222</sup> See, e.g., EchoStar Petition at 14-15; ACA Comments at 2, 6-7; RCN Comments at 1-4.

<sup>223</sup> EchoStar Petition at 14-15; ACA Comments at 2; ACA Reply Comments at 2.

<sup>224</sup> EchoStar Petition at 15. Under the attribution standards applicable to the program access rules, John Malone holds an attributable interest in Discovery. John Malone holds 5.47 percent of the outstanding shares and 31.08 percent of the overall voting power in Discovery Holding as of July 31, 2007, and Discovery Holding holds a 66.66 percent equity stake in Discovery. Malone also serves as Chair of Discovery Holding’s Board of Directors. Thus, by virtue of his stock interest in Discovery Holding, which exceeds five percent, and his position on the Board of Discovery Holding, Malone holds a cognizable interest in Discovery under the program access attribution rules. See *supra* para. 12; see also Discovery Holding Company, *SEC Form 10-Q for the Quarterly Period Ending September 30, 2007*, at I-5; 47 C.F.R. § 76.1000(b) (defining cognizable interests).

<sup>225</sup> See Discovery Opposition at 4; see also Letter from Tara M. Corvo, Mintz Levin, Counsel to Discovery, to Marlene Dortch, Secretary, FCC (June 6, 2007) (“Discovery June 6, 2007 Ex Parte”); Liberty Media Opposition of April 9, 2007 at 4.

<sup>226</sup> Discovery asserts that imposing a program access condition on Discovery is unwarranted because Discovery is already subject to the program access rules and its co-owner Advance/Newhouse would not approve any withholding or discrimination strategy because it would be against Advance/Newhouse’s interest as a holder of 33 percent of Discovery’s equity. Furthermore, Discovery claims that Advance/Newhouse would be able to block any such strategy because any major action by Discovery requires approval of 80 percent of all shares. See Discovery June 6, 2007 Ex Parte (memorializing representations made by Discovery on June 5, 2007, to Commission staff with regard to Discovery’s ownership structure). However, decisions to impose, increase, or change subscriber license fees of the Discovery Channel require only a simple majority vote. See Discovery Holding July 10, 2007 Response to Information and Document Request I.D. at LMC.I.D.0000422-424 (Shareholders Agreement of Discovery Section 3.02 (Nov. 30, 1991)); see also Discovery Holding *SEC Amendment No. 2 to Form 10*, June 27, 2005, at Ex. 10.1, 10.2, 10.3, 10.4 and 10.5 (the amendments to the shareholders agreement dated December 20, 1996; September 7, 2000; September, 2001; and June, 23, 2003 do not affect the “majority provisions” contained in Section 3.02 of the 1991 Shareholders Agreement). In addition, on December 13, 2007, Discovery Holding announced that it would combine its interests in Discovery with Advance/Newhouse’s interests in Discovery and Animal Planet into a newly created holding company. See *supra* note 44. It is not clear whether or how this restructuring would affect the ability of Advance/Newhouse to prevent Discovery from entering into any particular program carriage agreements.

<sup>227</sup> Congress essentially recognized that all MVPDs needed access to all vertically integrated satellite cable programming on non-discriminatory terms and conditions and that the Commission must therefore enforce (continued....)

conceded that it is subject to the prohibitions in the program access rules<sup>228</sup> and has agreed to remain subject to program access conditions analogous to those conditions that the Commission adopted with regard to News Corporation in the *News Corp.-Hughes Order*.<sup>229</sup> By prohibiting permanent foreclosure and overt discrimination in the pricing of satellite cable programming, the program access rules directly address the concerns raised by EchoStar and others regarding continued access to cable programming that Liberty Media owns or controls. In addition, Liberty Media's proffered program-access commitments address commenters' concerns about exclusive distribution agreements between DIRECTV and Liberty Media programming networks. Because these commitments ensure that the operative prohibitions in the program access rules will remain in force even if the rules no longer apply to Liberty Media, we are satisfied that the potential harms created by vertical integration of Liberty Media and DIRECTV would be mitigated with respect to programming owned by Liberty Media. However, we are also concerned about the influence of John Malone and other officers and directors of Liberty Media who may themselves hold attributable interests in programming networks.

78. Like Liberty Media, Discovery is subject to the program access rules as a "satellite cable programming vendor."<sup>230</sup> Advance/Newhouse's interest in Discovery triggers the rules because Advance/Newhouse holds an attributable interest in a cable system under the program access rules.<sup>231</sup> The rationale for imposing program access conditions on Liberty Media applies equally to Discovery. First, in the absence of any restrictions embodied in the rules or conditions, Discovery, like Liberty Media, would be able to withhold programming or price discriminate in favor of DIRECTV. Second, both Liberty Media and Discovery offer the type of nationally distributed, general interest programming that the Commission sought to address via the *News Corp.-Hughes* program access condition. That is, Liberty Media and Discovery each control popular programming networks that create similar nationally distributed and popular content without close substitutes.<sup>232</sup> Third, Liberty Media and Discovery are situated similarly within the corporate hierarchy of entities controlled by John Malone. Malone holds attributable interests in Discovery Holding, Liberty Media, Liberty Global, and LCPR under the

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prohibitions against unfair and discriminatory terms and conditions of carriage, including exclusive carriage arrangements, until competitive conditions significantly change. See 47 U.S.C. § 548(c)(2).

<sup>228</sup> Liberty Media's proffered conditions would apply to all of its programming, including the RSNs it is acquiring from News Corp. and any other satellite-delivered RSNs it may acquire during the term of the conditions. We address RSNs separately because, as described in the next section, we find that Liberty Media would have significant market power with respect to regional sports programming as a result of the transaction, and that additional remedies are necessary.

<sup>229</sup> See Liberty Media Opposition at 2 (Liberty Media committed in the Transfer Application "to abide by all relevant conditions established by the Commission" when News Corp. acquired its interest in DIRECTV three years ago").

<sup>230</sup> The term "satellite cable programming vendor" means "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor." 47 C.F.R. § 76.1000(i). The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that the term does not include satellite broadcast programming." 47 C.F.R. § 76.1000(h).

<sup>231</sup> The term "attributable interest" refers to the criteria referenced and set forth in 47 C.F.R. § 76.1000(b).

<sup>232</sup> See *supra* paras. 8-12, 29, 33-36; see also *2002 Program Access Order*, 17 FCC Rcd at 12139 ¶ 33. On January 16, 2008, Discovery and Oprah Winfrey announced that they would jointly create the Oprah Winfrey Network ("OWN"). OWN will debut in 2009 on what is now the Discovery Health Channel. See Discovery Communications, *Special Announcement: Oprah Winfrey and Discovery Communications To Form New Joint Venture: "OWN: The Oprah Winfrey Network"* (press release), Jan. 15, 2008.

attribution standards applicable to the program access rules.<sup>233</sup> He is well positioned to influence or even direct Discovery's decisions concerning whether or not to sell programming to an unaffiliated MVPD and how to set the prices, terms, and conditions of such sales. In addition, Liberty Media and Discovery Holding have interlocking directorates that could facilitate communication or cooperation leading to discrimination by Discovery in favor of DIRECTV and to the detriment of its MVPD competitors.<sup>234</sup> Certain employees or officers of Liberty Media are also highly paid executives of Discovery Holding, and, pursuant to a services agreement, Discovery Holding compensates Liberty Media for the services that these Liberty Media employees and officers render to Discovery Holding. The shared directors, officers, and employees could allow the firms in question to cooperate in a strategy designed to raise DIRECTV's rivals' prices for Discovery's programming, which would inure to DIRECTV's benefit through subscriber migration. After the transaction, therefore, Liberty Media and Malone unquestionably would be able to unduly influence the decisions of their attributable programming networks to improve DIRECTV's competitive position vis-à-vis its rivals.<sup>235</sup>

79. We also determine that, post-transaction, Liberty Media and John Malone would have the incentive to unduly influence the decisions of attributable programming networks to improve DIRECTV's competitive position. Underpinning the program access rules is a recognition by Congress and the Commission that the incentive to engage in anticompetitive pricing or withholding strategies implicitly exists where there is vertical integration. Section 19 of the 1992 Cable Act added to Section 628 of the Communications Act, which prohibits unfair or discriminatory practices in the sale of satellite

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<sup>233</sup> Besides serving as the Chairman of the Board for each of Discovery Holding, Liberty Media, and Liberty Global, John Malone possesses at least 30 percent of the aggregate voting power for each company. *See supra* paras. 8-12; *see also* 47 C.F.R. § 76.1000(b). Liberty Global and Liberty Media have 10 and eight board members, respectively. *See* Liberty Media, *Investor Relations – Corporate Governance*, at <http://www.libertymedia.com/ir/Board-of-Directors.htm> (visited Feb. 1, 2008); *see also* Liberty Global, *Board of Directors Liberty Global, Inc.*, at <http://www.lgi.com/directors.html> (visited Feb. 1, 2008). Including Malone, they share four directors in common. As noted previously, Liberty has conceded in proxy statements, and in its Application, that LCPR is attributable to Liberty. *See supra* note 221.

<sup>234</sup> Discovery Holding and Liberty Media have five and eight board members, respectively. Including Malone, they share four directors in common, and Liberty Media directors hold 80 percent of Discovery Holding's board seats. Discovery Holding, in turn, holds a 66.66 percent equity interest in Discovery. Charles Tanabe serves as Secretary for both companies and Robert Bennett, a Liberty Media director, serves as President of Discovery Holding and sits on its Executive Committee. Paul Gould and M. LaVoy Robinson are the remaining two overlapping directors. *See* Discovery Holding, *Corporate Governance*, at [http://www.discoveryholding.com/ir/directors\\_members.htm](http://www.discoveryholding.com/ir/directors_members.htm) (visited Dec. 21, 2007); *see also* Discovery Holding Annual Report at 7, Apr. 28, 2006, at [http://www.discoveryholding.com/ir/pdfs/D34759\\_asprinted.pdf](http://www.discoveryholding.com/ir/pdfs/D34759_asprinted.pdf); Liberty Media, *Investor Relations – Corporate Governance*, at <http://www.libertymedia.com/ir/Board-of-Directors.htm> (visited Feb. 1, 2008); *see also supra* note 131.

<sup>235</sup> In implementing Section 19 of the 1992 Cable Act, which added Section 628 to the Communications Act, the Commission concluded that “the concept of undue influence between affiliated firms is closely linked with discriminatory practices and exclusive contracting, the direct regulation of which is to be undertaken pursuant Sections 628(c)(2)(B), (C), and (D) based on externally ascertainable pricing and contracting information.” *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3424 ¶ 145 (1993) (“1992 Cable Act Implementation Order”). The Commission also observed that “Section 628(c)(2)(A) can play a supporting role where information is available (such as might come from an internal ‘whistleblower’) that evidences ‘undue influence’ between affiliated firms to initiate or maintain anticompetitive discriminatory pricing, contracting, or product withholding.” *Id.* The Commission determined that the best way to evaluate complaints of undue influence is to “compare the programming arrangement of the complaining distributor against the programming arrangements enjoyed by its competitors.” *Id.* at 3363 ¶ 13.

cable and satellite broadcast programming.<sup>236</sup> In its implementation of Section 628, the Commission determined that subsection (b) of the statute does not impose a threshold burden on complainants to establish that they have suffered harm as a result of the proscribed conduct.<sup>237</sup> In particular, the Commission determined that “subsection (c) defines specific conduct which the Commission’s rules must prohibit and which Congress has already determined causes anticompetitive harm.”<sup>238</sup> The Commission determined that if behavior meets the definitions of the activities proscribed in subsection (c), such practices are “implicitly harmful.”<sup>239</sup> The Commission further observed that this concept of “harm” is common in FCC regulation:

Our rules, for example, require licensees to keep their towers properly painted and lit; a violation occurs even if no one is damaged as a result of the licensee’s failure to comply with our rules. We believe that Congress adopted a similar stance with respect to the specific practices proscribed by Section 628(c). In each case, a legislative determination was made that there was sufficient potential for harm that the specified unfair practices should be prohibited.<sup>240</sup>

Thus, the Commission determined that unfair practices must be prevented even where no damage to a competitor can be shown. In this manner, Congress and the Commission inferred the vertically integrated firm’s incentive to engage in unfair practices. This transaction presents the same potential for harm that the program access rules were designed to prevent. Today, the program access rules would mitigate the harm posed by the vertical integration of Liberty Media and DIRECTV. If the program access rules were to cease to apply to Discovery because of a corporate restructuring, however, prophylactic measures similar to the program access rules would be necessary.

80. Although the program access rules currently prevent Discovery from withholding valuable programming, they could cease to apply to Discovery if Advance/Newhouse were to divest its interest in Discovery.<sup>241</sup> Since this scenario presumes that Advance/Newhouse will have divested its interest, or brought it below the five percent attribution threshold, Discovery’s claim that Advance/Newhouse would prevent any undue favoritism toward DIRECTV is invalid with respect to the scenario in which the rules no longer apply.

81. Accordingly, we will require as a condition of our approval of the transaction that the program access conditions set forth herein with respect to Liberty Media shall apply also to Discovery for as long as John Malone or any other officer or director of Liberty Media or DIRECTV holds an

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<sup>236</sup> 47 U.S.C. § 548.

<sup>237</sup> *1992 Cable Act Implementation Order*, 8 FCC Rcd at 3363 ¶ 12.

<sup>238</sup> *Id.* at 3376 ¶ 46.

<sup>239</sup> *Id.* at 3377 ¶ 47.

<sup>240</sup> *Id.* at 3377 ¶ 48.

<sup>241</sup> Discovery Holding and Advance/Newhouse recently bought out Cox Communications’ 25 percent interest in Discovery, and, as noted above, Discovery Holding has announced that it is combining its shares in Discovery with those of Advance/Newhouse into a newly formed holding company. *See supra* note 44; *see also* Discovery Communications, *Cox Communications and Discovery Communications Complete Exchange of Cox’s Ownership Stake* (press release), May 14, 2007. The program access rules conceivably could continue to apply to Discovery by virtue of John Malone’s common interests in LCPR and Discovery. However, [REDACTED]. *See* DIRECTV Nov. 19, 2007 Response to Information and Document Request at DTV-SUPP-00067 ([REDACTED]); Liberty Global July 30, 2007 Response to Information and Document Request II.H at LGI.II.H.004753-LGI.II.H.004772 ([REDACTED]). Moreover, Liberty Media may choose to divest LCPR as a means of complying with our Puerto Rico condition described above. *See supra* para. 63.

attributable interest in Discovery and for as long as Liberty Media holds an attributable interest in DIRECTV, provided that our program access rules are in effect. As with application of the condition to News Corp. and Liberty Media programming, both of which currently are subject to the program access rules, the condition that we adopt with regard to Discovery in this Order will not become operative unless Discovery is no longer a “cable satellite programming vendor” subject to the program access rules.

82. Finally, to ensure that the program access condition applies to any entity that is situated similarly to Liberty Media and Discovery, we clarify below that the program access conditions will apply broadly to any entity that is managed by Liberty Media, or in which Liberty Media or Malone hold an attributable interest (including Discovery), and to any Affiliated Program Rights Holder.<sup>242</sup> As was the case in *News Corp.-Hughes*, and for the reasons stated therein, these conditions will apply equally to regional sports networks as well as national and non-sports regional networks.<sup>243</sup>

83. Specifically, to ensure that the access and non-discrimination requirements of the program access rules will continue to apply to programming networks that are affiliated with DIRECTV or Liberty Media, through any attributable interest, and to obtain the additional protections encompassed by the Applicants’ related commitments, we adopt the following conditions:<sup>244</sup>

- Liberty Media shall not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD.<sup>245</sup> Liberty Media shall continue to make such services available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.<sup>246</sup>
- DIRECTV shall not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.
- As long as Liberty Media holds an attributable interest in DIRECTV, DIRECTV shall deal with any Affiliated Program Rights Holder with respect to programming services the Affiliated Program Rights Holder controls as a vertically integrated programmer subject to

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<sup>242</sup> The term “Affiliated Program Rights Holder” includes (i) any program rights holder in which Liberty Media or DIRECTV holds a non-controlling “attributable interest” (as determined by the FCC’s program access attribution rules) or in which any officer or director of Liberty Media, DIRECTV, or of any other entity controlled by John Malone holds an attributable interest; and (ii) any program rights holder in which an entity or person that holds an attributable interest also holds a non-controlling attributable interest in Liberty Media or DIRECTV, provided that Liberty Media or DIRECTV has actual knowledge of such entity’s or person’s attributable interest in such program rights holder. As the Commission noted in *New Corp.-Hughes*, this commitment extends beyond the program access rules because DBS operators are not included within the exclusivity prohibition. *See* 47 C.F.R. § 1002(c).

<sup>243</sup> *See News Corp.-Hughes Order*, 19 FCC Rcd at 530-31 ¶ 126 (explaining that loss of access to certain highly popular cable programming – whether it is news, drama, sports, music, or children’s programming – may harm the foreclosed unaffiliated competitor in the marketplace).

<sup>244</sup> These conditions are included in Appendix B.

<sup>245</sup> The term “Liberty Media” as used with respect to the program access and arbitration conditions includes any entity or program rights holder in which Liberty Media or John Malone holds an attributable interest. Thus, the term “Liberty Media” includes Discovery Communications. Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in any non-broadcast national or regional programming service while these conditions are in effect if the programming service is not obligated to abide by such conditions.

<sup>246</sup> In committing not to offer its programming services on an exclusive basis, Liberty voluntarily forgoes 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).



- the program access rules.<sup>247</sup>
- Neither Liberty Media nor DIRECTV (including any entity over which either firm 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.
  - 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).
  - These conditions shall apply to Liberty Media, DIRECTV, and any Affiliated Program Rights Holder until the later of a determination by the Commission that Liberty Media no longer holds an attributable interest in DIRECTV or the Commission's program access rules no longer remain in effect (provided that if the program access rules are modified these commitments shall be modified, as the Commission deems appropriate, to conform to any revised rules adopted by the Commission).
  - Aggrieved MVPDs may bring program access complaints against the Applicants using the procedures found at Section 76.1003 of the Commission's rules.<sup>248</sup>

84. We find that the additional conditions advocated by commenters with respect to national and non-sports regional programming are unnecessary.<sup>249</sup> ACA has asked the Commission to prohibit Liberty Media and Discovery from engaging in any noncost-based price discrimination when dealing with small and medium-sized cable operators or their buying group, contending that "volume discounts" are a means of raising rivals' programming costs.<sup>250</sup> The record is devoid of any evidence demonstrating that these conditions are necessary to remedy transaction-specific harms. Rather, it appears that ACA's real complaint is with the operation of the Commission's program access rules.<sup>251</sup> We repeatedly have held that such arguments should be raised and addressed in proceedings of general applicability, not in license

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<sup>247</sup> This condition would only be of significance in the event an Affiliated Program Rights Holder is not otherwise subject to the Commission's program access rules.

<sup>248</sup> See also 47 C.F.R. § 76.1003.

<sup>249</sup> We note that application of the relevant conditions of this Order are based on a network's ownership, as opposed to whether the content of the network's programming is "international" or "domestic." In other words, we acknowledge that international programming distributed in the United States falls within the definition of 'national and regional programming services' in the condition described above. However, we reject any suggestion that our conditions should apply to programming distributed outside the United States. See EchoStar Petition at 15-17; see also Letter from Linda Kinney, Counsel, EchoStar Satellite L.L.C., to Marlene H. Dortch, Secretary, FCC, Attachment ("News Corp/Liberty/DIRECTV Proposed Conditions") at 1 (Mar. 29, 2007) ("The program access protections should apply to both domestic and international programming and markets.")

<sup>250</sup> ACA Comments at 12-13.

<sup>251</sup> We note that the Commission recently concluded its review of the continued need for the prohibition against program exclusivity agreements, but concomitantly issued a Notice of Proposed Rulemaking seeking comment on whether and how the Commission should address additional program access concerns raised in this proceeding by small and rural MVPDs regarding allegedly onerous and unreasonable conditions imposed by some programmers for access to their content. *2007 Program Access Order and NPRM*, 22 FCC Rcd at 17867 ¶ 133. We note that ACA raised concerns with volume discounts as a form of non-cost-based discrimination in comments filed in response to the *2007 Program Access Order and NPRM*. See ACA Comments, MB Docket No. 07-198 (Jan. 4, 2008) at 17-18, 23.

transfer proceedings.<sup>252</sup>

**(b) Arbitration**

85. *Position of Parties.* Though the Commission declined to apply an arbitration condition to News Corp. with respect to access to its non-RSN programming, EchoStar recommends that we do so here.<sup>253</sup> EchoStar contends that this transaction would create harms with respect to national programming, that the current program access complaint procedures fail to “ensure fair and non-discriminatory access to cable or News Corp.-affiliated programming,” and that therefore we should adopt an arbitration condition for national programming in this transaction.<sup>254</sup> It contends that the News Corp.-Hughes arbitration conditions have worked very effectively, that the Applicants offer no explanation as to why such a condition is not warranted, and that Liberty Media’s “long history of abuses in the national programming market . . . also underscores the clear need for a failsafe remedy in this transaction.”<sup>255</sup> Liberty Media counters that because the Commission determined that an arbitration condition applicable to non-RSN programming was unwarranted in the News Corp.-Hughes proceeding, no basis exists for such a condition here.<sup>256</sup>

86. *Discussion.* The Commission designed the arbitration condition in the *News Corp.-Hughes* proceeding to alleviate harms arising from News Corp.’s increased incentive and ability, post-transaction, to temporarily foreclose access by its competitors to its RSNs.<sup>257</sup> The Commission did not find in *News Corp.-Hughes*, nor do we find in this transaction, that temporary foreclosure would be a successful anticompetitive strategy with respect to national programming.<sup>258</sup> We find that EchoStar’s allegations regarding a “long history of abuse” of Liberty’s predecessor in interest, TCI, lack sufficient evidentiary support and are irrelevant to our review of how the current transaction would impact access to RSNs. Absent a finding of a transaction-related harm, we have no basis to extend the arbitration remedy to non-RSN programming as EchoStar recommends. Any general concerns EchoStar has with respect to the utility of the Commission’s program access procedures are more appropriately addressed in the pending program access proceeding.<sup>259</sup>

**(ii) Regional Sports Programming**

87. As a result of this transaction, Liberty Media will acquire FSN Northwest, FSN Pittsburgh and FSN Rocky Mountain, News Corp.’s RSNs in Seattle, Pittsburgh, and Denver, respectively. These

<sup>252</sup> See, e.g., *News Corp.-Hughes Order*, 19 FCC Rcd at 534 ¶ 131.

<sup>253</sup> EchoStar Petition at 19-21. The Broadband Service Providers Association also supports arbitration-type procedures for the remedies phase of a program access complaint proceeding, which it submitted in MB Docket 07-18 and in this proceeding. Letter from John Goodman, Executive Director, Broadband Service Providers Association, to Marlene H. Dortch, Secretary, FCC at 1, Attachment (“Broadband Service Providers Association FCC Discussion Outline”) at 3 (Feb. 1, 2008) (“BSPA Feb. 1, 2008 Ex Parte”).

<sup>254</sup> EchoStar Petition at 19-20 n.48 (“The timing and means by which the Commission corrects the flaws in the program access regime is not relevant for this transaction’s review. The Commission’s task here is to design meaningful conditions that address merger-specific harms. Adopting an arbitration remedy in this proceeding does not prejudice the Commission’s separate review of the program access rules.”).

<sup>255</sup> *Id.* at 22 (referencing conduct of Liberty’s predecessor-in-interest, TCI).

<sup>256</sup> Liberty Media Opposition of Apr. 9, 2007 at 24-25.

<sup>257</sup> See *News Corp.-Hughes Order*, 19 FCC Rcd at 552 ¶¶ 172-177.

<sup>258</sup> See *id.* at 533-34 ¶ 130 (confidential version), submitted in MB Docket No. 07-18.

<sup>259</sup> See *2007 Program Access Order and NPRM*, 22 FCC Rcd at 17868-69.

RSNs serve approximately 8.6 million homes, and carry sporting events from the MLB, NFL, NHL, and NBA.<sup>260</sup> At the outset, we note that RSNs are often considered “must-have” programming. As the Commission observed in the *News Corp.-Hughes Order*, “the basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: 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.”<sup>261</sup> Hence, an MVPD’s ability to gain access to RSNs, and the price and other terms of conditions of access, can be important factors in its ability to compete with rivals. As noted in the *Adelphia Order*, an MVPD that drops local sports programming risks subscriber defections, and MVPDs “will drive hard bargains to buy, acquire, defend or exploit regional sports programming rights.”<sup>262</sup>

88. To address and eliminate concerns regarding access to RSNs owned now or in the future by Liberty Media or DIRECTV, Liberty Media and DIRECTV have agreed to comply with the conditions that News Corp. and DIRECTV agreed to in the *News Corp.-Hughes Order* relating to access to RSNs.<sup>263</sup> These conditions include a commitment to comply with restrictions embodied in the program access rules, as discussed above, in the event the RSNs are no longer subject to the rules.<sup>264</sup> In addition, Liberty Media has agreed to comply with the RSN arbitration condition adopted in the *News Corp.-Hughes Order*. With respect to RSNs, given that this transaction, like News Corp.’s original purchase of DIRECTV, also creates a vertically integrated MVPD with sizeable programming assets, a similar arbitration condition is appropriate to mitigate potential anticompetitive harms.<sup>265</sup> Such harms are likely to arise from Liberty Media’s increased incentive and ability, post-transaction, to temporarily foreclose its RSN programming. Accordingly, we clarify and accept Liberty Media’s proffered arbitration condition with respect to its RSNs.<sup>266</sup> Below, we assess whether we should adjust the scope of that commitment and address concerns raised by commenters.

89. *Positions of the Parties.* Commenters agree that an arbitration condition is necessary but seek various modifications to the terms offered by the Applicants. EchoStar, for example, is concerned that the condition may not apply to any future-acquired RSNs and seeks confirmation of the length of time that the condition would apply.<sup>267</sup> ACA asks that the small cable operator provisions be modified in various respects.<sup>268</sup> Liberty Media confirms that its proffered RSN arbitration condition would apply to future-acquired RSNs for a six-year period.<sup>269</sup> With respect to commenters’ concerns regarding the small cable operator provisions, both Liberty Media and News Corp. contend that further modifications are

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<sup>260</sup> David Lieberman, *Liberty Media Deals for DIRECTV: Malone Swaps News Corp. Shares for Control*, USA TODAY, Dec. 26, 2006, at B.2; see also Andy Vuong, *John Malone: From Cable to Clubhouse*, DENVER POST, Feb. 14, 2007, at C-01.

<sup>261</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 535 ¶ 133.

<sup>262</sup> *Adelphia Order*, 21 FCC Rcd at 8259 ¶ 124.

<sup>263</sup> See *News Corp.-Hughes Order*, 19 FCC Rcd at 525, 529 ¶¶ 113, 124.

<sup>264</sup> Liberty Media’s programming is now subject to the program access rules due to John Malone’s common interests in Liberty Media and LCPR. Application at 23 n.44.

<sup>265</sup> Cf. *News Corp.-Hughes Order*, 19 FCC Rcd at 552-53 ¶¶ 172-79, 642-48 App. D (confidential version), submitted in MB Docket 07-18.

<sup>266</sup> See Appendix B.

<sup>267</sup> EchoStar Petition at 11-13.

<sup>268</sup> ACA Reply Comments at 2; ACA Comments at 9-15.

<sup>269</sup> Liberty Media Opposition of Apr. 9, 2007 at 4-6.

unwarranted.<sup>270</sup>

90. *Discussion.* The Commission may craft conditions in license transfer proceedings to mitigate harms that would likely arise if the transfer occurred absent restrictions. For example, in *News Corp.-Hughes*, economic analysis showed that an MVPD lost – or would likely lose – subscribers in a Designated Market Area (“DMA”) if it did not carry the programming of the local sports teams. Given this evidence that hometown sports programming was “must have,” the Commission determined that News Corp.’s acquisition of DIRECTV would increase its incentive and ability to temporarily withhold News Corp. RSN programming from its competitors.<sup>271</sup> It therefore designed an arbitration condition to mitigate that harm.<sup>272</sup> In *Adelphia*, the record showed that, after the transactions, Comcast and Time Warner would be able to profitably impose a uniform price increase for their affiliated RSNs on their MVPD competitors in several key DMAs.<sup>273</sup> This provided further evidence that, in the MVPD market, RSN programming was “must have.” Therefore, the Commission crafted an arbitration remedy similar to that adopted in the *News Corp.-Hughes Order*.<sup>274</sup> Thus, in both *News Corp.-Hughes* and *Adelphia*, the arbitration condition was crafted to prevent transaction-related harms that were likely to arise as a result of the vertical integration between MVPDs and RSNs. Here, Liberty Media has agreed to abide by the *News Corp.-Hughes* RSN arbitration condition after the transaction. We must determine whether this is sufficient to mitigate the harms that we have already found are likely to arise from the vertical integration of DIRECTV and RSNs. We conclude that three modifications to the proffered condition, as clarified in Appendix B, are necessary to mitigate the potential harms.<sup>275</sup>

91. *Scope and Duration.* Commenters seek clarification of two aspects of the Applicants’ proffered RSN arbitration condition: (1) the duration of the condition, and (2) whether the condition would apply to future-acquired RSNs.<sup>276</sup> Commenters recommend that the condition apply for a six-year term that commences the day the transaction closes.<sup>277</sup> In addition, commenters contend that the condition should apply to RSNs that DIRECTV and Liberty Media acquire in the future.<sup>278</sup> In response, Liberty Media clarified that it intends for the RSN condition to last for six years, beginning on the transaction’s closing date, and that the condition would apply to the RSNs acquired from News Corp as well as any later-acquired RSNs.<sup>279</sup> EchoStar recommends that we extend the condition beyond that time

<sup>270</sup> News Corp. Opposition of Apr. 9, 2007 at 15-18; Liberty Media Opposition of Apr. 9, 2007 at 25-27.

<sup>271</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 552 ¶ 172 (confidential version), submitted in MB Docket 07-18.

<sup>272</sup> *Id.* at 552 ¶¶ 173-75 (confidential version), submitted in MB Docket 07-18.

<sup>273</sup> *Adelphia Order*, 21 FCC Rcd at 8275 ¶ 159.

<sup>274</sup> In *Adelphia*, the Commission implemented a similar remedy to prevent Comcast and Time Warner from harming MVPD competition by uniformly raising the prices paid by competing MVPDs for their affiliated RSNs – costs that Comcast and Time Warner could offset with the increased profits earned by the RSNs. *Adelphia Order*, 21 FCC Rcd at 8273-74 ¶¶ 155-57.

<sup>275</sup> As noted in Appendix B, the arbitrator must issue his or her final award within 30 days after being appointed. A party aggrieved by the arbitrator’s final 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, and the Commission shall issue its findings and conclusions not more than 60 days after receipt of the petition, which may be extended by the Commission for one period of 60 days.

<sup>276</sup> EchoStar Petition at ii, iii, 12-13, 17; CU Comments at 2-3.

<sup>277</sup> EchoStar Petition at ii, iii, 17, 30; CU Comments at 2-3.

<sup>278</sup> EchoStar Petition at ii, 11-13, 30-31; CU Comments at 2-3; ACA Reply Comments at 8.

<sup>279</sup> Liberty Media Opposition of Apr. 9, 2007 at 6.

frame if, at the end of that term, we determine that the conditions remain necessary to mitigate the harms that the condition was intended to alleviate.<sup>280</sup> Liberty Media counters that even though it had no attributable broadcast or RSN interests when it submitted its Application in this proceeding, it has agreed to be bound by exactly the same conditions imposed by the Commission upon News Corp., and argues that those conditions satisfy any legitimate public interest concerns that might arise from this transaction.<sup>281</sup>

92. As clarified by the Applicants, the condition will apply for six years after the closing date of the transaction and will apply to any RSN that Liberty Media owns, manages, or controls during the term of the condition, including future-acquired RSNs.<sup>282</sup> We note here, as we did in *News Corp.-Hughes* and *Adelphia* that 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.<sup>283</sup> Thus, as in *News Corp.-Hughes*, 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 condition has proven unduly burdensome, rendering the condition no longer necessary in the public interest. We reject, however, EchoStar's suggestion that our condition should last beyond six years. We find that six years is a sufficient time to address transaction-related harms and that EchoStar's proposal could lead to open-ended terms based on speculation about future competitive conditions that ultimately could harm MVPD markets. Thus, we adopt Applicant's proffered six-year term, including the *News Corp.-Hughes* option for modification or early termination, should such a modification or early termination serve the public interest.

93. *Defining RSN.* Though we did not define the term "RSN" in the *News Corp.-Hughes Order*, we did describe several characteristics of RSN programming.<sup>284</sup> First, we explained that RSNs consist of programming with a uniquely local interest, the airing of which is time-sensitive. Second, we characterized RSN programming as programming for which no reasonably available substitute exists. Third, we found that an RSN may leverage significant market power in a geographic market.<sup>285</sup> In *Adelphia*, we defined the term "RSN" for purposes of the arbitration condition as follows:

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<sup>280</sup> EchoStar Petition at 18. EchoStar also urges the Commission to revisit the appropriate length of time for the RSN and retransmission consent conditions. It contends that no evidence exists to show the "anticompetitive risks associated with access to RSNs/broadcast affiliates and vertically-integrated MVPDs will not continue indefinitely, and more specifically will cease in six years." *Id.* We address this concern in para. 92, *infra*.

<sup>281</sup> Liberty Media Opposition of Apr. 9, 2007 at 5-6.

<sup>282</sup> See Appendix B; see also Liberty Media Opposition of Apr. 9, 2007 at 1-6. Ownership will be determined in accordance with the attribution standards applicable to the Commission's program access rules. See 47 C.F.R. § 76.1000, *et seq.* Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in an RSN during the period of these conditions if the RSN is not obligated to abide by the conditions.

<sup>283</sup> See *News Corp.-Hughes Order*, 19 FCC Rcd at 555 ¶ 179; *Adelphia Order*, 21 FCC Rcd at 8276 ¶ 164.

<sup>284</sup> EchoStar contends that the Big 10 Network is an RSN and asks us to define an RSN in a manner that protects against alleged gamesmanship or uncertainty going forward. EchoStar also submitted a petition for declaratory ruling in the *News Corp.-Hughes Order's* docket asking the Commission to determine whether the Big 10 Network qualified as an RSN for purposes of the *News Corp.-Hughes Order's* arbitration conditions. Letter from Linda Kinney, Vice President of Law and Regulation, EchoStar, to Marlene H. Dortch, Secretary, FCC at 1-2, Att. (Petition for Declaratory Ruling in MB Docket 03-124) (July 26, 2007). Subsequently, EchoStar withdrew both requests that we address the status of the Big 10 Network because it had reached a carriage agreement with News Corp. Letter from Linda Kinney, Vice President of Law and Regulation, EchoStar, to Marlene H. Dortch, Secretary, FCC at 1 (Sept. 12, 2007).

<sup>285</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 543 ¶ 148.

*The term “RSN” means any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.*<sup>286</sup>

94. The *Adelphia* definition of RSN was intended to capture the attributes ascribed to RSNs in *News Corp.-Hughes*. We adopt that definition of RSN, with one modification, on a going-forward basis, as applicable to RSN program access arbitration proceedings arising from this transaction. The Applicants offer MVPD service in Puerto Rico, so our definition of RSN should reflect the types of sports programming that Puerto Ricans are likely to value most highly. Accordingly, we add Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer Leagues First Division to the list of sports leagues in our definition.<sup>287</sup>

95. Thus, we adopt the following definition of RSN for purposes of the program access arbitration condition:

*The term “RSN” means any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR,*

<sup>286</sup> *Adelphia Order*, 21 FCC Rcd at 8275 ¶ 158.

<sup>287</sup> We note that Puerto Rico has its own sports leagues that MVPD subscribers are likely to find highly desirable. “Even though Puerto Rico is a United States territory, it is an autonomous nation when it comes to sports.” See Craveonline, *Hoopsville.com*, <http://www.hoopsvibe.com/fiba-world-basketball-championship/fiba-world-championship-news/puerto-rico-s-basketball-tradition-a-brief-history-ar45975.html> (visited Feb. 4, 2008). Puerto Rico fields its own teams in both the Summer and Winter Olympics, as well as international competitions. “[In the 2004 Summer Olympics, the Puerto Rican National Basketball Team’s defeat of the United States NBA ‘Dream Team’] . . . the most lopsided defeat in U.S. basketball history . . . led to an increased sense of cultural identity and pride, and further contributed to basketball’s status as a vital part of Puerto Rican culture.” *Id.* Baseball is an especially popular sport in Puerto Rico. “In the common lives of the citizenry of . . . Puerto Rico, baseball is the primary sport in terms of participation, live attendance as well as television viewing . . . Mass participation in a particular sport sets up the environment for star players to emerge locally and eventually migrat[e] to Major League Baseball in the USA where fame and fortune awaits. Such Latin American stars become idols for their compatriots, thus generating greater interest in the sport, thus feeding on the popularity.” See Zona Latina, “Watching Baseball on Television in Latin America,” <http://www.zonalatina.com/Zldata230.htm> (visited Feb. 4, 2008) (“www.zonalatina.com”). “. . . [A]s much as 30% of the Major League Baseball players are of Latino descent, much higher than the 11% in the population as a whole.” See [www.zonalatina.com](http://www.zonalatina.com). In 2001, market research firm TGI, a division of the KMR Group, which in turn is a subsidiary of the WPP marketing and advertising group, interviewed more than 50,000 people throughout Latin America to determine their viewing patterns. Of the people who said that they frequently watch baseball on television, 24 percent were from Puerto Rico. See [www.zonalatina.com](http://www.zonalatina.com); KMR Group, <http://www.kmr-group.com/americas/utility.asp?p=91&r=8415.881> (visited Feb. 4, 2008). KMR Group also operates Mediafax, which is the sole measurer television audiences in Puerto Rico, and is the counterpart to the Nielsen Company in the United States. *Hispanic TV Station Rankings by Market*, MULTICHANNEL NEWS, Oct. 17, 2005 at 18A.

*NCAA Division I Football, NCAA Division I Basketball, Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer League's First Division and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.*<sup>288</sup>

96. *Modifications to Small Cable Operator Provisions.* ACA urges the Commission to refine the Applicants' proffered RSN arbitration conditions to address the concerns of small operators. First, ACA wants the Commission to clarify the rights of a collective bargaining agent.<sup>289</sup> ACA points to a dispute between the National Cable Television Cooperative ("NCTC") and Fox Cable regarding NCTC's ability to gain access to the expiring contracts of small cable operators on whose behalf it sought to negotiate RSN renewals pursuant to the *News Corp.-Hughes* conditions, and contends that media conglomerates have the incentive and ability to delay and frustrate bargaining efforts. ACA maintains that collective bargaining agents should be given the right to access the expiring contracts of their principals.<sup>290</sup> ACA contends that the sharing of an expiring contract between a principal and its bargaining agent increases the efficiency of negotiating renewals.<sup>291</sup> Conversely, according to ACA, a practice of forbidding the bargaining agent from viewing the expired contract of its principal eviscerates the collective bargaining alternative for small and medium-sized cable companies.<sup>292</sup> News Corp. states that the Commission need not consider ACA's proposed modifications or clarifications because News Corp. has not sought modifications to the arbitration condition, which does not expire until six years after the release date of the *News Corp.-Hughes Order*.<sup>293</sup> Moreover, it disputes NCTC's characterization of the facts surrounding the parties' dispute and states that once Fox Cable received a notice of intent to arbitrate on behalf of several small cable operators that had appointed NCTC as their collective bargaining agent, Fox Cable provided NCTC with the expired contracts of all the small cable operators listed in the notice.<sup>294</sup>

97. Second, ACA urges the Commission to extend the arbitration notice periods to prevent inadvertent loss of arbitration rights.<sup>295</sup> ACA's members report that the notice provisions in the *News Corp.-Hughes* arbitration conditions set an initial notice window that is too narrow and that imposes overwhelming burdens for small companies with limited administrative resources.<sup>296</sup> ACA states that the

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<sup>288</sup> We note that this definition of RSN (most recently adopted in the *Adelphia Order*) applies only to this Order and only to negotiations involving access to RSN programming. This definition is intended to preclude Applicants from evading the condition by spreading highly valued sports programming among various programming services. See *Adelphia Order*, 21 FCC Rcd at 8275 ¶ 158 (defining RSN for purposes of program access).

<sup>289</sup> ACA Reply Comments at 2.

<sup>290</sup> ACA Comments at 9-10.

<sup>291</sup> *Id.* at 10-11.

<sup>292</sup> *Id.* at 11.

<sup>293</sup> News Corp. Opposition of Apr. 9, 2007 at 15-18. Though News Corp. states in its Opposition that the terms expire six years after the adoption date of the Order, the Order states that the condition expires six years after the release of the Order. *News Corp.-Hughes Order*, 19 FCC Rcd at 679 App. F(III).

<sup>294</sup> News Corp. Opposition of Apr. 9, 2007 at 16-18.

<sup>295</sup> ACA Reply Comments at 2.

<sup>296</sup> ACA Comments at 11-12.

narrow notice-and-demand windows create substantial risk of inadvertent procedural default. It notes that in other contexts, the Commission has provided extended response periods in recognition of the limited resources available to smaller cable companies.<sup>297</sup> Thus, according to ACA, the Commission should (1) extend the amount of time for the submission of a notice of intent to arbitrate from 5 to 20 days, and (2) extend the timeframe for submitting a complete arbitration demand to 45 days after contract expiration from the current window of between 15 and 20 days after contract expiration. ACA contends that these extensions would not prejudice the Applicants in any way.<sup>298</sup> Liberty Media counters that, even conceding the timing problems described by ACA, ACA's problems arising from the short timing windows are not transaction-specific concerns.<sup>299</sup>

98. ACA also seeks to expand the scope of the small cable provisions to include all ACA members, not just those members that serve fewer than 400,000 subscribers.<sup>300</sup> ACA contends that no ACA member serves more than 1.5 percent of U.S. television households and that the transaction would create a "vast disparity" in market power between its members and the merged firm.<sup>301</sup> ACA argues that application of the special provisions for small firms to all ACA members would extend the *News Corp.-Hughes* protections afforded to small cable operators to an additional two million households and would offset the immense disparity in post-transaction market power between its members and Liberty Media.<sup>302</sup> Liberty Media claims that ACA's concern is not transaction specific and notes that the proposed modification would likely benefit the nation's 10th-largest MVPD.<sup>303</sup> Liberty Media asserts that there is no reason for the Commission to revisit the scope of the "small cable company" definition.<sup>304</sup>

99. Finally, ACA recommends increasing the duration of the conditions applicable to small and medium-sized cable companies from six to ten years.<sup>305</sup> ACA maintains that the six-year term provides insufficient protection for small and medium-sized cable companies because of RSNs' resistance to the collective bargaining process and because many Liberty Media programming and RSN contracts have

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<sup>297</sup> *Id.* at 12.

<sup>298</sup> *Id.*

<sup>299</sup> Liberty Media Opposition of Apr. 9, 2007 at 25.

<sup>300</sup> ACA Comments at 14. Those provisions are available to any "small cable company," defined in our rules as one that "serves a total of 400,000 or fewer subscribers over one or more cable systems." 47 C.F.R. § 76.901(e); see also *News Corp.-Hughes Order*, 19 FCC Rcd at 679 App. F; *Adelphia Order*, 21 FCC Rcd at 8339 App. B.

<sup>301</sup> ACA Comments at 15.

<sup>302</sup> ACA Comments at 14-15.

<sup>303</sup> Liberty Media Opposition of Apr. 9, 2007 at 256 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2620 Table B-3 (2006) ("*Twelfth Annual Video Competition Report*"). Liberty Media states that, based on the *Twelfth Annual Video Competition Report*, ACA's proposed definition of 'small' likely would include the tenth largest MVPD in the nation." *Id.* The evidence Liberty Media cites to in support of its position, Table B-3 of the *Twelfth Annual Video Competition Report*, shows that Mediacom serves approximately 1.5 percent of the nation's MVPD subscribers, and thus ranks 10th in the national market for the purchase of video programming. See *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2620 Table B-3.

<sup>304</sup> Liberty Media Opposition of Apr. 9, 2007 at 26.

<sup>305</sup> ACA mistakenly states that the *News Corp.-Hughes* program access-type conditions last for six years. ACA Comments at 17. Instead, that Order states that the conditions regarding program access type commitments apply to News Corp. and DIRECTV for as long as News Corp. has an attributable interest in DIRECTV and the program access rules are in effect. *News Corp.-Hughes Order*, 19 FCC Rcd at 676 Appendix F (II).



terms exceeding five years.<sup>306</sup> ACA contends that if the Commission decides against granting this extension, its members would face the prospect of renewals unconstrained by program access commitments, arbitration, or collective bargaining rights.<sup>307</sup> Liberty Media counters that ACA provides no evidence to support its view that the terms of most RSN contracts exceed five years.<sup>308</sup> News Corp. contends that after it divests its interest in DIRECTV, the arbitration condition would be unnecessary because it would no longer be vertically integrated with an MVPD.<sup>309</sup>

100. News Corp. is currently engaged in an ongoing arbitration proceeding with a bargaining agent.<sup>310</sup> The fact that the arbitration between News Corp. and the bargaining agent is underway demonstrates that small operators have been able to avail themselves of the arbitration condition. We note that in the *Adelphia Order*, we took steps to ensure that a bargaining agent was aware of when its principal's contracts expired so that the agent could meet the deadlines in the arbitration condition. We did so by modifying News Corp.'s program access RSN arbitration condition slightly in the *Adelphia Order* so that a small operator would be permitted to disclose to its bargaining agent the date the operator's contract was set to expire.<sup>311</sup> We take the same action here to ensure that a bargaining agent can meet the deadlines for providing notice to arbitrate and for submitting its arbitration demand, as described below. However, for purposes of arbitrating RSN access disputes under the terms of this Order, we will not extend the modifications to allow the bargaining agent access to additional details of the contracts held by its principals.<sup>312</sup>

101. The purpose of the arbitration condition is to place MVPDs in a similar bargaining position to that which would exist in the absence of the transaction.<sup>313</sup> The arbitration condition induces the parties to enter into negotiations and ensures that programming cannot be withheld from the MVPD. ACA's arbitration proposals would go farther than necessary to achieve this result, affecting the balance between programmer and MVPD. In standard negotiations, an MVPD would rarely have access to the contracts signed between the programmer and other MVPDs. We retain the small cable operator

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<sup>306</sup> ACA Comments at 17.

<sup>307</sup> *Id.*

<sup>308</sup> Liberty Media Opposition of Apr. 9, 2007 at 26.

<sup>309</sup> News Corp. Opposition of Apr. 9, 2007 at 10-14.

<sup>310</sup> *See* NCTC Comments at 5-6.

<sup>311</sup> The *Adelphia Order* specifies that a small cable operator may disclose to its bargaining agent the date on which the operator's contract expires, notwithstanding a contractual term to the contrary. *Adelphia Order*, 21 FCC Rcd at 8339 Appendix B at (B)(5) (provisions applicable to small MVPDs).

<sup>312</sup> The Commission is seeking comment on the issue of non-disclosure agreements between programmers and MVPDs. *2007 Program Access Order and NPRM*, 22 FCC Rcd at 17867-68 ¶ 133.

<sup>313</sup> *Cf. News Corp.-Hughes*, 19 FCC Rcd at 552 ¶ 174. In *News Corp.-Hughes*, the Commission found that, once News Corp. was vertically integrated with DIRECTV, it would have the incentive and ability to temporarily foreclose its highly valued RSN programming from competing MVPDs. To prevent News Corp. from employing that foreclosure strategy, the Commission crafted an arbitration condition so that carriage of programming would continue uninterrupted if negotiations failed to produce a mutually acceptable set of prices, terms, and conditions, and so that parties would have 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." In other words, the RSN arbitration condition placed the parties in the same negotiating position as they would have been before the transaction. *Cf. id.* at 552 ¶¶ 172-74.

provisions from the *News Corp.-Hughes Order*, as modified in *Adelphia*, but go no farther, because with this limited modification, the provisions place a bargaining agent in the same situation as any MVPD negotiating a request for carriage in the context of the arbitration condition.

102. We likewise reject ACA's remaining proposals. Though ACA contends that the notice and final demand deadlines for small cable operators are overly burdensome and difficult to track, it does not provide specific evidence in support of its position. Absent such evidence, we have no basis for changing the current deadlines.<sup>314</sup> Second, we retain the 400,000 subscriber "small cable company" standard for determining eligibility for the small operator provisions. We adopted the small cable provisions in *News Corp.-Hughes* to give small MVPDs equal access to a remedy. As we noted in the *News Corp.-Hughes Order*, "given the size of their subscriber base and financial resources, small and medium-sized MVPDs may also be far less able to bear the costs of commercial arbitration, even on an expedited basis, than large MVPDs, thus rendering the remedy of less value to them."<sup>315</sup> ACA does not adequately explain why we should expand the protections offered to small cable companies to a wider category of MVPDs or how the current definition materially harms competition.<sup>316</sup>

103. Finally, we reject ACA's recommendation to extend the term of the Applicants' proffered arbitration conditions for small cable operators from six years to 10. ACA alleges that a six-year term does not provide adequate protection given the alleged delays involved in the dispute between NCTC and News Corp. and the fact that RSN contracts often exceed a five-year term. We find that the record evidence is insufficient to support extension of the term to ten years. In addition, as noted above, 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.<sup>317</sup> Accordingly, we still believe that six years is the appropriate duration of the arbitration conditions. Moreover, because Liberty Media has agreed to comply with the same retransmission consent condition for the broadcast stations it now owns and any it acquires in the future, we find it reasonable to apply the RSN arbitration condition for the same amount of time, as the Commission did in *News Corp.-Hughes*.

### (iii) Broadcast Programming Issues

#### (a) Retransmission Consent Arbitration

104. *Background.* In the *News Corp.-Hughes Order*, the Commission found that News Corp.'s acquisition of DIRECTV would increase its incentive to temporarily foreclose its broadcast programming from competing MVPDs in order to obtain a higher price, and that such an anticompetitive strategy was likely to be successful.<sup>318</sup> The Commission adopted an arbitration remedy to limit News Corp.'s incentive

<sup>314</sup> Under the procedures set forth in the *News Corp.-Hughes Order*, notice can consist of a one-sentence letter expressing intent to arbitrate. A full demand consists of the following: (1) a final offer in the form of a contract; (2) a statement describing the nature of the dispute, (3) the names and addresses of all other parties, (4) the amount involved, and (5) the hearing locale requested. *News Corp.-Hughes Order*, 19 FCC Rcd at 631-32, 677-79 App. B (Modifications to Rules for Arbitration Involving Regional Sports Networks), App. C (Modifications to Rules for Arbitration Involving Retransmission Consent), App. F(III) (Additional Conditions Concerning Access to Regional Sports Cable Programming Networks); American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures*, Rule R-4, at <http://www.adr.org/sp.asp?id=22440> (visited Jan. 25, 2008).

<sup>315</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 553 ¶ 176.

<sup>316</sup> ACA Comments at 9-11.

<sup>317</sup> See *News Corp.-Hughes Order*, 19 FCC Rcd at 555 ¶ 179; see also *Adelphia Order*, 21 FCC Rcd at 8276 ¶ 164.

<sup>318</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 572-73 ¶¶ 220-21. Commercial television broadcast station signals are carried by DBS operators pursuant to either mandatory carriage or retransmission consent agreements. (continued....)

and ability to engage (or threaten to engage) in such behavior.<sup>319</sup> The Commission designed the remedy to serve as a last resort in the event retransmission consent negotiations fail to produce a mutually acceptable set of price, terms, and conditions.<sup>320</sup> Moreover, the remedy mandates that News Corp. continue to provide the retransmission of its broadcast programming under the same terms and conditions as those in the expired agreement as soon as it receives timely notice of the MVPD's intent to arbitrate.<sup>321</sup> Under the terms of the order, the arbitration remedy is available for negotiating retransmission consent agreements for any broadcast station that News Corp. owns and operates or for any independently owned Fox network affiliates for which News Corp. negotiates retransmission consent.<sup>322</sup>

105. *Positions of the Parties.* The Applicants initially asserted that the retransmission consent conditions adopted in the *News Corp.-Hughes Order* would not apply to the transaction because Liberty Media does not “own or control multiple broadcast television stations.”<sup>323</sup> After the Application was filed, however, Liberty Media informed the Commission that it was acquiring a controlling interest in two broadcast stations and stated that it would abide by retransmission consent conditions “similar to” the conditions in the *News Corp.-Hughes Order* “with respect to” the two stations.<sup>324</sup> Responding to a request for clarification from EchoStar, Liberty Media stated that under its proffer, the retransmission consent conditions would sunset six years from the date of closing of the Share Exchange Agreement, and would apply to the two newly acquired broadcast stations and any other television broadcast stations it

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Noncommercial television stations do not have retransmission consent rights. In markets where a DBS operator carries any station to subscribers within the station's local market (*i.e.*, “local-into-local” carriage), all broadcast television stations in the market have a right to mandatory carriage by that DBS operator (*i.e.*, the “carry-one, carry-all” requirement). 47 C.F.R. § 76.66. Broadcasters also have the option of negotiating terms of retransmission with the DBS operator. The reciprocal bargaining obligation applies to retransmission consent negotiations between all broadcasters and MVPDs regardless of the designated market area in which they are located. *See* Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat 2809 (2004) (codified in scattered sections of 17 and 47 U.S.C.) (“SHVERA”). Additionally, broadcasters and DBS operators are prohibited from entering into exclusive retransmission consent agreements (although terms, conditions, and prices may vary if based on competitive marketplace considerations), and they must negotiate in good faith. *See* 47 U.S.C. § 325(b)(3)(C)(ii), (iii); 47 C.F.R. §§ 76.64(l), 76.65. By statute and regulation, the exclusivity and good faith negotiation requirements are effective until January 1, 2010. 47 U.S.C. § 325(b)(3)(C)(ii), (iii); 47 C.F.R. §§ 76.64(l), 76.65(f).

<sup>319</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 572-73 ¶¶ 220-21.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*; *see also id.* at 572 ¶ 219.

<sup>323</sup> Application at 2 n.2, 18.

<sup>324</sup> Supplement to Application at 2. The letter states that “Liberty Media proposes to adopt each of the broadcast-related conditions imposed on News Corp. with respect to the two broadcast television stations it seeks to acquire.” Supplement to Application at 1. It also states that Liberty Media “offers to abide by conditions with respect to WFRV-TV and WJMN-TV similar to those regarding access to local broadcast television programming that the FCC established in the *News Corp.-Hughes Order* [see *News Corp.-Hughes Order*, 19 FCC Rcd at 680-83 at App. F (IV)]. These conditions include the provisions for commercial arbitration in the case of a negotiating impasse with other [MVPDs] regarding retransmission consent for WFRV-TV and WJMN-TV.” Supplement to Application at 2. On April 18, 2007 Liberty Media completed its purchase of the two broadcast stations. *See* <http://www.cbcorporation.com/news/prdetails.php?id=2043> (visited February 22, 2008).

may acquire during the six-year period.<sup>325</sup>

106. EchoStar advocates applying the *News Corp.-Hughes* retransmission consent conditions to Liberty Media, but, as discussed above, asks the Commission to extend the six-year term by initiating a proceeding to evaluate a continuing need for the condition.<sup>326</sup> Liberty Media disagrees, contending that it has agreed to be bound by exactly the same conditions imposed by the Commission upon News Corp. It argues that those conditions satisfy any legitimate public interest concerns that might arise from this transaction, especially since it did not possess any attributable broadcast stations until it submitted its Transfer Application.<sup>327</sup> ACA proposes that we apply the same small cable operator provisions to retransmission consent negotiations that it proposes for the Applicants' proffered RSN arbitration conditions.<sup>328</sup> The Applicants state that ACA's proposals are unnecessary and urge the Commission to reject them.<sup>329</sup>

107. *Discussion.* We accept the Applicant's voluntary commitment to comply with the retransmission consent arbitration condition for six years.<sup>330</sup> The *News Corp.-Hughes* retransmission consent arbitration condition, as modified, and thus the Applicant's voluntary condition, both provide a mechanism for modification or early termination of the condition in the event there is a material change in circumstances warranting relief.<sup>331</sup> For the reasons discussed above in connection with RSN arbitration, we reject EchoStar's request to extend the term of the retransmission consent arbitration condition beyond six years.<sup>332</sup> Finally, with respect to ACA's request, we retain the small cable operator conditions, as

<sup>325</sup> Liberty Media Opposition of Apr. 9, 2007 at 6. EchoStar asks the Commission to confirm that the retransmission consent conditions will apply for at least a six-year period and that the transaction would restart that six-year clock. EchoStar Petition at 17; *see also* EchoStar Petition at 11-12 and n.29.

<sup>326</sup> EchoStar Petition at 18.

<sup>327</sup> Liberty Media Opposition of Apr. 9, 2007 at 5-6.

<sup>328</sup> ACA asks that we: clarify the rights of a collective bargaining agent (ACA Comments at 8-11, ACA Reply Comments at 2), extend the arbitration notice periods to prevent inadvertent loss of arbitration rights (ACA Comments at 11-12, ACA Reply Comments at 2), expand the definition of "small cable company" to include all ACA members (ACA Comments at 14-15, ACA Reply Comments at 2), and increase the terms of the conditions applicable to small and medium-sized cable companies from six to ten years (ACA Comments at 2, 17).

<sup>329</sup> Liberty Media Opposition of Apr. 9, 2007 at 25-27; News Corp. Opposition of Apr. 9, 2007 at 15-18.

<sup>330</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 503 n.195 (citing three-year retransmission consent cycle requirements established under 47 C.F.R. §§ 76.64 and 76.66); *id.* at 576 n.628 (applying conditions for six years, or two retransmission cycles). As noted in Appendix B, the arbitrator must issue his or her final award within 30 days after being appointed. A party aggrieved by the arbitrator's final 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, and the Commission shall issue its findings and conclusions not more than 60 days after receipt of the petition, which may be extended by the Commission for one period of 60 days. For purposes of this Order, ownership shall be determined in accordance with the Commission's attribution rules applicable to broadcast licensees. 47 C.F.R. § 73.3555 Notes 1-3. Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in a broadcast television station during the period of the conditions set forth in this Order unless the station is required to abide by such conditions.

<sup>331</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 682 App. F(IV). In that proceeding, the Commission found that the merger of DIRECTV and News Corp. could increase the risk of harm to News Corp.'s competitors and consumers by increasing News Corp.'s incentive to temporarily withhold its broadcast signals, behavior that would not be constrained by rules governing the carriage of local broadcast signals or by the program access rules. *Id.* at 568 ¶¶ 209-11. The substitution of Liberty Media for News Corp. does not suggest that the risk of harm is reduced.

<sup>332</sup> *See* para 92, *supra* Section V.C.2.

modified in *Adelphia*, and reject ACA's remaining proposals for the same reasons we stated above.<sup>333</sup>

**(b) Other Broadcast Programming Issues**

108. In *News Corp.-Hughes*, we accepted the commitments News Corp. volunteered regarding non-discriminatory access to any broadcast station that News Corp. owns or on whose behalf it negotiates retransmission consent.<sup>334</sup> Liberty Media and DIRECTV have offered to comply with a broadcast non-discrimination condition similar to the commitment agreed to by News Corp. when it acquired DIRECTV.<sup>335</sup> Though commenters have not addressed this condition, we accept Liberty's offer to comply with a broadcast non-discrimination provision as a condition to this license transfer proceeding.<sup>336</sup> Moreover, we accept as a condition to this transaction Liberty's agreement to comply with the remaining *News Corp.-Hughes* broadcast-related condition, *i.e.*, compliance with the good faith and exclusivity requirements of SHVERA beyond the sunset date of December 31, 2009 for as long as the program access rules are in effect.<sup>337</sup>

**(iv) Interactive Television**

109. EchoStar urges the Commission to apply programming conditions to interactive television<sup>338</sup> features and programming, as well as to programming on so-called non-traditional platforms

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<sup>333</sup> See paras. 100-102, *supra* Section V.C.2.

<sup>334</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 572 ¶ 219; *see also id.* at 680 App. F(IV).

<sup>335</sup> Supplement to Application at 2 ("In light of Liberty Media's proposed acquisition of a controlling interest in WFRV-TV and WJMN-TV, Liberty Media offers to abide by conditions with respect to WFRV-TV and WJMN-TV similar to those regarding access to local broadcast television programming that the FCC established in the *News Corp.-Hughes Order*."); *see also* Liberty Media Opposition of Apr. 9, 2007 at 6. Although the Applicants describe their commitment as one by Liberty Media to abide by the *News Corp.-Hughes* broadcast programming conditions, which include the broadcast non-discrimination provision, Liberty Media states in its Opposition that such conditions would last only six years. However, the analogous *News Corp.-Hughes* condition does not terminate after six years.

<sup>336</sup> See Appendix B. Although commenters did not raise the issue of broadcast non-discrimination conditions explicitly, several commenters urge the Commission to adopt all of the News Corp. conditions in this transaction. Those conditions include a non-discrimination condition for broadcast programming. ACA Comments at 9; CU Comments at 2-3; *News Corp.-Hughes Order*, 19 FCC Rcd at 676 App. F(I).

<sup>337</sup> Supplement to Application at 2; *see also News Corp.-Hughes Order*, 19 FCC Rcd at 676 App. F(IV). Appendix F(IV) from the *News Corp.-Hughes Order* includes a condition mandating compliance with the good faith and exclusivity provisions of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") for as long as the program access rules are in effect, notwithstanding the then-applicable sunset date of January 1, 2006 for the SHVIA provisions. SHVIA has subsequently been modified by SHVERA, and we therefore modify the relevant condition accordingly. *See supra* note 318; Appendix B. As mentioned above, the Applicants state that they will comply with the "broadcast" conditions for six years. Despite this misstatement of the duration of the non-arbitration broadcast conditions, we understand that Applicants intended to abide by the same conditions as those adopted in *News Corp.-Hughes*. *See* Liberty Media Opposition at 6; *see also* Supplement to Application at 2. The duration of each of the broadcast conditions set forth in Appendix B therefore is the same as the duration of each analogous condition in *News Corp.-Hughes*.

<sup>338</sup> Although the Commission has not defined the term "interactive television" ("ITV") for regulatory purposes under the Communications Act, the Commission has broadly characterized ITV as a service or suite of services that support subscriber-initiated choices or actions that are related to one or more video programming streams. *See Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321, 1323 ¶ 6 (2001) ("*ITV NOP*"). Services providing such capabilities may include video-on-demand, personal video recorder, gaming, email, TV-based e-commerce, interactive advertising, Internet access, and program-related enhanced content. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, (continued....)

(e.g., video-on-demand, Internet, mobile applications).<sup>339</sup> According to EchoStar, given Liberty Media's "checkered history of exploiting regulatory grey areas," the Commission should clarify the full scope and reach of the programming restrictions that apply to the Applicants.<sup>340</sup> EchoStar asks the Commission to confirm that interactive and on-demand services are covered by the conditions imposed in this proceeding.<sup>341</sup> We find that there is no basis for the Commission to impose new conditions on or expand the reach of existing conditions to any non-traditional offerings that Liberty Media or DIRECTV might develop.<sup>342</sup>

110. EchoStar appears to be concerned that Liberty Media might attempt to evade programming protections by moving valued programming to non-traditional platforms.<sup>343</sup> There is no evidence on the record that Liberty Media has made such a transition or plans to do so. Further, EchoStar is concerned that the Applicants may seek to disadvantage competing program suppliers and technology companies.<sup>344</sup> EchoStar argues that the combination of Liberty Media's extensive interactive and online assets with DIRECTV's platform "changes the equation dramatically."<sup>345</sup> As the Applicants point out, EchoStar nowhere explains why a change in DIRECTV's *de facto* controlling shareholder would make DIRECTV anymore likely to engage in anticompetitive behavior in the emerging ITV marketplace.<sup>346</sup> Aside from vague references to Liberty Media's "checkered history," EchoStar has failed to identify any specific connection between this transaction and the alleged harms it would seek to remedy through its proposed conditions.

#### **b. Access to Unaffiliated Programming and Exclusive Dealing**

111. To provide all the programming their subscribers desire, DIRECTV and Liberty Media must have access to programming networks with which they are not affiliated. There are two types of unaffiliated programming in this context: (1) programming from networks that are vertically integrated (Continued from previous page) \_\_\_\_\_

17 FCC Rcd 26901, 26971 ¶ 170 (2002). In the *ITV NOI*, the Commission noted that ITV was rapidly developing, thus making it difficult to define with specificity the precise universe of services that might be encompassed within the term. For purposes of discussion, the *ITV NOI* instead attempted to identify the major technical resources or "building blocks" necessary for the provision of what it understood to be likely ITV services. The identified components were: (1) a video transmission capacity associated with interactive content (e.g., the digital video stream), (2) a two-way connection (e.g., via the Internet), and (3) specialized customer premises equipment (e.g., the interactive television set-top box). *ITV NOI*, 16 FCC Rcd at 1323225 ¶¶ 6, 10-13.

<sup>339</sup> EchoStar Petition at 23-24.

<sup>340</sup> *Id.* at 24. EchoStar states that program access rules apply to "satellite cable programming," defined as satellite delivered "video programming" that is intended primarily for retransmission to cable subscribers. EchoStar argues that because Congress has defined "interactive on-demand services" as a subset of "video programming," interactive on-demand services are entitled to program access protections. *Id.* at 24 n.56. Because we find that the concerns raised by EchoStar are not transaction specific, we find it unnecessary to address this argument in this proceeding.

<sup>341</sup> *Id.* at 24 n.56.

<sup>342</sup> However, we note that video-on-demand networks that satisfy the definition of "satellite cable programming" are covered by the program access rules, and thus are subject to the program access conditions of this Order. *See* 47 U.S.C. § 548(i)(1); 47 U.S.C. § 605(d)(1); 47 C.F.R. § 76.1000(h).

<sup>343</sup> EchoStar Petition at 23 ("Liberty should not be permitted to evade the programming protections adopted by the Commission through the use of these technologies.").

<sup>344</sup> *Id.* at 23-24.

<sup>345</sup> *Id.* at 23-24.

<sup>346</sup> DIRECTV Opposition of Apr. 9, 2007 at 19; Discovery Opposition at 7-9.

with cable operators, and (2) programming from networks that are not vertically integrated with any cable operator.<sup>347</sup> Programming networks that are affiliated with a cable operator cannot enter into exclusive contracts absent a waiver of the program access rules, and they also must abide by the rules' nondiscrimination provisions.<sup>348</sup> Programming networks that are not vertically integrated with a cable operator are not subject to the program access rules. Some commenters are concerned that this transaction will increase the incentives of Liberty Media and DIRECTV to secure exclusive contracts from non-vertically integrated sports networks.

112. *Positions of the Parties.* Commenters allege that DIRECTV already abuses its ability to obtain exclusive programming distribution agreements and that this transaction would make matters worse.<sup>349</sup> EchoStar and RCN contend that given Liberty Media's previous behavior as a vertically integrated cable operator, DIRECTV would be likely to enter into more exclusive agreements as a result of the transaction.<sup>350</sup> Commenters point to DIRECTV's NASCAR Hot Pass and NFL Sunday Ticket as examples of exclusive distribution agreements that harm competition, stating that no substitutes exist for such programming, and that MVPDs suffer if they are unable to provide it to their subscribers.<sup>351</sup> Commenters also criticize DIRECTV's alleged *de facto* exclusive arrangement with Major League Baseball ("MLB") for Extra Innings, a programming package that offers out-of-market games.<sup>352</sup> RCN contends that such exclusive agreements cut off access to "must have" programming, which MVPDs, especially new entrants, must offer their subscribers to remain competitive.<sup>353</sup> RCN notes that Congress

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<sup>347</sup> The Viacom networks, such as MTV and Nickelodeon, fall into the second category.

<sup>348</sup> See 47 C.F.R. §76.1002(c)(2), (4). For example, the networks owned by Time Warner, such as HBO, fall into this category.

<sup>349</sup> For example, RCN contends that DIRECTV already has market power and that the transaction would enhance DIRECTV's ability to secure exclusive agreements with non-vertically integrated programmers for "must have" programming. RCN Comments at 4-5, Atts A, B; ACA Reply Comments at 9-10. As evidence of DIRECTV's "abuses" of its ability to enter into exclusive contracts, EchoStar notes that "DIRECTV's slate of exclusive programming has materially changed" since the Commission allowed DIRECTV to offer out-of-market NFL games on an exclusive basis in the News Corp.-Hughes transaction. EchoStar Petition at 22; see also *News Corp.-Hughes Order*, 19 FCC Rcd at 600 n.797.

<sup>350</sup> EchoStar Petition at 22; RCN Comments at 7-8; see also *supra* note 206.

<sup>351</sup> RCN Comments in Docket 07-29 ("RCN Program Access Comments") at 12-18, transmitted by letter from Richard Ramlall, Senior Vice Pres., Strategic and External Affairs, RCN, to Marlene Dortch, Secretary, FCC (Apr. 19, 2007) ("RCN Apr. 19, 2007 Ex Parte"); ACA Reply Comments at 10; EchoStar Petition at 22. ACA states that small and medium-sized cable operators are especially vulnerable to competitors' exclusive control over sports programming. ACA Reply Comments at 10. The Broadband Service Providers Association also raises general concerns regarding a variety of programming practices, such as DIRECTV's exclusive carriage of NFL Sunday Ticket. BSPA Feb. 1, 2008 Ex Parte at 1, Attachment at 4.

<sup>352</sup> Commenters criticize DIRECTV's contract with MLB for Extra Innings, which conferred exclusive rights to carry those games in the 2007 season on DIRECTV if no other MVPD matched DIRECTV's contract terms. Those contract terms included a requirement that any MVPD carrying Extra Innings must also carry The MLB Channel in programming packages that reach more than 80 percent of the MVPD's total residential subscribers. RCN Comments at 7; EchoStar Petition at 21; Statement of Robert A. DuPuy, President and CEO of Major League Baseball to the Committee on Commerce, Science and Transportation, U.S. Senate (Mar. 27, 2007), [http://commerce.senate.gov/public/index.cfm?FuseAction:Hearings.Testimony&Hearing\\_ID=1838&Witness\\_ID=6562](http://commerce.senate.gov/public/index.cfm?FuseAction:Hearings.Testimony&Hearing_ID=1838&Witness_ID=6562). Ultimately, Major League Baseball negotiated a deal that enabled other MVPDs to carry Extra Innings. Steve Donohue, *Solid Start for MLB Net: Big Launch Platform for '09 Channel in Out-of-Market Pact*, MultiChannel News, Vol. 28, Iss. 15 (Feb. 3, 2008).

<sup>353</sup> RCN expressed concern that exclusives with non-vertically integrated sports programmers harm competition. RCN Comments at 4; RCN Apr. 19, 2007 Ex Parte; RCN Program Access Comments at 13-15.

has also expressed concern over DIRECTV's exclusive sports programming deals.<sup>354</sup>

113. RCN and ACA recommend that the Commission adopt a condition that would limit Liberty Media's and DIRECTV's ability to enter into exclusive agreements with non-vertically integrated suppliers of local, regional, and national sports programming.<sup>355</sup> EchoStar recommends prohibiting the merged firm from acquiring any additional exclusive programming, not just sports programming.<sup>356</sup>

114. The Applicants dismiss the rationale underlying the proposed condition. They counter that Commission rules permit DIRECTV's use of exclusive agreements and that this transaction would not increase DIRECTV's incentive or ability to enter into such agreements.<sup>357</sup> DIRECTV notes that Congress crafted the ban on exclusive cable programming to counter the imbalance caused by the combination of ownership of "must have" programming with the cable operators' market power in individual franchise areas.<sup>358</sup> DIRECTV states that unlike cable operators serving individual franchise areas, it does not have market power and will not acquire it through this transaction.<sup>359</sup> Moreover, according to DIRECTV, a condition precluding DIRECTV from using exclusive agreements – when other MVPDs can – would put DIRECTV at a competitive disadvantage, especially with respect to cable and telephone companies that attempt to differentiate their services through bundled service offerings.<sup>360</sup> DIRECTV points out that the Commission did not forbid DIRECTV's use of exclusive agreements with non-vertically integrated programmers in the *News Corp.-Hughes Order* and asserts that it therefore should not do so here.<sup>361</sup>

115. DIRECTV disagrees with allegations that Liberty Media's past business conduct would alter DIRECTV's incentive and ability to obtain exclusive agreements after the transaction is consummated.<sup>362</sup> In fact, according to DIRECTV, Liberty Media's acquisition of DIRECTV would reduce concerns about vertical integration because the transaction would delink DIRECTV from News Corp., leaving Liberty Media as the only programmer that is vertically integrated with DIRECTV.<sup>363</sup> DIRECTV states that commenters' proposal to forbid DIRECTV from entering into exclusive programming agreements stems from misplaced concern over DIRECTV's agreement with MLB for

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<sup>354</sup> RCN Comments at 2-3, Attachments A, B. RCN refers to Senator John Kerry's letter to the Commission, dated Feb. 1, 2007, and Commissioner Martin's response on Feb. 22, 2007 stating their concerns over an exclusive baseball agreement between Major League Baseball and DIRECTV. RCN criticizes DIRECTV's use of other exclusive programming agreements, such as NASCAR Hot Pass, discussed above in paragraphs 112-113. RCN Comments at 2-3, Attachments A, B.

<sup>355</sup> RCN Comments at 1-2, 8-10; ACA Reply Comments at 10.

<sup>356</sup> EchoStar Petition at 21.

<sup>357</sup> DIRECTV Opposition of Apr. 9, 2007 at 3-4, 5, 7; Liberty Media Opposition of Apr. 9, 2007 at 19-20.

<sup>358</sup> DIRECTV Opposition of Apr. 9, 2007 at 5, 9.

<sup>359</sup> *Id.* The transaction will not increase DIRECTV's market share. *Id.* at 7.

<sup>360</sup> *Id.* at 5-9; Liberty Media Opposition of Apr. 9, 2007 at 20. The Applicants explain that EchoStar, Time Warner, and Comcast would be permitted to continue offering exclusives, and that RCN could enter into new exclusive agreements. DIRECTV Opposition of Apr. 9, 2007 at 5-6; Liberty Media Opposition of Apr. 9, 2007 at 20.

<sup>361</sup> DIRECTV Opposition of Apr. 9, 2007 at 7.

<sup>362</sup> EchoStar alleged in the *News Corp.-Hughes* proceeding that Rupert Murdoch's influence on DIRECTV (via his ownership of News Corp.) would increase incentives to "gain exclusivity or other undue advantages over competing distributors." DIRECTV Opposition of Apr. 9, 2007 at 7.

<sup>363</sup> *Id.* at 8.



Extra Innings.<sup>364</sup> Contrary to commenters' allegations, DIRECTV contends, the Extra Innings contract is not and never was exclusive.<sup>365</sup>

116. RCN and ACA also urge the Commission to require DIRECTV to provide reasonable and non-discriminatory sublicense agreements for its exclusive programming to competing MVPDs.<sup>366</sup> RCN explains that such a requirement would enable competing MVPDs to acquire only the exclusive "must have" sports programming, not the formatting and packaging enhancements created by DIRECTV.<sup>367</sup> In opposition, Liberty Media likens RCN's proposal to forcing CBS to share its exclusive rights to the Super Bowl, March Madness, or the Masters Golf tournament so that CBS' competitors could develop a "differentiated" programming schedule.<sup>368</sup> DIRECTV notes that it would be impossible for DIRECTV to sublicense its exclusive programming under the relevant agreements.<sup>369</sup> Finally, DIRECTV emphasizes that the proposed condition would give competitors an unfair advantage by entitling them to DIRECTV's exclusive programming, in addition to any exclusive programming they may be able to secure on their own.<sup>370</sup>

117. *Discussion.* Exclusive agreements between MVPDs and non-vertically integrated programming networks fall outside the scope of the congressional rationale underlying the program access rules.<sup>371</sup> Independent programmers not affiliated with any MVPD have no incentive to favor one MVPD over another in order to achieve particular competitive outcomes in the market for sale of MVPD service to consumers. The only factor an independent programmer considers is whether it is obtaining the highest price it can for that programming. As DIRECTV correctly notes, it was the market imbalance stemming from combining MVPD market power with ownership of programming that led Congress to forbid vertically integrated programming networks from entering into exclusive distribution agreements with MVPDs.<sup>372</sup> Congress noted that programming networks affiliated with cable operators have an incentive and ability to discriminate against MVPDs with which their affiliated cable operators compete.<sup>373</sup>

118. The record does not support a condition forbidding DIRECTV from entering into exclusive distribution agreements with non-vertically integrated programmers. We find that this transaction would not give DIRECTV market power or provide DIRECTV with an unfair advantage in obtaining programming on an exclusive basis.<sup>374</sup> The transaction would not increase the number of DIRECTV

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<sup>364</sup> *Id.* at 4.

<sup>365</sup> *Id.*

<sup>366</sup> RCN Comments at 6; ACA Reply Comments at 10.

<sup>367</sup> RCN Comments at n.21.

<sup>368</sup> Liberty Media Opposition of Apr. 9, 2007 at 21.

<sup>369</sup> DIRECTV Opposition of Apr. 9, 2007 at n.15.

<sup>370</sup> *Id.* at 4-6.

<sup>371</sup> *2002 Program Access Order*, 17 FCC Rcd at 12127 ¶¶ 6-7.

<sup>372</sup> *Id.* (citing 1992 Cable Act § 2(a)(2)). As noted above, Liberty Media has agreed to abide by restrictions on its dealings with vertically integrated programming networks by offering to comply with the program access rules as a condition to this transaction. *See supra* Section V.C.2.a.(i).

<sup>373</sup> *2002 Program Access Order*, 17 FCC Rcd at 12141, 12143-44 ¶¶ 40, 45.

<sup>374</sup> EchoStar alleges that, absent a divestiture, the transaction could enable DIRECTV-Puerto Rico and LCPR to foreclose EchoStar's access to programming in Puerto Rico. *See* EchoStar Petition at 25. We note that EchoStar did (continued....)

subscribers in any local, regional, or geographic market. Further, the record includes no evidence providing an alternative basis for concluding that the transaction would increase DIRECTV's incentive or ability to enter into exclusive agreements with unaffiliated programming networks. Commenters' contentions that Liberty Media's past behavior would increase DIRECTV's incentives to use exclusives bear no connection to the economic principles described above that would justify their proposed condition. Moreover, other MVPDs have had exclusive agreements with non-vertically integrated programmers or are equally capable of securing them.<sup>375</sup> These factors lead us to conclude that though DIRECTV may be the second-largest MVPD nationally based on the number of subscribers it serves, the transaction will not confer an unfair advantage on DIRECTV in obtaining exclusive distribution agreements for programming that is not already subject to the program access rules.<sup>376</sup> Thus, we conclude that the proposed conditions are not necessary to mitigate any transaction-specific harm.

### c. Carriage of Unaffiliated Programming

119. This transaction, like the *News Corp.-Hughes* transaction, will combine a major MVPD with an owner of broadcast and non-broadcast programming. Recognizing the potential concerns raised by such a combination, News Corp. offered to be bound by a condition prohibiting discrimination against unaffiliated program providers, similar to the proscriptions embodied in the Commission's program carriage rules.<sup>377</sup> Liberty Media and DIRECTV have offered to be bound by the same condition in connection with Liberty Media's acquisition of News Corp.'s interest in DIRECTV.<sup>378</sup> As we did in *News Corp.-Hughes*, and for the same reasons set forth there, we find that adoption of such a condition in connection with the transaction now before us would serve the public interest.<sup>379</sup> Accordingly, DIRECTV and Liberty Media will be bound by the program carriage condition set forth in Appendix B.<sup>380</sup>

120. The Hispanic Information and Telecommunications Network, Inc. ("HITN") raised a related issue in its Petition to Deny, urging the Commission to deny the Application because it fails to address DIRECTV's obligations to provide carriage for noncommercial, educational, and informational

(Continued from previous page) \_\_\_\_\_

not provide any evidence to substantiate this claim. Even so, our remedy regarding Puerto Rico addresses EchoStar's concern.

<sup>375</sup> *Comcast-AT&T Order*, 17 FCC Rcd at 23286; *AT&T-MediaOne Order*, 15 FCC Rcd at 9854-55; *Adelphia Order*, 21 FCC Rcd at 8281-83 ¶¶ 174-78. Comcast, Time Warner, and EchoStar all serve national subscriber bases that are larger than or comparable to DIRECTV's subscriber base, and thus, to the extent an exclusive arrangement is made more feasible by a large national footprint, these MVPDs are well-positioned to compete against DIRECTV for exclusive distribution rights.

<sup>376</sup> We note that EchoStar has stated that it did not lose a significant number of its baseball package subscribers when Extra Innings initially entered into a *de facto* exclusive agreement with DIRECTV. EchoStar President Carl Vogel has said that the switch had a "small incremental impact" on the 50,000 MLB subscribers." *EchoStar's Ergen Believes DTV Transition Will Be Pushed Off*, COMMUNICATIONS DAILY, Aug. 13, 2007, 2007 WLNR 15819868.

<sup>377</sup> 47 C.F.R. § 76.1300, *et seq.*

<sup>378</sup> Application at iii, 4.

<sup>379</sup> See Appendix B ("Neither News Corp. nor DIRECTV will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage."). The Commission adopted the condition in *News Corp.-Hughes* to deal with concerns about unaffiliated programmers' ability to secure carriage by DIRECTV. See *News Corp.-Hughes Order*, 19 FCC Rcd at 523-34 ¶¶ 107-08.

<sup>380</sup> As in the *News Corp.-Hughes Order*, we clarify that 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. 47 C.F.R. § 76.1003 *see also News Corp.-Hughes Order*, 19 FCC Rcd at 523-24 ¶ 107.

programming and does not sufficiently safeguard the interests of independent programmers that rely on carriage by DBS operators to reach a critical mass of viewers.<sup>381</sup> Subsequently, HITN withdrew its Petition to Deny.<sup>382</sup> No other commenters in this proceeding raised issues regarding the carriage of noncommercial, educational, and informational programming. In its Withdrawal of Petition to Deny, HITN encourages the Commission to address issues related to the carriage of public interest, minority controlled, and independent channels in a broader proceeding. HITN refers the Commission to HITN's Petition for Declaratory Ruling filed on May 18, 2007, and states that the latter petition raises one such issue regarding qualifications for carriage on the public interest set aside channels. In the Petition for Declaratory Ruling, HITN requests that the Commission issue a declaratory ruling that V-me Media, Inc., does not meet the requirements of a qualified national educational programming provider under section 25.701 of our rules, concerns that are similar to the issues raised in its Petition to Deny in this proceeding.<sup>383</sup> We grant the withdrawal and note that Liberty Media and DIRECTV will be bound by the program carriage condition described above.

121. Commercial programmers also raise concerns with respect to program carriage. For example, HDNet LLC ("HDNet") alleged that DIRECTV engaged in illegal and discriminatory behavior when it announced in October 2007 that it would remove HDNet and HDNet Movies from the current tier of HDTV offerings that DIRECTV's customers receive in exchange for a flat \$9.99 HDTV fee.<sup>384</sup> HDNet also alleged that HDNet's two networks would be moved with four others – Universal HD, Smithsonian HD, MGM HD, and MHD – to an obscure and expensive tier and that subscribers were being told that the current channel was a free preview.<sup>385</sup> HDNet further alleged that Discovery wrongfully terminated an advertising agreement with HDNet and that Liberty suggested that HDNet sell it a 50 percent ownership interest.<sup>386</sup> HDNet asked the Commission to impose certain conditions and arbitration requirements on this transaction.<sup>387</sup> In response, DIRECTV and Discovery dispute HDNet's interpretation of the facts and contends that the Commission's program carriage rules provide a more appropriate forum for resolving these issues.<sup>388</sup> HDNet subsequently informed the Commission that it had settled its dispute with DIRECTV and withdrew its requests for the imposition of any conditions on the proposed transaction.<sup>389</sup> WealthTV also raises allegations concerning program carriage and notes that it has been unable to secure acceptable terms of carriage with DIRECTV.<sup>390</sup> WealthTV alleges that

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<sup>381</sup> HITN Petition at 1-2.

<sup>382</sup> HITN Withdrawal of Petition at 1.

<sup>383</sup> 47 C.F.R. § 25.701(f)(2).

<sup>384</sup> Letter from David S. Turetsky, Dewey & LeBoeuf LLP, Counsel to HDNet LLC to Marlene H. Dortch, Secretary, FCC (Nov. 13, 2007) at 3.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 4.

<sup>387</sup> *Id.*, Attachment ("Proposed Transaction Conditions") at 1-8.

<sup>388</sup> Letter from William M. Wiltshire, Harris, Wiltshire & Grannis LLP, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Nov. 20, 2007) at 2; Letter from Tara M. Corvo, Counsel to Discovery Communications, LLC, to Marlene H. Dortch, Secretary, FCC (Nov. 20, 2007) at 1-3 (noting that "the decision to accept, and later terminate, advertisements from HDNet was made by Discovery for appropriate business reasons without input from, or knowledge of, Liberty Media, DIRECTV, Discovery Holding or John Malone.").

<sup>389</sup> Letter from David S. Turetsky, Dewey & LeBoeuf LLP, Counsel to HDNet LLC, to Marlene H. Dortch, Secretary, FCC (Dec. 6, 2007) at 1.

<sup>390</sup> Letter from Kathleen Wallman, Wallman Consulting, LLC, Advisor to WealthTV, to Marlene H. Dortch, Secretary, FCC (Dec. 13, 2007) at 1 ("WealthTV Dec. 13, 2007 Ex Parte").

Liberty's vertical integration with DIRECTV will make it more difficult for non-vertically integrated programmers to gain carriage on DIRECTV.<sup>391</sup> It seeks imposition of conditions that would require DIRECTV to reserve a certain percentage of its capacity for the carriage of non-vertically integrated programming.<sup>392</sup> In response, DIRECTV notes that it was already vertically integrated with News Corp. and that WealthTV's proposed condition therefore is not transaction-specific.<sup>393</sup> We agree and therefore decline to adopt WealthTV's proposed condition. As noted above, Liberty Media and DIRECTV will be bound by the program carriage condition set forth in Appendix B.

### 3. Other Potential Public Interest Harms

#### a. Future Application of the *News Corp.-Hughes* Conditions

##### (i) Program Access Conditions

122. Commenters urge the Commission to continue to apply the *News Corp.-Hughes* program access conditions to News Corp. after Liberty Media's acquisition of DIRECTV is consummated.<sup>394</sup> News Corp. asserts that it should be free of those conditions, stating that once it divests its interest in DIRECTV, it will lack any undue advantage over its programming rivals. We agree.

123. *Positions of the Parties.* NCTC contends that the program access conditions should continue to apply to all of News Corp.'s RSNs after the transaction if the Commission finds that the transferred RSNs will be operated as a *de facto* or *de jure* joint venture between News Corp. and DIRECTV.<sup>395</sup> Moreover, it recommends that the conditions apply to all News Corp. programming

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*; see also Letter from Kathleen Wallman, Wallman Consulting, LLC, Advisor to WealthTV, to Marlene H. Dortch, Secretary, FCC (Jan. 29, 2008) at 1 ("WealthTV Jan. 29, 2008 Ex Parte"). Specifically, WealthTV asks the Commission to require DIRECTV to reserve five percent of the merged firm's capacity for independent programming that is not affiliated with any MVPD or broadcaster and to allocate 80 percent of that capacity to "independent programmers" at any given time with at least 80 percent of such independent programmers receiving distribution on the first or second most widely distributed tiers. WealthTV proposes that the merged firm fulfill the terms of this condition within two years, by either adding new capacity or via the attrition of existing contracts. In addition, it states that the Commission should not allow programming affiliated with Liberty Media or John Malone to be added until the 5 percent set-aside has been met. WealthTV Dec. 13, 2007 Ex Parte at 2.

<sup>393</sup> Letter from William M. Wiltshire, Harris, Wiltshire & Grannis LLP, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Dec. 21, 2007) ("DIRECTV Dec. 21, 2007 Ex Parte") at 2. Moreover, DIRECTV notes that 42 percent of the programming it carries is not vertically integrated. *Id.* at 2. WealthTV counters that this figure does not reflect the amount of "general appeal" non-vertically integrated programming that DIRECTV carries. See WealthTV Jan. 29, 2008 Ex Parte at 2; see also Letter from Kathleen Wallman, Wallman Consulting, LLC, Advisor to WealthTV, to Marlene H. Dortch, Secretary, FCC (Feb. 19, 2008) at 1. In response, DIRECTV notes that the figure does accurately reflect the amount of non-vertically integrated programming it carries and that WealthTV improperly narrows the scope of programming represented in that figure to non-vertically integrated "general appeal" programming. DIRECTV contends that by narrowing the category of programming in this manner, WealthTV is asking the Commission to favor one type of programming over others. Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Feb. 6, 2008) at 2-3.

<sup>394</sup> ACA Comments at 18-20; CU Comments at 6-7; NCTC Comments at 6; ACA Reply Comments at 3.

<sup>395</sup> NCTC Comments at 6. ACA states that all the *News Corp.-Hughes* conditions (program access and arbitration) should remain in place, at a minimum, for the full term of the *News Corp.-Hughes Order*. ACA Comments at 18-19; ACA Reply Comments at 3-4. The *News Corp.-Hughes* program access conditions apply to News Corp. for as long as the Commission deems News Corp. to have an attributable interest in DIRECTV and the Commission's program access rules remain in effect. The RSN and retransmission consent conditions terminate on January 14, 2010. *News Corp.-Hughes Order*, 19 FCC Rcd at 676 App. F.

agreements entered into or modified by DIRECTV during the period beginning four months prior to the announcement of the merger and ending four months after the transaction closes. NCTC contends that News Corp. and DIRECTV may have entered into “sweetheart deals” in anticipation of the transaction.<sup>396</sup> EchoStar and Consumers Union, Consumer Federation of America, Free Press, and the Media Access Project (“CU”) advise the Commission to thoroughly investigate any carriage agreements, business agreements, or management relationships between News Corp. and DIRECTV.<sup>397</sup> Specifically, they ask the Commission: (1) to determine whether News Corp. programming contracts with DIRECTV contain most favored nation clauses, which they allege provide DIRECTV with a competitive advantage; and (2) to require the Applicants to produce any ancillary agreements referred to in the Share Exchange Agreement.<sup>398</sup> They contend that, if the Commission’s review shows that the financial interests of News Corp. and DIRECTV would remain intertwined after the transaction, and that Chase Carey would remain the CEO and director of DIRECTV as well as a director of News Corp., then continued application of the program access conditions to News Corp. will remain necessary.<sup>399</sup> EchoStar alleges that DIRECTV and News Corp. are crafting preferential terms for each other in their program access contracts while they are still a vertically integrated firm, and that these contracts will provide an unjustifiable competitive advantage for DIRECTV going forward. Thus, even if the program access conditions do not continue to apply by the terms of the *News Corp.-Hughes Order* after the transaction, EchoStar recommends that any contracts executed while DIRECTV and News Corp. are affiliated should remain subject to the program access conditions until the last News Corp./DIRECTV programming contract expires.<sup>400</sup>

124. News Corp. counters that once the transaction is consummated, it will no longer have any ownership interest in DIRECTV, nor will it have any power over or ability to influence DIRECTV’s affairs.<sup>401</sup> It explains that the agreements implementing the transaction with Liberty do not permit News Corp. to exercise any control over the terms and conditions of carriage or the price that MVPDs must pay to obtain carriage of the RSNs it is transferring to Liberty Media/DIRECTV.<sup>402</sup> Instead, the agreements merely allow certain Fox RSNs to continue their present operations consistent with how those RSNs operated under Fox’s ownership.<sup>403</sup> Liberty Media states that the ancillary agreements mentioned in the

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<sup>396</sup> NCTC Comments at 8. For example, NCTC states that programming services affiliated with News Corp. may have entered into or modified agreements with DIRECTV in anticipation of this transaction.

<sup>397</sup> EchoStar Petition at 28-30; CU Comments at 5-7.

<sup>398</sup> EchoStar Petition at 28-29; CU Comments at 4-5.

<sup>399</sup> CU Comments at 6-7; EchoStar Petition at 29-30.

<sup>400</sup> EchoStar Petition at 30-31.

<sup>401</sup> News Corp. Opposition of Apr. 9, 2007 at 5.

<sup>402</sup> *Id.* at 8-9.

<sup>403</sup> *Id.*; Liberty Media Opposition of Apr. 9, 2007 at 12-13. The Transitional Services Agreement between Liberty Media and Fox Sports Net, Inc. enables the transferred RSNs to obtain certain basic administrative services. Via the Technical Services Agreement, FSN will provide technical services for a period of up to five years to Liberty Media. The Fox Sports Net License Agreement provides the transferred RSNs with FSN “backdrop feed” programming until 2011 for time periods when there are no games involving local teams. The Production Services Agreement identifies the programming that will be produced by the transferred RSN and provided to FSN and the terms upon which it will be provided for a period of one year. The Sports Access Agreement authorizes Sports Access to provide news services with access to the RSN programming service for news gathering and monitoring and to excerpt highlights for news programming. The Webpage Services Agreement outlines how Fox Interactive Media, Inc. will provide certain web-based services to the transferred RSNs as long as the RSNs continue to receive the FSN backdrop feed pursuant to the Fox Sports Net License Agreement. The National Advertising Sales Representation Agreement with National Advertising Partners provides national advertising sales to the transferred (continued....)

Applicants' Share Exchange Agreement do not relate to any ongoing ownership, management, or other vestigial interest by News Corp. in DIRECTV.<sup>404</sup> In addition, News Corp. notes that CU, EchoStar, and NCTC fail to show how alleged preferential treatment between News Corp. and DIRECTV in program carriage agreements would create an ability or incentive for a non-vertically integrated News Corp. to engage in anticompetitive conduct after the transaction.<sup>405</sup> DIRECTV highlights the fact that, by virtue of its current affiliation with News Corp. and Liberty Media, DIRECTV is better positioned now than it would be post-transaction – after severing ties with News Corp. – to work with News Corp. and Liberty on an alleged “coordinated content strategy.”<sup>406</sup> DIRECTV asserts that because there is no evidence that it has engaged in such activity despite its current connection to both Liberty Media and News Corp., it is even less likely to do so after it eliminates its link to News Corp. after this transaction closes.<sup>407</sup> Liberty Media contends that commenters do not justify their request for “wholesale review” of DIRECTV’s affiliation agreements, and disputes allegations that the existence of MFN provisions in News Corp.’s affiliation agreements with DIRECTV would maintain the benefits of vertical integration between News Corp. and the merged firm post-transaction.<sup>408</sup> Instead, Liberty Media counters that the existence of MFN provisions proves that the agreements were negotiated at arm’s length to ensure that DIRECTV receives the best price, terms and conditions from News Corp. in the event News Corp. gives a better deal to another distributor in the future.<sup>409</sup> Moreover, as Liberty Media and DIRECTV point out, the affiliation agreements were subjected to review and approval by a committee of independent directors to ensure that the agreements were fair to the other 61.6 percent of DIRECTV’s shareholders.<sup>410</sup>

125. News Corp. notes that commenters’ concerns regarding Chase Carey’s post-transaction role

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RSNs through 2011. The Regional Sports Network License Agreement authorizes Fox College Sports to use high school and college events produced by the transferred RSNs to be carried on the Fox College Sports pay television service (through 2011). The Fox Sports Direct (“FSD”) Representation Agreement continues FSD’s representation of the transferred RSNs for purposes of out-of-market distribution of the RSN programming on DIRECTV and EchoStar, and is terminable in the event that DIRECTV and/or EchoStar agree to separate one or more of the RSNs from the FSD agreements. The Global Affiliation Letter Agreement requires Liberty Media and DIRECTV to honor existing Global Affiliation Agreements that provide for carriage of various Fox Networks, including the transferred RSNs, during the term of such agreements or until one or more of the RSNs is severed from a particular Global Affiliation Agreement. The RSN Subsidiary Non-Compete Agreement prohibits News Corp. and its affiliates from competing with the RSNs in their service areas for a period of five years after the closing. The DTV Non-Competition Agreement prohibits News Corp. from competing with DIRECTV in the DBS market for a four-year period and from soliciting executive officers or members of senior management from DIRECTV for a period of two years. Liberty Media Opposition of Apr. 9, 2007 at 12-16.

<sup>404</sup> Liberty Media Opposition of Apr. 9, 2007 at 12.

<sup>405</sup> News Corp. Opposition of Apr. 9, 2007 at 14.

<sup>406</sup> DIRECTV Opposition of Apr. 9, 2007 at 18.

<sup>407</sup> *Id.*

<sup>408</sup> Liberty Media Opposition of Apr. 9, 2007 at 17-18.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 18; DIRECTV Opposition of Apr. 9, 2007 at 18-19. DIRECTV notes that its by-laws provide that the Audit Committee has the “sole authority to review, consider and pass upon any Related Party Transaction, and no such transaction shall be effected without the approval of or authorization of a majority of the Audit Committee, provided that the committee may ratify any such transaction.” The Audit Committee is composed of at least three independent members. Those independent members have a fiduciary duty to DIRECTV shareholders and have no tie to News Corp. DIRECTV Opposition of Apr. 9, 2007 at 18-19 (citing *News Corp.-Hughes*, 19 FCC Rcd at 659, App. E, Committees, Section 3(d)).

in News Corp. are misplaced because he will resign his membership on the News Corp. Board of Directors after the transaction.<sup>411</sup> It alleges that continued application of the program access condition to News Corp. after it sells DIRECTV to Liberty would be unfair because News Corp. would no longer possess an economic incentive to favor one MVPD over another and it would face a competitive disadvantage as compared to other independent programmers.<sup>412</sup>

126. *Discussion.* In *News Corp.-Hughes*, the Commission crafted program access conditions to mitigate potential transaction-related harms arising from News Corp.'s vertical integration with DIRECTV. Those conditions prohibit News Corp. and DIRECTV from entering into agreements that unfairly discriminate against DIRECTV's MVPD competitors, and they apply for as long as News Corp. holds an attributable interest in DIRECTV.<sup>413</sup> Once this transaction closes, News Corp. will sell its interest in DIRECTV to Liberty Media.<sup>414</sup> At that point, News Corp. will no longer have an attributable interest in DIRECTV.<sup>415</sup> Thus, the program access conditions would no longer apply to News Corp.<sup>416</sup> Commenters, however, ask us to extend the program-access type conditions' application to News Corp. after it no longer holds an attributable interest in DIRECTV. They recommend this remedy based on their concerns that sweetheart deals and discriminatory terms may be embedded in the transaction documents and programming agreements. As noted above, however, News Corp. and DIRECTV drafted these documents while still subject to our program access conditions. Such conduct, therefore, is already prohibited. If an MVPD believes News Corp. or DIRECTV violated this condition while they were vertically integrated, the program access complaint provision provides an avenue for relief.<sup>417</sup>

127. Moreover, our own review of the documents triggering concern among commenters confirms our assessment that continued application of the conditions is unnecessary. The review of the transaction agreements, including the ancillary agreements, and News Corp.'s programming agreements with DIRECTV does not lead us to believe that DIRECTV or News Corp. will receive any undue advantage vis-à-vis their competitors as a result of their prior vertical integration.<sup>418</sup> That review also

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<sup>411</sup> News Corp. Opposition of Apr. 9, 2007 at 7, 12-13. In addition, News Corp. notes that even if Carey retains his position on the DIRECTV board, the *News Corp.-Hughes Order* states that the program access conditions apply only for "as long as the FCC deems News Corp. to have an Attributable Interest in DIRECTV," and that Carey's board membership would be attributable to him, not News Corp. News Corp. Opposition of Apr. 9, 2007 at 13 (citing *News Corp.-Hughes Order*, 19 FCC Rcd at 676 App. F). However, we note that Carey has already resigned his post on News Corp.'s board. See News Corporation, *News Corporation Appoints James Murdoch and Natalie Bancroft to Board of Directors, Murdoch to Join Office of the Chairman Effective Immediately, Bancroft Appointment Effective Upon and Subject to Closing of Dow Jones Acquisition, Chase Carey Resigns from Board* (press release), Dec. 7, 2007 ("News Corp. Press Release").

<sup>412</sup> News Corp. Opposition of Apr. 9, 2007 at 10-12.

<sup>413</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at App. F(II).

<sup>414</sup> We note that Chase Carey has already resigned from the News Corp. Board. See News Corp. Press Release, *supra* note 411.

<sup>415</sup> News Corp. will not retain any right to appoint directors. See DIRECTV Dec. 17, 2007 Response to Information and Document Request at 2; see also Application, Share Exchange Agreement at § 6.8.2.

<sup>416</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at App. F(II).

<sup>417</sup> 47 C.F.R. § 76.1003(g). Thus, provided that an MVPD submits its complaint within the period specified by the Commission's program access complaint provision, the MVPD can obtain remedies for violations of the program access conditions even after this transaction closes.

<sup>418</sup> We base these conclusions on a review of all the transaction documents and programming agreements between News Corp. and DIRECTV. See News Corp. July 10, 2007 Response to Information and Document Request at III.A (continued....)

shows that the ancillary agreements criticized by commenters do not provide News Corp. with control of or the ability to exercise undue influence over those RSNs.<sup>419</sup> Based on that review, the rationale for imposing the program access conditions in the *News Corp.-Hughes* transaction will not apply to News Corp. post-transaction.

**(ii) Arbitration Conditions**

128. Commenters also recommend that the RSN and retransmission consent arbitration conditions from the *News Corp.-Hughes* transaction continue to apply to News Corp. after the transaction is consummated. News Corp. contends that the Commission need not make this determination because it has not asked the Commission to terminate the conditions. We agree. We crafted the arbitration conditions for News Corp. because we found that its merger with DIRECTV would increase News Corp.'s incentives to raise its MVPD rivals' costs after the transaction.<sup>420</sup> By the terms of the *News Corp.-Hughes Order*, the Commission will consider a petition for modification of the arbitration conditions if, because of a material change in circumstance, the condition no longer serves the public interest. News Corp. has not petitioned the Commission for removal of the *News Corp.-Hughes Order's* arbitration conditions. Thus, assessing the continued need for the conditions after the transaction is premature. Accordingly, the conditions shall continue to apply for their full term or until such time as the Commission grants relief. If and when News Corp. asks the Commission to terminate the conditions, we will evaluate whether our doing so would serve the public interest.<sup>421</sup>

**b. Local-Into-Local Provision of Broadcast Television Service**

129. In the *News Corp.-Hughes Order*, the Commission adopted a condition requiring News Corp. to increase by 30 the number of markets in which DIRECTV provided local-into-local broadcast TV service.<sup>422</sup> DIRECTV fulfilled that condition, and now provides local-into-local service in 144 of the nation's 210 television markets, covering more than 94 percent of U.S. TV households.<sup>423</sup> DIRECTV (Continued from previous page) \_\_\_\_\_  
and III.B; *see also* DIRECTV July 10, 2007 Response to Information and Document Request at III.A and III.B; Liberty Media July 10, 2007 Response to Information and Document Request at I.A.

<sup>419</sup> *See* Liberty Media July 10, 2007 Response to Information and Document Request I.A. at LMCI.A.0000112-138 [[REDACTED]], LMCI.A.0000140-194 [[REDACTED]], LMCI.A.0000196-202 [[REDACTED]]; LMC I.A. 0000204-210 [[REDACTED]], LMCI.A.0000219-224 [[REDACTED]], LMCI.A.0000225-234 [[REDACTED]], LMCI.A.0000237-243 [[REDACTED]], LMCI.A.0000253-282 [[REDACTED]], LMCI.A.0000285-298 [[REDACTED]], LMCI.A.0000301-314 [[REDACTED]], LMCI.A.0000317-334 [[REDACTED]], LMCI.A.0000337-348 [[REDACTED]], LMCI.A.0000351-362 [[REDACTED]], LMCI.A.0000379-388 [[REDACTED]], LMCI.A.0000391-397 [[REDACTED]], LMCI.A.0000401-404 [[REDACTED]], LMCI.A.0000407-412 [[REDACTED]], LMCI.A.0000415-424, [[REDACTED]], LMCI.A.0000426-433 [[REDACTED]].

<sup>420</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 551 ¶ 169.

<sup>421</sup> News Corp. Opposition of Apr. 9, 2007 at 14-15.

<sup>422</sup> That condition states: "By year end 2004, DIRECTV must provide local broadcast channels to subscribers in an additional 30 designated market areas ("DMAs") beyond what had been previously funded, projected or planned by Hughes/DIRECTV." *News Corp.-Hughes Order*, 19 FCC Rcd at 683, App. F(VI). The term "local-into-local" refers to the delivery of local television broadcast signals by a satellite carrier into a local market pursuant to Section 338 of the Communications Act and Section 76.66 of the Commission's rules. 47 U.S.C. § 338(a)(1); 47 C.F.R. § 76.66(a)(6). A satellite carrier may deliver local television broadcast signals to subscribers in a DMA provided it delivers the signals of all other qualified television stations in that DMA that request carriage. *See* 47 U.S.C. § 338(k)(3) and 47 C.F.R. § 76.66(b).

<sup>423</sup> Letter from Susan Eid, DIRECTV, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 03-124 (Dec. 22, 2004) (stating that DIRECTV met the condition in the *News Corp.-Hughes Order* to provide local-into-local service by the end of 2004 to subscribers in an additional 30 DMAs beyond what had been previously funded, projected, or (continued....)



states that it expects to launch local-into-local service in six additional markets by the middle of 2008.<sup>424</sup> DIRECTV has committed to providing “a seamless, integrated local channel package” to all 210 markets before the end of 2008.<sup>425</sup> In addition, DIRECTV delivers high-definition broadcast signals in 60 markets, covering approximately 70 percent of U.S. TV households, and it plans to expand its offering of HD local signals to 100 markets by the end of 2008.<sup>426</sup>

130. Commenters ask the Commission to require DIRECTV to provide local-into-local television broadcast service in all 210 TV markets via satellite by 2008.<sup>427</sup> They allege that News Corp. promised in the *News Corp.-Hughes* proceeding that it would do so. For the reasons set forth below, we decline to impose additional local-into-local broadcast television signal carriage requirements in this proceeding.

131. *Positions of the Parties.* Commenters urging imposition of a condition, all of them broadcasters, contend that the Commission relied on News Corp.’s alleged commitment to provide local broadcast signals in all 210 DMAs by the end of 2008 in adopting the *News Corp.-Hughes Order*.<sup>428</sup> Further, they argue that the Commission should require DIRECTV and Liberty to offer universal local-into-local service, via satellite, by 2008, even if News Corp. did not make a specific commitment to do so, to enhance the public interest benefits of the merger.<sup>429</sup> They claim that improvements in satellite technology,<sup>430</sup> additional satellite capacity,<sup>431</sup> and the greater availability of satellites since the adoption of (Continued from previous page) \_\_\_\_\_ planned by Hughes/DIRECTV). See Letter from William Wiltshire, Harris, Wiltshire & Grannis LLP, Counsel to DIRECTV, to Marlene H. Dortch, Secretary, FCC (Jan. 30, 2008) (“DIRECTV Jan. 30, 2008 Ex Parte”).

<sup>424</sup> DIRECTV Jan. 30, 2008 Ex Parte at 1.

<sup>425</sup> DIRECTV Opposition at 12-13; DIRECTV Jan. 30, 2008 Ex Parte at 1.

<sup>426</sup> Application at 6-7; DIRECTV Oct. 3, 2007 Ex Parte (DIRECTV will provide local broadcast signals in HD format “to 100 DMAs after the successful launch and implementation of its two new satellites, D10 and D11.”); Letter from William M. Wiltshire, Harris, Wiltshire & Grannis LLP, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Aug. 23, 2007) (“DIRECTV Aug. 23, 2007 Ex Parte”).

<sup>427</sup> NDB Petition at 4-5, 10-13; National Association of Broadcasters (“NAB”) Comments at 1-2; NAB Reply Comments at 1-2. See also, e.g., Michigan Broadcasters Reply Comments at 1; Mississippi Broadcasters Reply Comments at 4-5; Missouri Broadcasters Reply Comments at 1-2; Nebraska Broadcasters Reply Comments at 1-2; Ohio Association of Broadcasters/Virginia Association of Broadcasters (“OAB/VAB”) Reply Comments at 2-3, 5; Letter from Suzanne D. Goucher, President & CEO, Maine Association of Broadcasters to FCC (Apr. 10, 2007) (“Maine Broadcasters Apr. 10, 2007 Ex Parte”) at 1. They claim that News Corp. has failed to provide local-into-local coverage in 68 small market DMAs, including Lima, Ohio (#196); Presque Isle, Maine (#204); Marquette (#180) and Alpena (#208), Michigan; Cheyenne, Wyoming-Scottsbluff (#195) and North Platte (#204), Nebraska; and Harrisonburg (#181) and Charlottesville (#182), Virginia.

<sup>428</sup> NAB Comments at 2 (citing *News Corp.-Hughes Order*, 19 FCC Rcd at 617 ¶ 334); NDB Petition at 11-13; Mississippi Broadcasters Reply Comments at 4-5; Nebraska Broadcasters Reply Comments at 1-2. See also Letter from Linda C. Compton, President and CEO, Indiana Broadcasters Assoc., to Marlene H. Dortch, Secretary, FCC (Dec. 6, 2007) at 1; Letter from Ann Arnold, President, Texas Assoc. of Broadcasters (Nov. 29, 2007) at 1; Letter from George R. Borsari, Jr., Borsari & Paxson, Counsel for NDB, to Marlene H. Dortch, Secretary, FCC (Apr. 16, 2007) (“NDB Apr. 16, 2007 Ex Parte”) at 3 (citing *News Corp.-Hughes Order*, 19 FCC Rcd at 616 ¶ 332 (stating that News Corp. will finance the launch of a new generation of satellites as early as 2006 and no later than 2008, which “will enable DIRECTV to provide local broadcast channels in all 210 DMAs”)).

<sup>429</sup> See, e.g., NDB Petition at 4-5; OAB/VAB Reply Comments at 2; NDB Apr. 16, 2007 Ex Parte at 7-8.

<sup>430</sup> OAB/VAB Reply Comments at 3-4 (delivery of local-into-local service to smaller markets is economically and technically feasible, as demonstrated by DIRECTV’s service to Zanesville, Ohio (DMA#203) and by EchoStar’s service to Harrisonburg (DMA#181) and Charlottesville, Virginia (DMA #182)); Maine Broadcasters Apr. 10, 2007 Ex Parte at 1.

the *News Corp.-Hughes Order* makes universal local-into-local satellite service attainable.<sup>432</sup>

132. These commenters claim that DIRECTV ignores small markets, offering local-into-local service to only 15 of the smallest DMAs.<sup>433</sup> NDB asserts that the “seamless integrated local” over-the-air antenna service that DIRECTV provides to subscribers in rural areas is inferior to satellite-delivered local service because antenna service cannot deliver local stations to viewers in areas where local signals are blocked by mountains and other obstructions.<sup>434</sup> It adds that universal delivery of local broadcast signals via satellite would be more effective in expediting the digital transition than would the delivery of additional HD signals in large markets.<sup>435</sup> Commenters maintain that the provision of local-into-local service also promotes localism, benefits consumers, and enhances competition.<sup>436</sup> As examples of these benefits, they point to the delivery of local news, local sports, and local public affairs. They also note the importance of local emergency announcements, including the closed-captioning of those announcements for the hearing challenged, which are critical to public safety.<sup>437</sup> NDB asserts that a condition requiring universal delivery of local signals via satellite is necessary to prevent MVPD competition and competition among broadcasters from lagging in smaller, rural markets.<sup>438</sup>

133. DIRECTV maintains that the Commission did not impose any condition that requires

(Continued from previous page) \_\_\_\_\_

<sup>431</sup> OAB/VAB Reply Comments at 3 (asserting that two additional satellites that DIRECTV intends to deploy in 2007 “could easily be used to deliver local-into-local satellite television service to the remaining 68 television markets”); Maine Broadcasters Apr. 10, 2007 Ex Parte at 1.

<sup>432</sup> Letter from George R. Borsari, Jr., Borsari & Paxson, Counsel for NDB, to Marlene H. Dortch, Secretary, FCC (Dec. 6, 2007) (“NDB Dec. 6, 2007 Ex Parte”); NDB Apr. 16, 2007 Ex Parte at 5.

<sup>433</sup> NDB Petition at 5; OAB/VAB Reply Comments at 3 (claiming EchoStar currently offers service to 176 DMAs).

<sup>434</sup> NDB Apr. 16, 2007 Ex Parte at 3-4, 6-7 (noting that subscribers must flip an A-B antenna switch to disengage from DIRECTV and receive the signals of their local stations over the air).

<sup>435</sup> NDB Apr. 16, 2007 Ex Parte at 7-8.

<sup>436</sup> NDB Petition at 5-6, 10 (citing NAB comments in the *News Corp.-Hughes* proceeding); Michigan Broadcasters Reply Comments at 1-2; NAB Reply Comments at 1-2; OAB/VAB Reply Comments at 3; Maine Broadcasters Apr. 10, 2007 Ex Parte at 1; NDB Apr. 16, 2007 Ex Parte at 5-6 (citing Clayton Antitrust Act, 15 U.S.C. § 12 *et seq.*; Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*).

<sup>437</sup> For example, Mississippi Broadcasters states that local news and Emergency Alert System messages broadcast on TV are not received by DIRECTV subscribers in the rural DMAs of Biloxi-Gulfport (#160), Hattiesburg-Laurel (#165), Greenwood-Greenville (#184), and Meridian (#185). Mississippi Broadcasters Reply Comments at 2-4. *See also* NDB Petition at 5-6; Letter from Harriet J. Lange, President, Kansas Assoc. of Broadcasters, to Kevin J. Martin, Chairman, FCC (Jan. 11, 2008).

<sup>438</sup> NDB Petition at 7-8 (noting that the Commission has recognized that competition between DBS and cable services has increased in those markets in which DBS broadcast satellite providers offer local-into-local service); NDB Apr. 16, 2007 Ex Parte at 4 (arguing that viewers that receive distant signals are excluded from the local stations’ ratings, in turn reducing local station revenues). *See also* Mississippi Broadcasters Reply Comments at 2-4; NAB Reply Comments at 1-2; Letter from Sue Toma, Executive Director, Iowa Broadcasters Assoc.; Letter from Sens. Kent Conrad and Byron Dorgan, U.S. Senate, to Kevin Martin, Chairman, FCC (May 7, 2007); Letter from Rep. Mary Gaskill, Iowa House of Representatives, to Royce Sherlock, Media Bureau, FCC (Oct. 23, 2007); Letter from Sen. Judith Saffirini, Texas State Senate, to Kevin J. Martin, Chairman, FCC (Oct. 29, 2007). NDB further contends that DIRECTV deliberately failed to follow through installation of local-into-local service in Bismarck, North Dakota. Supplemental filing from George R. Borsari, Jr., Borsari & Paxson, Counsel for NDB (Aug. 20, 2007) at 1-5. DIRECTV denies that it planned to install the service. Letter from William M. Wiltshire, Harris, Wiltshire, & Grannis LLP, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Oct. 25, 2007) (“DIRECTV Oct. 25, 2007 Ex Parte”).

DIRECTV to provide satellite-delivered local broadcast signals in every television market and notes that it has already achieved and surpassed the local-into-local condition that the Commission did impose in the *News Corp.-Hughes Order*.<sup>439</sup> DIRECTV states that it currently provides local-into-local service in 144 DMAs, and expects to reach 150 DMAs in the next few months.<sup>440</sup> It asserts that the Commission understood that DIRECTV would use a mix of delivery systems when it granted conditional approval in the *News Corp.-Hughes Order*, affording DIRECTV discretion as to the delivery mechanism, based on market conditions.<sup>441</sup>

134. DIRECTV states that it plans to allocate its existing satellite capacity to additional rollout of HD service in large markets and to some expansion of local-into-local service, “consistent with economic, satellite capacity, and technological limitations.”<sup>442</sup> It asserts that in 60 markets covering 70 percent of the nation’s television households, it offers at least some local broadcast signals in HD, explaining that it will have enough capacity to provide more comprehensive HD local service to the vast majority of Americans after its next two satellites are launched.<sup>443</sup> DIRECTV also submitted an economic analysis showing that a requirement that it offer satellite-delivered local broadcast signals in the 60 markets it does not already serve or plan to serve could cost it more than \$250 million.<sup>444</sup> DIRECTV asserts that such a requirement would put it at a competitive disadvantage by imposing costs on DIRECTV that other competitors are not required to incur.<sup>445</sup>

135. DIRECTV contends that the broadcasters who favor imposition of a universal local-into-local condition fail to recognize the tension between the competing public interest objectives of using new satellite capacity to provide local-into-local service in additional DMAs and launching HD local service in DMAs that already receive standard definition local service. It asserts that satellite-delivered local-into-local service is available in markets covering all but approximately 2.4 percent of television households nationwide, but “[t]he transition to digital television is a massive and complex undertaking, affecting virtually every segment of the television industry and every American who watches television.”<sup>446</sup> It states that providing local-into-local service in the markets where it is not yet available might benefit a small segment of the public, but the retransmission of local stations in HD will have a greater positive effect on the DTV transition, accelerating its progress and extending its benefits to more

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<sup>439</sup> DIRECTV Opposition at 11-12.

<sup>440</sup> DIRECTV Jan. 30, 2008 Ex Parte at 1.

<sup>441</sup> DIRECTV Opposition at 12 (broadcasters “seek to dictate the manner by which DIRECTV will deliver a seamless, integrated local service, rather than allowing market forces to determine the best mix of technologies for achieving this goal”).

<sup>442</sup> *Id.*

<sup>443</sup> DIRECTV Aug. 23, 2007 Ex Parte at 1.

<sup>444</sup> DIRECTV Aug. 23, 2007 Ex Parte at 2 (attaching Benjamin Klein, Andres Lerner, Emmett Dacey, *An Economic Analysis of DIRECTV Providing Local-Into-Local Service via Satellite In All 210 DMAs*). See also Letter from George R. Borsari, Jr., Borsari & Paxson, Counsel for NDB, to Marlene H. Dortch, Secretary, FCC (Oct. 29, 2007) (providing its own analysis). The parties dispute the accuracy of the reports regarding the amount of satellite capacity available for local-into-local service, as well as the cost of providing the service. See, e.g., DIRECTV Oct. 25, 2007 Ex Parte; Letter from William M. Wiltshire, Harris, Wiltshire, & Grannis LLP, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Nov. 6, 2007); NDB Dec. 6, 2007 Ex Parte.

<sup>445</sup> DIRECTV Aug. 23, 2007 Ex Parte at 2.

<sup>446</sup> DIRECTV Opposition at 12-14, n.43. Although DIRECTV provides local-into-local service in markets serving 94 percent of TV households, EchoStar and DIRECTV together provide local-into-local service in markets serving more than 97 percent of TV households. *Id.*

viewers throughout the United States.<sup>447</sup>

136. Finally, DIRECTV has committed to specific methods of delivering local broadcast signals in all 210 DMAs by the end of 2008.<sup>448</sup> By the end of 2008, DIRECTV will deliver local signals via satellite in 150 DMAs.<sup>449</sup> In the remaining 60 DMAs, DIRECTV will provide a means for consumers to view local broadcast signals via their DIRECTV set-top box using over-the-air antennas. These consumers will be able to purchase a digital tuner accessory from DIRECTV at an estimated one-time cost of \$50.<sup>450</sup> Consumers will be responsible for purchasing their own off-air antenna, but DIRECTV will install it for existing customers at a flat fee of \$99 and for new customers at an incremental fee above the cost of installing the DBS antenna.<sup>451</sup> DIRECTV already provides a \$3 monthly discount to subscribers who receive local service using over-the-air antennas and will continue to offer this discount to subscribers who use the tuner accessory. DIRECTV states that with the tuner accessory, subscribers will have a “seamless, integrated” experience, meaning that the broadcast programming will appear in the electronic program guide and that all other available set-top box functions, such as DVR capability, will work with broadcast programming.<sup>452</sup>

137. *Discussion.* We do not agree that the Commission conditioned its approval in the *News Corp.-Hughes* proceeding on DIRECTV’s provision of local-into-local service into all 210 DMAs by the end of 2008. We decline to impose a universal local-into-local condition here. There is no evidence in the record that such a condition is necessary to remedy a transaction-specific harm. Moreover, Liberty and DIRECTV have reiterated the commitment to provide local broadcast signals, in a manner transparent to the customer, in all 210 DMAs by the end of 2008. Finally, no entity has alleged that the transaction will diminish DIRECTV’s incentive or ability to expand the rollout of local broadcast service.

## VI. ANALYSIS OF PUBLIC INTEREST BENEFITS

138. The Applicants claim that the transaction will increase competition and benefit consumers. They state that the transfer of control of DIRECTV from News Corp. to Liberty Media will decrease media concentration and alleviate many of the concerns that the Commission had in approving News Corp.’s acquisition of DIRECTV, since Liberty Media does not have any “must have” programming. They state that the transaction will eliminate Liberty Media’s current interest in News Corp. and will therefore further decrease media concentration by separating the two companies. Finally, they claim consumers will benefit because the transaction will make Liberty Media’s experience and expertise in interactive commerce and other technologies more readily available to DIRECTV.<sup>453</sup>

139. We agree that the transaction will decrease media concentration and find that this is a public benefit of the transaction. We also find, however, that the Applicants have not shown that making Liberty

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<sup>447</sup> *Id.* at 13. The Applicants also contend that NDB’s Petition fails to comply with the requirements of Section 25.154(a) of the Commission’s rules. 47 C.F.R. § 25.154(a). DIRECTV Opposition at 11 n.34; Liberty Media Opposition at 7. Assuming this were true, we would still be able to consider NDB’s comments as an informal objection under Section 25.154(b). *See Pacific Gas and Electric Company*, Memorandum Opinion and Order, 18 FCC Rcd 22761, 22766 n.47 (2003); *see also Nextel License Holdings 4, Inc.*, 17 FCC Rcd 7028, 7033 ¶ 16 (2002) (noting that there is no standing requirement to file an informal objection).

<sup>448</sup> DIRECTV Jan. 30, 2008 Ex Parte.

<sup>449</sup> *Id.* at 1.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* at 4.

<sup>452</sup> *Id.*

<sup>453</sup> Application at 16; Liberty Media Consolidated Opposition to Petitions at 30.

Media's expertise available to DIRECTV provides any substantial benefit to the public compared to DIRECTV's situation today.

### A. Analytical Framework

140. In determining whether a transaction is in the public interest, the Commission evaluates whether the transaction is likely to produce public interest benefits.<sup>454</sup> The Commission applies several criteria in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction specific. This means that the claimed benefit must be likely to be accomplished as a result of the transaction but be unlikely to be realized by other means that entail fewer anticompetitive effects. For example, the Commission does not credit benefits that are likely to be realized even absent the transaction. Second, the claimed benefit must be verifiable.<sup>455</sup> Because much of the information relating to the potential benefit of a transaction is in the sole possession of the Applicants, they are required to provide sufficient supporting evidence so that the Commission can verify the likelihood and magnitude of each claimed benefit.<sup>456</sup> The Commission discounts or dismisses speculative benefits that cannot be verified.<sup>457</sup> In this regard, benefits that are expected to occur only in the distant future are inherently more speculative than benefits that are expected to occur more immediately. The Commission calculates the magnitude of benefits net of the cost of achieving them.<sup>458</sup> Third, the benefits must flow through to consumers, and not inure solely to the benefit of the company.<sup>459</sup>

141. Finally, the Commission applies a "sliding scale approach" to its ultimate evaluation of benefit claims. Under this approach, where potential harms appear both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand.<sup>460</sup> On the other hand, where potential harms appear less likely and less substantial, we will accept a lesser showing.<sup>461</sup>

### B. Claimed Benefits

#### 1. Reduction of Vertical Integration and Media Concentration

142. DIRECTV is currently controlled by News Corp., which also controls Fox Broadcasting. As discussed above, Fox controls both a number of RSNs and a number of full-power television stations, as well as operating one of the four major television networks. As the Applicants point out, in approving News Corp.'s acquisition of control of DIRECTV, the Commission was concerned about the possible

<sup>454</sup> For instance, we consider "any efficiencies and other benefits that might be gained through increased ownership or control." 47 U.S.C. § 533(f)(2)(D).

<sup>455</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 610 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 189-90; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20064 ¶ 158; *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255; *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173.

<sup>456</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 610 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 190; *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173; see also *1992 Horizontal Merger Guidelines* § 4 (Rev. 1997).

<sup>457</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 611 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 190.

<sup>458</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 610-11 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630-31 ¶ 190.

<sup>459</sup> *Application of Western Wireless Corp. and ALLTEL Corp. for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13053, 13100 ¶ 132 (2005) ("*ALLTEL-WWC Order*").

<sup>460</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 611 ¶ 318; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20631 ¶ 192 (citing *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 256).

<sup>461</sup> *ATT-Bell South Order*, 22 FCC Rcd at 5662 ¶ 203.

harms that could occur to MVPDs that compete with DIRECTV because of News Corp.'s control of "must have" programming – Fox's broadcast television stations and RSNs.<sup>462</sup> In particular, the Commission found that if News Corp. acquired control of DIRECTV, it would have a greater incentive and ability to temporarily withhold its programming from other MVPDs and thereby be able to secure higher prices than it had before. Consumers would be harmed by both the temporary withholding and the resulting higher prices, which would likely be passed on to them.<sup>463</sup> The Commission therefore imposed a number of conditions on News Corp. to ameliorate these potential harms.<sup>464</sup>

143. The Applicants claim that the transfer of control of DIRECTV from News Corp. to Liberty Media will greatly decrease the amount of vertical integration and accompanying harms. While News Corp. currently controls 15 RSNs, after the transaction, Liberty Media will control only three. And while News Corp. owns a number of broadcast television stations, Liberty Media owns only two. Therefore, the harms the Commission was concerned about in the *News Corp.-Hughes* proceeding will be greatly reduced.<sup>465</sup>

144. The Applicants also state that Liberty Media is currently affiliated with News Corp., and, thus, with both Fox and DIRECTV, because it owns approximately 16 percent of News Corp. stock (which represents approximately 19 percent of the voting rights). The transaction will eliminate this ownership and will, therefore, in a different manner, reduce the amount of media consolidation. As the Commission has generally been concerned with the increase of media consolidation, the Applicants claim this deconsolidation as a public benefit.<sup>466</sup>

145. A number of commenters express skepticism that Liberty Media and News Corp. are truly disentangling themselves from each other.<sup>467</sup> EchoStar also argues that Liberty Media could have decoupled itself from News Corp. without acquiring DIRECTV in the process,<sup>468</sup> and that Liberty Media's statement that it may acquire more programming in the future means that the transaction will actually lead to more vertical integration.<sup>469</sup>

146. Commenters' skepticism is generally predicated on the number of ancillary contracts Liberty Media and News Corp. have entered into, and several commenters asked the Commission to carefully examine those contracts.<sup>470</sup> We have done so. The Applicants argue that the contracts are simply ordinary agreements that will allow the RSNs to continue to operate as they have in the past as part of the Fox RSN network, which already includes both News Corp.-controlled and independently controlled RSNs.<sup>471</sup> For example, several of the agreements cover services that News Corp. already provides to other RSNs that are affiliated with – but not controlled by – Fox and News Corp. The

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<sup>462</sup> *News Corp.-Hughes Order*, 19 FCC Rcd at 477 ¶ 4.

<sup>463</sup> *Id.*

<sup>464</sup> *See id.* at 552-55 ¶¶ 172-79, 572-76 ¶¶ 218-26.

<sup>465</sup> Moreover, as discussed above, we are imposing on Liberty Media similar conditions to those imposed on News Corp. with respect to any RSN that Liberty Media now owns or later acquires.

<sup>466</sup> Public Interest Statement at 19-20.

<sup>467</sup> Consumers Union Comments at 3-7; NCTC Comments at 6-7; EchoStar Petition at 26-33.

<sup>468</sup> EchoStar Petition at 32-33.

<sup>469</sup> *Id.* at 9.

<sup>470</sup> *See, e.g.*, NCTC Comments at 6; EchoStar Petition at 28-29

<sup>471</sup> Liberty Media Opposition at 11-16; News Corp. Opposition at 8-9.

agreements are part of the record in this proceeding. No commenter has pointed to any particular provision of the contracts that causes them concern. We have found no provision in these contracts that would give Fox or News Corporation an incentive to discriminate against competitors of Liberty Media or DIRECTV. We also agree with the Applicants that the ancillary contracts do not allow News Corp. to exercise any control or undue influence over the RSNs that will be owned by Liberty Media.

147. Commenters have also raised as evidence of the continued relationship of Liberty Media and News Corp. the fact that Chase Carey, then a member of the News Corp. Board of Directors, will continue to serve as CEO of DIRECTV after the transaction.<sup>472</sup> However, News Corp. stated that, upon consummation of the transaction, Carey would resign from News Corp.'s Board of Directors, and any News Corp. employees currently on DIRECTV's Board of Directors would resign from DIRECTV's Board. In fact, Carey resigned his position as a member of News Corp.'s Board of Directors on December 7, 2007.<sup>473</sup> News Corp. further states that the transaction will "completely sever" its ownership and control ties with DIRECTV.<sup>474</sup> Therefore, we find that Chase Carey's continued involvement with DIRECTV after the transaction will not result in any relationship between News Corp. and Liberty Media.

148. As an overarching point, News Corp. argues that, far from wishing to remain connected, News Corp. and Liberty Media entered into this agreement specifically to end the "complicated ownership connections" between them.<sup>475</sup> News Corp. states that the recent history of its tensions with Liberty Media is well documented.<sup>476</sup> Liberty Media increased its stake in News Corp. in 2004 without notice to News Corp. In response, News Corp. adopted a shareholders' rights plan to prevent Liberty Media from acquiring additional shares without approval from the News Corp. Board of Directors. News Corp. states that the parties then negotiated for more than two years before agreeing to this transaction as a way of disentangling their relationship.<sup>477</sup> News Corp. argues that this history belies any assumption or conclusion that the parties will be "close and interconnected" following consummation of the transaction.<sup>478</sup>

149. EchoStar argues that, aside from the alleged continued relationship between News Corp. and DIRECTV, the transaction will not reduce media vertical integration because Liberty Media owns a number of programming assets, as well as other related assets, and is constantly adding to its portfolio.<sup>479</sup> Therefore, EchoStar contends, the level of media concentration will not differ regardless whether DIRECTV is owned by News Corp. or Liberty Media. EchoStar agrees, however, that at least for now, Liberty Media has fewer programming assets than News Corp.<sup>480</sup> Moreover, Liberty Media has significantly less "must have" programming of the kind the Commission was concerned about in the *News Corp.-Hughes* proceeding, and Liberty Media has agreed to be bound by the same conditions we

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<sup>472</sup> Consumers Union Comments at 5-6; EchoStar Petition at 29-30.

<sup>473</sup> News Corp., *SEC Form 8-K* (filed Dec. 7, 2007).

<sup>474</sup> News Corp. Reply at 6-7.

<sup>475</sup> *Id.* at 6.

<sup>476</sup> *Id.* at 5 (citing SEC Definitive Proxy Statement).

<sup>477</sup> *Id.* at 5-6.

<sup>478</sup> *Id.* at 6.

<sup>479</sup> EchoStar Petition at 7-9, 32.

<sup>480</sup> *Id.* at 9.

imposed in *News Corp.-Hughes*.<sup>481</sup> We therefore find that the transfer of control of DIRECTV from News Corp. to Liberty Media will result in less media vertical integration.

150. In conclusion, we agree with the Applicants that the merger will result in Liberty Media and News Corp. severing their ownership interests with each other. Contrary to some commenters' concerns, we find that the agreements the parties have entered into with regard to the three RSNs that will be transferred to Liberty Media are not unusual, and we find nothing in them that would cause either Liberty Media or News Corp. to act in anything but their own, separate best business interests. Further, we find that the transfer of control of DIRECTV from News Corp. to Liberty Media, which owns fewer programming assets, only two broadcast stations and far fewer RSNs than News Corp., will lead to less media vertical integration.<sup>482</sup> We therefore conclude that the transaction will decrease media consolidation and that this decrease benefits the public.

## 2. Interactive Commerce and Other Technologies

151. The Applicants also claim as a benefit of the transaction that Liberty Media will now be able to make available to DIRECTV its experience and expertise in interactive commerce and other technologies.<sup>483</sup> Liberty Media argues that it has an established reputation for imagination and innovation and a long history of creating and developing new programming services.<sup>484</sup> Liberty Media argues that it will encourage DIRECTV to roll out advanced video service to consumers.<sup>485</sup> EchoStar, on the other hand, argues that the Application is devoid of any specific detail regarding the possibility of innovative synergies and, moreover, that any synergies are not merger specific.<sup>486</sup>

152. We agree that the Applicants have not provided sufficient detail about how or why the transaction will lead to greater innovation than would otherwise occur. When News Corp. acquired control of DIRECTV, it, too, claimed to have “a proven track record of innovation in programming and DTH services,”<sup>487</sup> and claimed that it would enhance interactive service and other innovations.<sup>488</sup> News Corp., however, provided far more detail in that application than the Applicants have here. Moreover, Liberty Media has not shown how DIRECTV will be *more* innovative under Liberty's control than the company is under News Corp.'s. We therefore conclude that while, as the Applicants claim, DIRECTV may very well continue to be innovative and imaginative, any benefits resulting from this aspect of the transaction are too nebulous and speculative to be considered.

## VII. BALANCING PUBLIC INTEREST HARMS AND BENEFITS

153. As we stated at the beginning of our analysis, our task under the Communications Act is to determine whether the “public interest, convenience and necessity will be served” by the granting of the

<sup>481</sup> Letter from Counsel for Liberty Media Corp. to Ms. Marlene Dortch, Secretary, FCC (Feb. 16, 2007); Liberty Media Opposition at 5-6.

<sup>482</sup> Also, as discussed above, we are imposing on Liberty Media remedial conditions to mitigate any competitive harms that might result from the vertical integration that will remain.

<sup>483</sup> Public Interest Statement at 20-21; Liberty Media Opposition at 30.

<sup>484</sup> Public Interest Statement at 20; Liberty Media Opposition at 30.

<sup>485</sup> Public Interest Statement at 21.

<sup>486</sup> EchoStar Petition at 33.

<sup>487</sup> See *News Corp.-Hughes Order*, 19 FCC Rcd at 611-12 ¶ 320.

<sup>488</sup> See *id.*, 19 FCC Rcd at 611-615 ¶¶ 320-28.



Application.<sup>489</sup> Having determined that the proposed transaction does not violate the Communications Act, other applicable statutes, or our rules, we now employ a balancing process, weighing the potential public interest harms of the proposed transaction that we have found against the potential public interest benefits.<sup>490</sup> The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.<sup>491</sup> Our options are to approve the application without conditions, approve it with conditions, or hold a hearing if we are unable to make the findings required for approval.<sup>492</sup> The Application and the substantial record before us make clear that, on balance, the public interest will be served by approval of the Application subject to the conditions that we have discussed above.

154. Liberty Media's proposed acquisition of DIRECTV is in many respects similar to News Corp.'s acquisition of DIRECTV, which the Commission approved with conditions in 2003. Liberty Media, like News Corp., controls video programming, and both the potential harms and the potential benefits of the combination of Liberty Media's and DIRECTV's assets are in many respects those inherent in the supplier/distributor integration. As we stated in 2003, on the one hand, certain of the potential competitive harms inherent in vertically integrated programming/MVPD providers have been recognized as requiring special remedies to prevent potential abuses. On the other hand, the remedies chosen, at least in recent years, have not generally been structural remedies, such as prohibitions on common ownership of programming and distribution assets, but behavioral remedies, such as requirements for program access and nondiscrimination.<sup>493</sup>

155. Recognizing these issues, the Applicants here have generally offered to be bound by the same conditions that the Commission imposed in *News Corp.* For the reasons discussed above in Section V.C., we accept the Applicants' proffer and impose similar conditions here, with some small modifications that take into account both the different assets controlled by Liberty Media and News Corp. and the parties' experience with the implementation of the conditions over the past few years. We conclude that these conditions are sufficient to ameliorate any potential vertical integration harms that might otherwise occur.

156. On the other hand, unlike in *News Corp.-Hughes*, this transaction also involves a potential horizontal overlap. If the transaction were to be approved as filed, John Malone would control two of the three MVPD providers serving parts of Puerto Rico: DIRECTV-Puerto Rico (through his control of Liberty Media) and LCPR (through his control of Liberty Global). The transaction would therefore decrease the number of independent MVPD providers serving many Puerto Rico consumers from three to two, and would likely result in increased prices, reduced quality, or decreased choices for those

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<sup>489</sup> See 47 U.S.C. §§ 310(d), 309(a), (d).

<sup>490</sup> See *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26.

<sup>491</sup> See *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

<sup>492</sup> If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, Section 309(e) of the Act requires that we designate the application for hearing. 47 U.S.C. § 309(e).

<sup>493</sup> See, e.g., 47 C.F.R. § 76.100, *et seq.*; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act*, 17 FCC Rcd 12124 (2002).

consumers. For the reasons discussed in Section V.C, we therefore are requiring that within one year of the adoption date of this Order, all of the attributable interests connecting DIRECTV-Puerto Rico and LCPR be severed.

157. We agree with the Applicants that the transaction will benefit the public interest. In particular, we find that the transfer of control of DIRECTV from News Corp. to Liberty Media, which owns fewer programming assets, only two broadcast stations, and far fewer RSNs than News Corp., will lead to less media vertical integration. Liberty Media also owns a minority interest in News Corp. itself, and the transaction will cause Liberty Media and News Corp. to sever their ownership interests with each other. We therefore conclude that the transaction will decrease media consolidation and that this decrease will likely benefit the public.

158. In sum, we find that the proposed transaction, as conditioned, will not likely cause harm to the public interest, and, that, indeed, it will result in some public interest benefits. Accordingly, after reviewing the record and weighing the potential harms against the potential benefits, we conclude that, on balance, the proposed transaction, as conditioned, will serve the public interest, convenience, and necessity.

## VIII. PROCEDURAL MATTERS

### A. Applicants' Waiver Request

159. The Applicants request a waiver of the Commission's space station application "cut-off" rules with respect to all pending applications filed by DIRECTV or its subsidiaries for additional space and earth station authorizations, "to the extent that those applications are subject to the Commission's 'first-come, first-served' processing regime."<sup>494</sup> Our rules provide that any pending application that is modified by a "major amendment" after a "cut-off" date specific to that application will be considered to be a "newly filed" application, therefore losing its place in the application processing queue. Prior to 2003, the Commission treated transfer of control applications as major amendments that could affect the length of time of the processing of an application. In 2003, however, the Commission determined that transfers of control would no longer be treated as major amendments of space station applications and would therefore not affect the processing of a space station application under its first-come, first-served procedures. Accordingly, the Commission eliminated the subsection of section 25.116 that classified transfer of control and assignment applications as "major amendments" for purposes of space station processing.<sup>495</sup> Thus, for purposes of processing space station applications subject to our first-come, first-served procedures, a transfer of control would have no impact on the status of the application. Accordingly, based on the foregoing, we dismiss the waiver request as moot.

### B. Weinstein Motion to Enlarge the Issue

160. On July 19, 2007, Stephen Weinstein filed a document entitled Motion to Enlarge the Issue ("Motion"). Weinstein claims that DIRECTV violated section 1.4000 of the Commission's rules governing over-the-air reception devices ("OTARD rule") and misrepresented OTARD requirements and protections.<sup>496</sup> Weinstein claims that DIRECTV did not give him accurate legal advice about the OTARD rule and his right to have an individual satellite antenna in cases where the landlord offers a central antenna system. He states: "In determining whether the proposed transfer will result in any party having excessive or monopolistic control, or in a restraint of trade between persons who are not parties to the

<sup>494</sup> Application at 26 -27. See 47 C.F.R. §§ 25.116(b)(4) and (d).

<sup>495</sup> 2003 First Space Station Reform Order, 18 FCC Rcd 10760, 10814 ¶¶ 138-40 (2003). See also Appendix B of that Order (eliminating section 25.116(b)(3)).

<sup>496</sup> 47 C.F.R. § 1.4000.

proposed transaction, it is essential [for the Commission] to consider that DIRECTV provides false legal advice to tenants, thereby preventing the tenants from obtaining service from a competitor."<sup>497</sup>

161. We decline to grant the Motion or to delay approval of the transaction pending an investigation of DIRECTV's practices regarding the Commission's OTARD rule. In general, the OTARD rule limits the ability of entities such as homeowners associations and landlords to restrict residents' ability to install certain antennas, including satellite antennas one meter or less in diameter. The Motion is beyond the scope of this proceeding, as Weinstein has not alleged a transaction-specific harm.<sup>498</sup> We deny the Motion.

## IX. ORDERING CLAUSES

162. Accordingly, having reviewed the Applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i), 4(j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, 310(d), that the Consolidated Application for Authority to Transfer Control of various Commission licenses and authorizations from News Corporation to Liberty Media Corporation IS GRANTED subject to the conditions set forth herein.<sup>499</sup>

163. IT IS FURTHER ORDERED that the Commission's grant of the transfer of control of licenses from News Corporation to Liberty Media Corporation is conditioned upon the completion, within one year from the adoption of this Order, of the severing of all attributable interests linking the relevant entities as described in Part V.C(1) of this Memorandum Opinion and Order as set forth more fully in Appendix B.

164. IT IS FURTHER ORDERED that pursuant to sections 4(i), 4(j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, 310(d), that the Petition to Deny filed by North Dakota Broadcasters IS DENIED and the Petition to Deny filed by EchoStar Satellite L.L.C. IS DENIED except to the extent otherwise indicated in this Order.

165. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, 310(d), that the Motion to Withdraw filed by Hispanic Information and Telecom Network IS GRANTED.

166. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, 310(d), that the Applicants' request to waive section 25.116 of the Commission's rules, 47 C.F.R. § 25.116, IS DISMISSED AS MOOT.

167. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, 310(d), that the Motion to Enlarge the Issue filed by Stephen Weinstein IS DENIED.

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<sup>497</sup> Motion at 1.

<sup>498</sup> If Weinstein believes that his landlord is violating the OTARD rule by restricting his ability to install an antenna, his remedy is to file a petition for declaratory ruling with the Commission as set forth in 47 C.F.R. § 1.2.

<sup>499</sup> See Appendix B.

168. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release, in accordance with section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Licenses and Authorizations

The consolidated application filed by News Corp., DIRECTV and Liberty Media includes Commission authorizations and licenses listed below. They are separated by the type of authorization or license, and, within each category, listed by licensee name, application or ULS file number, call sign or lead call sign (for ULS filings), and/or other service-specific information, as appropriate. Interested parties should refer to the applications for a more detailed listing of the authorizations or licenses. Each of the Applicants' subsidiaries or affiliates may hold multiple authorizations or licenses of a particular type.

## Part 25 – Satellite Communications

| <u>File No.</u>                 | <u>Licensee/Registrant</u> | <u>Call Sign</u> |
|---------------------------------|----------------------------|------------------|
| <i>Satellite Space Stations</i> |                            |                  |
| SAT-T/C-20070129-00021          | DIRECTV Enterprises, LLC   | S2369            |
|                                 |                            | S2430            |
|                                 |                            | S2455            |
|                                 |                            | S2632            |
|                                 |                            | S2669            |
|                                 |                            | S2673            |
|                                 |                            | S2693            |
| SAT-T/C-20070129-00023          | DIRECTV Enterprises, LLC   | S2132            |
|                                 |                            | S2133            |
|                                 |                            | S2191            |
|                                 |                            | S2640            |
|                                 |                            | S2641            |
|                                 |                            | S2689            |
| <i>Satellite Earth Stations</i> |                            |                  |
| SES-T/C-20070129-00151          | DIRECTV Enterprises, LLC   | E010129          |
|                                 |                            | E010130          |
|                                 |                            | E020172          |
|                                 |                            | E030105          |
|                                 |                            | E030117          |
|                                 |                            | E050112          |
|                                 |                            | E050113          |
|                                 |                            | E050121          |
|                                 |                            | E050122          |
|                                 |                            | E050229          |
|                                 |                            | E050230          |
|                                 |                            | E050255          |
|                                 |                            | E050286          |
|                                 |                            | E060014          |
|                                 |                            | E060187          |
| E060188                         |                            |                  |
| E060236                         |                            |                  |
| E060298                         |                            |                  |
| E060299                         |                            |                  |
| E930191                         |                            |                  |

| <u>File No.</u>                  | <u>Licensee/Registrant</u>       | <u>Call Sign</u> |
|----------------------------------|----------------------------------|------------------|
| SES-T/C-20070129-00151 (cont'd.) |                                  | E930229          |
|                                  |                                  | E930304          |
|                                  |                                  | E930485          |
|                                  |                                  | E950349          |
|                                  |                                  | E980285          |
|                                  |                                  | E980338          |
|                                  |                                  | E980340          |
|                                  |                                  | E980473          |
|                                  |                                  | E990159          |
| SES-T/C-20070129-00152           | DIRECTV Enterprises, LLC         | E050340          |
| SES-T/C-20070129-00153           | DIRECTV Enterprises, LLC         | E040179          |
|                                  |                                  | E040180          |
|                                  |                                  | E980170          |
|                                  |                                  | E980341          |
| SES-T/C-20070129-00154           | DIRECTV Enterprises, LLC         | E040024          |
| SES-T/C-20070129-00155           | California Broadcast Center, LLC | E010237          |
|                                  |                                  | E020091          |
| SES-T/C-20070129-00156           | DIRECTV Enterprises, LLC         | E990545          |

**Wireless Licenses**

| <u>File No.</u>         | <u>Licensee/Registrant</u> | <u>Call Sign</u> |
|-------------------------|----------------------------|------------------|
| FCC File No. 0002876183 | DIRECTV Enterprises, LLC   | WPZC401          |
| FCC File No. 0002876452 | The DIRECTV Group, Inc.    | WNEU909          |
| FCC File No. 0002876636 | DIRECTV, Inc.              | WPTZ691          |

## APPENDIX B

### Conditions

#### I. CONDITION TO REMEDY OVERLAPPING MVPD SERVICE IN PUERTO RICO

1. Within one year of the date on which this Order is adopted, all of the attributable interests connecting DIRECTV-Puerto Rico and Liberty Cablevision Puerto Rico, Ltd. (“LCPR”) must be severed, either by divestiture or by otherwise making the interests non-attributable. Specifically, within one year of the adoption date of this Order, the Applicants must certify either that they have complied with this condition or that they have filed all necessary applications for regulatory approval to do so. As part of the certification of compliance, the Applicants must explain with sufficient detail precisely how they came into compliance with this condition or how any filed applications would result in compliance and must identify all remaining direct or indirect relationships between DIRECTV-Puerto Rico and LCPR and their parent companies, including all indirect or direct subsidiaries, whether or not those relationships are attributable under our rules (e.g., equity or debt holdings or interests (including stock options), management roles of officers or directors, shared resources or personnel). Within nine months of the adoption of this Order, the Applicants shall submit to the Commission a description of their plan for complying with this condition to ensure that their proposal satisfies the public interest concerns underlying the condition.

2. If the Applicants choose to comply with the condition by making the connecting interests non-attributable, we will apply the Commission’s cable attribution standards set forth in Section 76.1000(b) of the rules.<sup>1</sup> We note that determining whether a particular interest is attributable is a fact-intensive inquiry, and, even where an interest may appear non-attributable under the bright-line attribution rules, the Commission retains the discretion to review individual cases that present unusual issues. Such would be the case where there are combined interests that are so extensive that they raise an issue of significant influence notwithstanding the fact that the interests do not come within the parameters of a particular attribution rule.<sup>2</sup>

#### II. PROGRAM CARRIAGE CONDITION TO PREVENT DISCRIMINATION AGAINST ALL FORMS OF UNAFFILIATED VIDEO PROGRAMMING

1. Neither Liberty Media nor DIRECTV will discriminate against unaffiliated programming services in the selection, price, terms, or conditions of carriage.

#### III. PROGRAM ACCESS CONDITIONS TO ENSURE NON-DISCRIMINATORY ACCESS TO ALL SATELLITE CABLE PROGRAMMING

1. Liberty Media shall not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD.<sup>3</sup> Liberty Media shall continue to make such

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<sup>1</sup> See 47 C.F.R. § 76.1000(b).

<sup>2</sup> *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd. 12559, 12581 ¶ 44 (1999).

<sup>3</sup> The term “Liberty Media” as used in this Appendix includes any entity or program rights holder in which Liberty Media or John Malone holds an attributable interest. Thus, the term “Liberty Media” includes Discovery (continued....)

services available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.<sup>4</sup>

2. DIRECTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.<sup>5</sup>

3. As long as Liberty Media holds an attributable interest in DIRECTV, DIRECTV will deal with any Affiliated Program Rights Holder with respect to programming services the Affiliated Program Rights Holder controls as a vertically integrated programmer subject to the program access rules.<sup>6</sup>

4. Neither Liberty Media nor DIRECTV (including any entity over which either firm 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.

5. 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).<sup>7</sup>

6. These conditions will apply to Liberty Media, DIRECTV, and any Affiliated Program Rights Holder until the later of a determination by the Commission that Liberty Media no longer holds an attributable interest in DIRECTV or the Commission's program access rules no longer remain in effect (provided that if the program access rules are modified these commitments shall be modified, as the Commission deems appropriate, to conform to any revised rules adopted by the Commission).

7. Aggrieved MVPDs may bring program access complaints against the Applicants using the procedures found at Section 76.1003 of the Commission's rules.<sup>8</sup>

(Continued from previous page) \_\_\_\_\_

Communications. Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in any non-broadcast national or regional programming service while these conditions are in effect if the programming service is not obligated to abide by such conditions.

<sup>4</sup> In committing not to offer its programming services on an exclusive basis, Liberty voluntarily forgoes 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).

<sup>5</sup> The term "Affiliated Program Rights Holder" includes (i) any program rights holder in which Liberty Media or DIRECTV holds a non-controlling "attributable interest" (as determined by the FCC's program access attribution rules) or in which any officer or director of Liberty Media, DIRECTV, or of any other entity controlled by John Malone holds an attributable interest; and (ii) any program rights holder in which an entity or person that holds an attributable interest also holds a non-controlling attributable interest in Liberty Media or DIRECTV, provided that Liberty Media or DIRECTV has actual knowledge of such entity's or person's attributable interest in such program rights holder. As the Commission noted in *New Corp.-Hughes*, this commitment extends beyond the program access rules because DBS operators are not included within the exclusivity prohibition. *See* 47 C.F.R. § 1002(c).

<sup>6</sup> This condition would only be of significance in the event an Affiliated Program Rights Holder is not otherwise subject to the Commission's program access rules.

<sup>7</sup> *See* Discussion *supra* at Section V.C.2 concerning exclusive arrangements with unaffiliated programmers.

<sup>8</sup> 47 C.F.R. § 76.1003.



#### IV. CONDITIONS CONCERNING ACCESS TO LOCAL BROADCAST TELEVISION STATION SIGNALS

1. When negotiations fail to produce a mutually acceptable set of price, terms and conditions for a retransmission consent agreement with a local broadcast television station that Liberty Media owns or on whose behalf it negotiates retransmission consent (“Liberty Media Broadcast Station”), an MVPD may choose to submit a dispute to commercial arbitration in accordance with the following procedures.<sup>9</sup>

##### A. *Commercial Arbitration Remedy*

1. The commercial arbitration condition commences following the expiration of any existing retransmission consent agreement.

2. Following such expiration, or 90 days after a first time request for retransmission consent, a MVPD may notify Liberty Media within five business days that it intends to request arbitration over the terms and conditions of retransmission consent.

3. Upon receiving timely notice of the MVPD’s intent to arbitrate, Liberty Media 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.

4. Retransmission of the broadcast signal during the period of arbitration is not required in the case of first-time requests for carriage.<sup>10</sup>

5. “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 Liberty Media will enter a “cooling-off” period during which negotiations will continue.

6. 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 15th business day after the expiration of the retransmission consent agreement and no later than the end of the 20th business day following such expiration. If the MVPD makes a timely demand, Liberty Media must participate in the arbitration proceeding.

7. The AAA will notify Liberty Media and the MVPD upon receiving the MVPD’s formal filing.

8. Liberty Media 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.

9. The MVPD’s final offer may not be disclosed until the AAA has received the final offer from Liberty Media.

10. 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.

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<sup>9</sup> For purposes of this Section IV, ownership shall be determined in accordance with the Commission’s attribution rules applicable to the ownership of broadcast licensees, 47 C.F.R. § 73.3555 Notes 1-3. Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in a television broadcast station during the period of the conditions set forth in this Appendix if the broadcast station is not obligated to abide by such conditions.

<sup>10</sup> A first-time request for carriage does not include a request for previously carried broadcast programming that has experienced a change in ownership.

## **B. Rules of Arbitration**

1. 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 Part F, below. The arbitrator shall issue his decision within 30 days from the date that the arbitrator is appointed.

2. 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 modify the requirement that they engage in final-offer arbitration.

3. 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.

4. 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:

- a. current contracts between MVPDs and Liberty-affiliated stations on whose behalf Liberty Media does not negotiate;
- b. current contracts between MVPDs and non-Liberty network stations;
- c. offers made in the preceding negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
- d. evidence of the relative value of Liberty programming compared to other network programming (e.g., advertising rates, ratings);
- e. contracts between MVPDs and stations on whose behalf Liberty Media has negotiated made before Liberty Media acquired control of DIRECTV, as well as offers made in such negotiations;
- f. internal studies of the imputed value of retransmission consent agreements in bundled agreements;
- g. changes in the value of non-Liberty retransmission consent agreements;
- h. changes in the value or costs of Liberty programming or broadcast stations, or in other prices relevant to the relative value of Liberty broadcast programming (e.g., advertising rates).

5. The arbitrator may not consider offers prior to the arbitration made by the MVPD and Liberty Media for the programming at issue in determining the fair market value.

6. 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 party's costs and expenses (including attorney fees) against the offending party.

7. 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 Liberty Media 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. If carriage of the Liberty Media Broadcast Station’s programming has continued uninterrupted during the arbitration process, and if the arbitrator’s award requires a smaller amount to be paid than was required under the terms of the expired contract, the Liberty Media Broadcast Stations will credit the MVPD with an amount representing the difference between the amount actually paid under the terms of the expired contract during the period of arbitration and the amount that is required to be paid under the arbitrator’s award.

8. 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 final award with the Commission and does so in a timely manner.

### ***C. Review of Final Award by the Commission***

1. A party aggrieved by the arbitrator's final 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 petition, together with an unredacted copy of the arbitrator's award, shall be filed with the Secretary's office and shall be concurrently served on the Chief, Media Bureau. The Commission shall issue its findings and conclusions not more than 60 days after receipt of the petition, which may be extended by the Commission for one period of 60 days.

2. 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.

3. 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.

4. The Commission may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if the Commission 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 attorney fees) of the arbitration.

5. Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter.

### ***D. Provisions Applicable to Small MVPDs***

1. 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 Liberty Media for carriage of the programming subject to this condition, and Liberty Media may not refuse to negotiate with such an entity.<sup>11</sup> The designated collective bargaining entity will have all the rights and responsibilities granted by these conditions. An MVPD that uses a bargaining agent may, notwithstanding any contractual term to the contrary, disclose to such bargaining agent the date upon which its then current retransmission consent agreement expires.

2. When dealing with MVPDs with fewer than 5,000 total subscribers, we require Liberty Media to either elect "must-carry" status or negotiate retransmission consent for its stations and any affiliated station on whose behalf it negotiates retransmission consent without any requirements for cash compensation or carriage of programming other than the broadcast signal.

### ***E. Additional Provisions Concerning Arbitration***

1. No later than 20 business days prior to the expiration of a must-carry election or retransmission consent agreement with an MVPD, Liberty Media must provide the MVPD with a copy of the conditions imposed in this Order. Liberty Media must provide a copy of the conditions imposed in

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<sup>11</sup> 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. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 7393 (1995); see also 47 C.F.R. §76.901(e).

this Order within 10 business days of receiving a first time request for retransmission consent.

2. This condition will expire six years after consummation of the transaction, or on such date as the Commission deems to be necessary in the public interest pursuant to an early termination of the condition in accordance with the provisions below.

3. 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 condition has proven unduly burdensome, rendering the condition no longer necessary in the public interest.

#### ***F. Modifications To Rules For Arbitration Involving Retransmission Consent***

1. We modify the Rules in several respects as they apply to arbitration over retransmission consent.

2. **Initiation of Arbitration.** Arbitration shall be initiated as provided in Rule R-4 except that, under Rule R-4(a)(ii) the MVPD shall not be required to submit copies of the arbitration provisions of the contract, but shall instead refer to this Order in the demand for arbitration. Such reference shall be sufficient for the AAA to take jurisdiction.

3. **Appointment of the Arbitrator.** Appointment of an arbitrator shall be in accordance with rule E-4 of the Rules. Arbitrators included on the list referred to in rule E-4 (a) of the Rules shall be selected from a panel jointly developed by the American Arbitration Association and the Commission and will be based on the following criteria:

- a) The arbitrator shall be a lawyer admitted to the bar of a state of the United States or the District of Columbia;
- b) The arbitrator shall have been practicing law for at least 10 years;
- c) The arbitrator shall have prior experience in mediating or arbitrating disputes concerning media programming contracts;
- d) The arbitrator shall have negotiated or have knowledge of the terms of retransmission contracts.

4. **Exchange of Information.** At the request of any party, or at the discretion of the arbitrator, the arbitrator may direct the production of current and previous contracts between either of the parties and MVPDs and broadcast stations as well as any additional information that is considered relevant in determining the value of the programming to the parties. Parties may request that access to information of a commercially sensitive nature be restricted to the arbitrator and outside counsel and experts of the opposing party pursuant to a protective order.

5. **Administrative Fees and Expenses.** 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 reasonable attorneys' fees) against the offending party.

6. **Locale.** In the absence of agreement between the parties, the arbitration shall be held in the city that contains the headquarters of the MVPD.

7. **Form of Award.** The arbitrator shall render a written award containing the arbitrator's findings of fact and reasons supporting the award. If the award contains confidential information, the arbitrator shall compile two versions of the award; one containing the confidential information and one with such information redacted. The version of the award containing the confidential information shall only be disclosed to persons bound by the Protective Order issued in connection with the arbitration. The

parties shall include such confidential version in the record of any review of the arbitrator's decision by the Commission.

**G. *Non-discriminatory Access to Local Broadcast Television Station Signals***

1. The non-discrimination commitments that Liberty Media has proposed and we have crafted as conditions regarding access to non-discriminatory access to satellite cable programming networks are extended to any broadcast station that Liberty Media owns or on whose behalf it negotiates retransmission consent.

**H. *Good Faith and Exclusivity Requirements of SHVERA***

1. The good faith and exclusivity requirements of SHVERA, in effect by their terms until December 31, 2009, are extended to apply to retransmission consent negotiations undertaken by Liberty Media for carriage of its local broadcast station signals so long as the program access rules are in effect.<sup>12</sup>

**IV. ADDITIONAL CONDITIONS CONCERNING ACCESS TO REGIONAL SPORTS NETWORKS**

1. When negotiations fail to produce a mutually acceptable set of price, terms and conditions for carriage of a non-broadcast regional sports network owned, managed, or controlled by Liberty Media either now or in the future ("Liberty Media RSN"), an MVPD may choose to submit a dispute to commercial arbitration in accordance with the following procedures.<sup>13</sup>

**A. *Commercial Arbitration Remedy***

1. An aggrieved MVPD may submit a dispute with the Liberty Media RSN over the terms and conditions of carriage of RSN programming in each region in which Liberty Media owns, manages or holds a controlling interest in a regional sports network.

2. Following the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify the Liberty Media RSN within five business days that it intends to request commercial arbitration to determine the terms of the new affiliation agreement.

3. Upon receiving timely notice of the MVPD's intent to arbitrate, a Liberty Media RSN 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.

4. Carriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage.<sup>14</sup>

5. "*Cooling Off Period.*" The period following the Liberty Media RSN's receipt of timely notice of the MVPD's intent to arbitrate and before the MVPD's filing for formal arbitration with the AAA shall constitute a "cooling-off" period during which time negotiations are to continue.

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<sup>12</sup> See 47 C.F.R. § 76.1000, *et. seq.*

<sup>13</sup> Ownership will be determined in accordance with the attribution standards applicable to the Commission's program access rules. See 47 C.F.R. § 76.1000, *et seq.* Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in an RSN during the period of the conditions set forth in this Appendix if the RSN is not obligated to abide by such conditions.

<sup>14</sup> A first-time request for carriage does not include a request for a previously carried RSN that has experienced a change in ownership.

6. *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 15th business day after the expiration of the RSN contract and no later than the end of the 20th business day following such expiration. If the MVPD makes a timely demand, the Liberty Media RSN must participate in the arbitration proceeding.

7. The AAA will notify the Liberty Media RSN and the MVPD upon receiving the MVPD's formal filing.

8. The Liberty Media RSN 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.

9. The MVPD's final offer may not be disclosed until the AAA has received the final offer from the Liberty Media RSN.

10. 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.

### **B. Rules of Arbitration**

1. 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 Part F below. The arbitrator shall issue his decision within 30 days from the date that the arbitrator is appointed.

2. 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 modify the requirement that they engage in final-offer arbitration.

3. 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.

4. Under no circumstances will the arbitrator choose a final offer that does not permit the Liberty Media RSN to recover a reasonable share of the costs of acquiring the programming at issue.

5. 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),<sup>15</sup> including, but not limited to:

- a) current or previous contracts between MVPDs and RSNs in which Liberty Media 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);
- b) evidence of the relative value of such programming compared to the RSN programming at issue (*e.g.*, advertising rates, ratings);
- c) internal studies or discussions of the imputed value of RSN programming in bundled agreements;
- d) other evidence (including internal discussions) of the value of RSN programming;
- e) changes in the value of non-Liberty Media RSN programming agreements;
- f) changes in the value or costs of Liberty Media RSN programming, or in other prices relevant to the relative value of Liberty Media RSN programming (*e.g.*, advertising rates).

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<sup>15</sup> We clarify that, by "possession," we mean actual possession or control.

6. The arbitrator may not consider offers prior to the arbitration made by the MVPD and the Liberty Media RSN for the programming at issue in determining the fair market value.

7. 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 party's costs and expenses (including attorney fees) against the offending party.

8. 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. If carriage of the RSN programming has continued uninterrupted during the arbitration process, and if the arbitrator's award requires a higher amount to be paid than was required under the terms of the expired contract, the MVPD will make an additional payment to the Liberty Media RSN 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. If carriage of the Liberty Media RSN programming has continued uninterrupted during the arbitration process, and if the arbitrator's award requires a smaller amount to be paid than was required under the terms of the expired contract, the Liberty Media RSN will credit the MVPD with an amount representing the difference between the amount actually paid under the terms of the expired contract during the period of arbitration and the amount that is required to be paid under the arbitrator's award.

9. 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.

#### ***C. Review of Final Award by the Commission***

1. A party aggrieved by the arbitrator's final 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 petition, together with an unredacted copy of the arbitrator's award, shall be filed with the Secretary's office and shall be concurrently served upon the Chief, Media Bureau. The Commission shall issue its findings and conclusions not more than 60 days after receipt of the petition, which may be extended by the Commission for one period of 60 days.

2. 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.

3. 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.

4. The Commission may award the winning party costs and expenses (including reasonable attorney 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.

5. Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter.

#### ***D. Provisions Applicable to Small MVPDs***

1. An MVPD meeting the definition of a "small cable company" may appoint a bargaining agent to bargain collectively on its behalf in negotiating carriage of RSNs with the Liberty Media RSN and the Liberty Media RSN may not refuse to negotiate carriage of RSN programming with such an entity.<sup>16</sup> The designated collective bargaining entity will have all the rights and responsibilities granted

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<sup>16</sup> See *supra* note 510.

by these conditions. An MVPD that uses a bargaining agent may, notwithstanding any contractual term to the contrary, disclose to such bargaining agent the date upon which its then current carriage contract with the RSN expires.

***E. Additional Provisions Concerning Arbitration***

1. No later than 20 business days prior to the expiration of an affiliation agreement with an MVPD for video programming subject to this condition, the Liberty Media RSN must provide the MVPD with a copy of the conditions imposed in this Order. No later than 10 business days after receiving a first time request for carriage, the Liberty Media RSN must provide the requesting MVPD with a copy of this Order's conditions.

2. This condition will expire six years after the consummation of the transaction, or on such date as the Commission deems to be necessary in the public interest pursuant to early termination in accordance with the provisions below. 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 condition have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

***F. Modifications To Rules For Arbitration Involving Regional Sports Networks***

1. We modify the Rules in several respects as they apply to arbitration involving regional sports networks.

2. Initiation of Arbitration. Arbitration shall be initiated as provided in Rule R-4 except that, under Rule R-4 (a) (ii) the MVPD shall not be required to submit copies of the arbitration provisions of the contract, but shall instead refer to this Order in the demand for arbitration. Such reference shall be sufficient for the AAA to take jurisdiction.

3. Appointment of the Arbitrator. Appointment of an arbitrator shall be in accordance with rule E-4 of the Rules. Arbitrators included on the list referred to in rule E-4 (a) of the Rules shall be selected from a panel jointly developed by the American Arbitration Association and the Commission and will be based on the following criteria:

- a) The arbitrator shall be a lawyer admitted to the bar of a state of the United States or the District of Columbia;
- b) The arbitrator shall have been practicing law for at least 10 years;
- c) The arbitrator shall have prior experience in mediating or arbitrating disputes concerning media programming contracts; and
- d) The arbitrator shall have negotiated or have knowledge of the terms of comparable cable programming network contracts.

4. Exchange of Information. At the request of any party, or at the discretion of the arbitrator, the arbitrator may direct the production of current and previous contracts between either of the parties and MVPDs, broadcast stations, video programming networks, and sports teams, leagues, and organizations, as well as any additional information that is considered relevant in determining the value of the programming to the parties. Parties may request that access to information of a commercially sensitive nature be restricted to the arbitrator and outside counsel and experts of the opposing party pursuant to a protective order.

5. Administrative Fees and Expenses. 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 reasonable attorneys' fees) against the offending party.

6. Locale. In the absence of agreement between the parties, the arbitration shall be held in the city that contains the headquarters of the MVPD.



7. Form of Award. The arbitrator shall render a written award containing the arbitrator's findings of fact and reasons supporting the award. If the award contains confidential information, the arbitrator shall compile two versions of the award, one containing the confidential information and one with such information redacted. The version of the award containing the confidential information shall only be disclosed to persons bound by the Protective Order issued in connection with the arbitration. The parties shall include such confidential version in the record of any review of the arbitrator's decision by the Commission.

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

Re: *News Corp. and the DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control, MB Docket No. 07-18*

Four years ago, I strenuously dissented to the Commission's decision to allow News Corp. to acquire DirecTV. At the time, I said that the consolidation of so many media properties under News Corp.'s control could not be good for localism, diversity and competition. Nothing in the past four years has alleviated my concerns. To the contrary, the intervening years only confirm the devastating effect of media consolidation on the health of our democracy and the public interest.

Nevertheless, while I have objected to many of the Commission's decisions that have brought us to this point, I must make decisions based on the facts as they exist today. The question here is whether we should approve the transfer of assets from one giant media conglomerate to a marginally-less-giant media conglomerate. Once consummated, the transaction will result in a measure of de-consolidation and somewhat less vertical integration. That is the distinction between this transaction and the Hughes-News Corp. deal four years ago, and that is why I am concurring rather than dissenting in today's decision.

I support the Order's imposition of the *News Corp-Hughes* conditions and the requirement that the Applicant to abide by these conditions for a fresh six year period. I also support the Order's requirement that DirecTV-Puerto Rico and Liberty Cablevision of Puerto Rico sever any attributable relationships within a one-year period. This should ensure that consumers in Puerto Rico will not be faced with fewer choices in video providers after the condition is met.

I am disappointed that the Commission failed to adopt a condition requiring DirecTV to provide local-into-local service via satellite to all of the nation's 210 television markets within a reasonable period of time. Such a condition would have served the public interest by ensuring that consumers in rural states from North Dakota to Michigan to Maine have access to the news and public safety information provided by local broadcast stations—without the upfront investment contemplated by the Applicant's over-the-air solution for these markets.

In the end, this transaction is hardly an occasion to jump for joy. The Commission should be waging a proactive battle against harmful media consolidation, not simply accepting small levels of de-consolidation when it comes. Over the past twenty-five years, the Commission has permitted the public interest largely to be defined by the demands of Wall Street and Madison Avenue. It's high time to restore a sense of balance to the system and give the American people the media environment they deserve.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN  
APPROVING IN PART, DISSENTING IN PART**

Re: News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control., MB Docket No. 07-18.

I approve in part this transaction, because it is in the public interest to deconsolidate a major vertically-integrated media and entertainment company that has significant interests in broadcasting, satellite program delivery, cable programming, film and print. While News Corp is transferring DirecTV to Liberty Media -- another vertically-integrated media company which seems to have an appetite to become even more vertically-integrated<sup>1</sup> -- a little media deconsolidation is better than no deconsolidation at all.

Equally significant is the willingness of Liberty Media and DirecTV to abide by the Commission's program access and program carriage rules and to agree to special retransmission consent and regional sports network arbitration conditions. These conditions safeguard against potentially anticompetitive practices of a vertically-integrated media company.

I must, however, dissent in part to the approval of this transaction, because it substantially frustrates important objectives of the Communications Act and longstanding policy goals of the Commission.

As the Commission has stated repeatedly, video competition is a significant policy goal and the delivery of local broadcast stations to local markets is an important element of a compelling subscription service's program offering. In order to promote video competition, increase choices and lower prices, cable and satellite operators should provide comparable services and every community in the United States should be served. In 2003, News Corporation argued that "DirecTV will be the strongest possible competitor to incumbent cable operators only if it can provide consumers with their local broadcast channels...." As a regulatory agency, the Commission should ensure that DBS should be just as attractive as cable and no community is left behind. Scores of markets throughout the country have been ignored by DirecTV. The Commission should not neglect these markets, relegating them to second-class video citizenship.

Perhaps because I am from rural America, I can appreciate fully the discouraging impact that the lack of DBS local-into-local service has on the video choices of rural households. This disincentive to satellite television service is compounded by DirecTV's hybrid local-into-local solution, which amounts to a rural or undesired market tax -- approved by members of the Commission who have often complained about video distributors requiring consumers to purchase expensive set-top boxes when cheaper alternatives could be made available.

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<sup>1</sup> During the pendency of this transaction, Liberty Media has proposed to purchase two broadcast stations, WFRV-TV in Green Bay, Wisconsin, and its satellite station WJMN-TV in Escanaba, Michigan.

I cannot support an unfair service tax on rural households, while DirecTV has made the business decision to provide local-into-local HD service over the next few years to local markets that are already served. A similar commitment should be made to provide local-into-local service to unserved markets in the coming years. Universal local-into-local service should be a localism goal of the Commission, and it should be an imperative for DirecTV. The benefits of video competition should be available for all Americans.