

DIRECT BROADCAST SATELLITE SERVICE IN THE MULTICHANNEL VIDEO DISTRIBUTION MARKET

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED EIGHTH CONGRESS FIRST SESSION

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DIRECT BROADCAST SATELLITE SERVICE IN THE MULTICHANNEL VIDEO DISTRIBUTION MARKET

THURSDAY, MAY 8, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee), presiding.

Chairman SENSENBRENNER. The Committee will be in order.

The Committee on the Judiciary has exclusive congressional jurisdiction over laws pertaining to antitrust and effective competition in the national marketplace. As Chairman of this Committee, I have made it a priority to rigorously examine business practices and structural barriers that unfairly restrain competition in our Nation's free market economy. Over 90 million Americans receive multichannel video services. The multichannel video industry, which comprises both cable and satellite video service distributors has expanded entertainment options for millions of Americans and provided access to timely and important news information. Last year cable and satellite revenues were well over \$50 billion.

The last several years have seen rapid growth in the direct broadcast satellite video distribution market. DBS technology provides Americans with expanded viewing options by transmitting satellite signals directly to their homes. Since 1994 the number of DBS subscribers has skyrocketed from zero to nearly 20 million. Satellite service has provided millions of Americans with access to multichannel video programs once reserved to cable subscribers in urban areas. In my State of Wisconsin, for example, 30 percent of the homes have no access to cable, including mine.

My Committee colleagues on both sides of this dais have heard complaints from constituents concerning poor cable service and cable bills that continue to increase well above the rate of inflation. DBS serves as an important competitive counterweight to cable's traditional dominance of the multichannel video TV programming distribution market. Two fierce competitors, DirecTV and EchoStar, control over 90 percent of the U.S. DBS market, but only around 20 percent of the broader, multichannel video distribution market. DBS offers the potential to provide rural communities with broadband Internet service, a central feature of the 21st century infrastructure. But far more remains to be accomplished in this field.

In 2001 the Hughes Corporation announced plans to sell DirecTV to EchoStar Communications. That combined company would have created a horizontally-integrated U.S. DBS monopoly. In December of 2001 this Committee conducted an oversight hearing on competition in the multichannel video distribution market at which competitive aspects of this proposal were discussed. After a protracted period of review, the Department of Justice, and a unanimous FCC, rejected that merger because of its serious anticompetitive potential.

Last month News Corp. announced that it had acquired a controlling interest in Hughes Corporation's DirecTV. While reaction to this announcement has not been universally enthusiastic, there is virtually unanimous agreement that the competitive implications of this merger are fundamentally different from those presented by the failed EchoStar-DirecTV merger. Because News Corp. does not own U.S. based satellite distribution assets, its acquisition of DirecTV does not raise horizontal antitrust concerns. At the same time, News Corp. has significant programming assets, including 20th Century Fox, the Fox Network, National Geographic Network and the Fox News Channel. As a result, its acquisition of DirecTV has led some to express concern about the creation of a vertically-oriented media conglomerate that could withhold programming from distribution competitors. Vertically-oriented media organizations are not without parallel in the U.S. media market. Larger media companies such as AOL Time Warner control both programming and distribution resources. Nonetheless, in its recently filed FCC transfer application, News Corp. agreed to several binding commitments to address potential program access concerns. The Committee looks forward to learning more about the nature and scope of these obligations. It should also be emphasized that News Corp.'s acquisition of DirecTV does not require relaxing media ownership rules presently being examined by the FCC.

Before we begin, I would like to stress that the purpose of today's hearing is not to prejudice the outcome of pending antitrust review of News Corp.'s proposed acquisition of DirecTV. We are legislators, not regulators. However, as legislators, particularly on this Committee, we have an obligation to continually examine the legal environment to ensure our antitrust laws are enforced in a manner that provides American consumers the most affordable, highest-quality products that our free-market economy can produce. Today's hearing advances this important commitment. And let me state that this hearing is restricted to this particular aspect, and the Chair intends to rule out of order questions or comments that are outside the scope of this hearing.

I look forward to hearing from today's distinguished panel, and yield to Ranking Member Conyers for his opening remarks.

Mr. CONYERS. Thank you, Mr. Chairman. Good morning, Members of the Committee, witnesses. I'm happy to have you all here. I want to thank the Chairman to begin with. I think this is very important, and Mr. Murdoch is not the most frequent witness that we have up on the Hill. We should extend our compliments to him for accepting our invitation.

We're all here to examine a merger that could have a greater potential impact on the diversity that we consider is so important in

the American system. News Corp., 16 billion global, to acquire DirecTV, 9 billion, subsidiary of General Motors, reaches 11 million viewers. This is the big guys.

New Corp would be a new entrant into the multichannel video market, and so the merger does not present any serious horizontal antitrust issues as far as I and my lawyers are concerned. So if there are antitrust issues, they're all vertical. Well, I don't know how some people count, but when you count viewers, News Corp.'s market share is about 19 or 20 percent. And in specific markets like sports programs, it's probably 50 percent or more of a given geographic market, a position that could constitute a market power issue under case law.

So what can we do to make sure that this enormous aggregation of power is not misused? Well, we get promises. News Corp. has promised to make Fox programming available to DirecTV's competitors on comparable terms and prices. Now, will Fox overcharge both DirecTV and its competitors for a desirable program? No. They wouldn't do anything like that. [Laughter.]

So when you put that possibility together with another possibility, that FCC may lift ownership caps entirely, we come up with a more critical issue that needs to be examined, and so that's why we're here. We want to put all the cards on the table. This is a one-time hearing, unless I can restrain the Chairman from holding a second hearing on this subject. So we've got to figure this stuff out. So I want as many of you that can, put aside—we've got your prepared statement, but let's talk business here today. What about the consumers? Where do they fit into this picture? On the affirmative action side we've got a very sorry picture. And so we are here, as the Federal Government always says, "We're here to help you guys. We're friends. Let's all work this out together."

There are some other issues here, as Chairman Sensenbrenner has raised, and he's asked me not to raise them, but I've got your addresses anyway, so I'll be seeing you after this hearing to go into them as well.

So I thank you again, Mr. Chairman.

Chairman SENSENBRENNER. Thank you. Without objection, all Members opening statements will appear in the record at this point.

[The prepared statement of Mr. Goodlatte follows:]

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF VIRGINIA

Thank you, Mr. Chairman, for your aggressive oversight of our Nation's antitrust laws. I am pleased to be here today to discuss the proposed merger of News Corp. and DirecTV. Direct Broadcast Satellite (DBS) technology brings broadcast television to rural areas, such as portions of the 6th district of Virginia, that otherwise would be difficult, if not impossible to reach by other video delivery technologies. Because the signals are sent directly to the homes of the consumers, this delivery method is not as limited by mountainous terrain as are other technologies. DBS is crucial to rural areas, and I have a strong interest in ensuring that competition in the DBS market thrives.

DBS technology provides important competition in the multi-channel video distribution market. For years, cable companies dominated this market but now DBS technology provides a high quality option for consumers. The continued growth of both the cable and DBS distribution industries will create a competitive atmosphere in the market and will thus ultimately benefit consumers.

Some argue that this proposed merger would create an anti-competitive environment. However, the proposed merger of DirecTV and News Corp. certainly does not raise horizontal antitrust concerns. Although there are some that question whether such a vertically-oriented business model would create an anti-competitive environment, I am pleased that News Corp. has expressed a willingness to adopt certain guidelines to specifically address the concerns that it could potentially deny access to its programming.

I am hopeful that these commitments from News Corp. illustrate the company's willingness to work to ensure that this proposed merger is good for competition and good for consumers. I look forward to hearing more details about the proposed merger and the precautions that are being taken to ensure that competition in the multi-channel video distribution market thrives. Thank you again Mr. Chairman, for holding this important hearing.

[The prepared statement of Mr. Jenkins follows:]

PREPARED STATEMENT OF THE HONORABLE WILLIAM L. JENKINS, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF TENNESSEE

I appreciate Chairman Sensenbrenner holding a hearing today to explore the proposed merger between News Corporation and DirectTV. Although I was required to miss most of the testimony due to the Agriculture Committee's legislative markup, I am familiar with the subject.

The message I receive repeatedly from the constituents of the first district of Tennessee is their need to obtain local channels, the expansion of local programming into more markets and the advancement of new technologies that will bring high-speed internet access to rural areas at an affordable price with improved quality.

The testimony given today suggested this may be achieved by the proposed merger. I am hopeful that all of those who review the proposed merger between News Corporation and DirectTV will keep the public in mind and the need to allow rural areas in the United States to be included in the advancements made in the media markets.

[The prepared statement of Mr. Feeney follows:]

PREPARED STATEMENT OF THE HONORABLE TOM FEENEY, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman, I want to thank you for holding this hearing today on "Direct Broadcast Satellite Service in the Multichannel Video Distribution Market." I believe that the innovation and competition that the satellite industry has brought to the pay television market has already had a positive impact on consumers. However, I also believe that the satellite industry is only at the early stages of being able to truly compete with cable. That is why I strongly support News Corporation's purchase of DirecTV. I believe that a combined News Corporation—DirecTV will offer the first true competition to cable and will make both cable and satellite a better service for consumers.

News Corporation has a history of bringing competition and innovation to old markets. From its introduction of a fourth television network, to competing with an entrenched cable news service, to starting the first 24-hour Spanish language sports channel, News Corporation has always been willing to invest and innovate to shake up the status quo. I believe that News Corporation will do the same in the pay television market. With the introduction of more vibrant competition in the MVPD marketplace, not only will cable rates likely stabilize, but consumers will benefit from improved service and technological innovation as News Corporation and cable operators try to differentiate their products in order to attract and maintain customers. While concerns have been raised about vertical integration and the anti-competitive threat posed by the combination of programming content and distribution outlet, I believe that the parties program access commitments will ensure that all competitive MVPD operators will have fair and open access to News Corporation programming. I look forward to working with the parties and the regulators to ensure that this merger is approved quickly and will provide the best competition and choice for all consumers.

[The prepared statement of Mr. Flake follows:]

PREPARED STATEMENT OF THE HONORABLE JEFF FLAKE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA

Thank you, Mr. Chairman, for conducting this important hearing on the proposed merger between News Corporation and Hughes Electronics.

As a believer in the free market, Mr. Chairman, when it comes to public policy, I always seek to find ways to allow the market to work—to determine what succeeds and what fails. Governments are not equipped to predict the market, nor should they try, and I believe that the Federal Government should have a limited role in reviewing mergers between private sector companies. Although I will certainly pay attention to the proceedings at this hearing and in the future, I do not anticipate that this merger will warrant substantial antitrust action.

Thank you again, Mr. Chairman. I am interested to learn what News Corporation plans for DirecTV, and I look forward to hearing today's testimony.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF UTAH

Mr. Chairman, I would like to congratulate you for holding this hearing on the merger between News Corporation and Hughes Electronics. I have been following the issue of satellite television for some time. Last year, my congressional district encompassed a large percentage of the land mass of Utah, and for my rural constituents, satellite television is the only method of receiving video programming. When the proposed merger between EchoStar and DirecTV was considered, I took an active role, in large part because of my role with the Western Caucus and my concerns about rural constituents.

The last round of redistricting rendered my district less rural than it had been before—and although I still represent some rural constituents, I now represent the much more urban areas of Provo and Salt Lake County. It bears mentioning that satellite television is also a lot less rural than it used to be—DirecTV and DISH Network dishes are now often perched on the balconies of high-rise apartment buildings as these two companies have taken the competitive fight right into cable's backyard. This has been good for DBS service, for cable service, and for consumers in general. I believe that having strong, competitive and vital DBS companies is in the interest of urban and rural consumers alike.

Last year, I initiated a letter from the House Western Caucus in opposition to the proposed merger between Hughes and EchoStar. From the standpoint of westerners with no access to cable systems, it was a merger between Macy's and Gimbel's in a town with two stores, and despite assurances from EchoStar that this would be a benign monopoly, I felt that consumers never benefit from the absence of competition.

The merger before us presents different issues. There is no question this is an issue of horizontal concentration. While it will certainly involve vertical integration, the two companies have proposed considerable measures to ensure that there will be no opportunity for them to disadvantage their competitors. I commend News Corporation and DirecTV for recognizing the need for merger conditions which will assure their competitors that there will be no discrimination in programming access.

In my role as a member of the House Judiciary Committee, it is my job to consider any antitrust threats that this merger may pose, and my initial impression is that there aren't any. However, in my role as Chairman of the Western Caucus, I am interested in the opportunities that the merger might provide for the same western and rural consumers that were threatened by the previous merger proposal.

News Corporation has more experience with satellite broadcasting than any other company. I am also interested in the questions of rural broadband and local-into-local, and how the post-merger DirecTV would proceed in these areas. In short, I am interested to hear from Mr. Murdoch how he intends to strengthen the company he is acquiring.

Obviously, the great benefit of DBS is that it is not sensitive to population density or to line-of-sight issues. This accounts for its popularity in the Intermountain West, and the development of satellite technology bears directly on the quality of life in that area. It is my hope that this merger will energize DirecTV and speed the deployment of the next generation of services.

News Corp.'s approach is to shake things up, creating out of nothing a fourth broadcast network, a second cable news network, and a second cable sports package. It is my hope that this company brings the same vigor to the DBS industry.

[The prepared statement of Mr. Coble follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NORTH CAROLINA

I appreciate Chairman Sensenbrenner holding a hearing today to discuss the merits of the proposed merger between News Corporation and DirecTV. I also applaud the contribution of all of the witnesses and appreciate their sharing with us their experiences and opinions.

Currently, as I understand it, there are two major suppliers of satellite services in the U.S.—DirecTV and Echostar. In some areas of my home state of North Carolina, cable providers may not effectively and cost-efficiently reach customers. In those cases, satellite may be a viewer's only option.

That said, I believe public policy should promote competition in the satellite industry. We must enable an environment that encourages new technologies, innovative business ideas and progressive strategies. I believe my constituents deserve choices and should be offered reasonable prices for programming no matter what their address—country road or city thoroughfare.

Over the years, I have heard from North Carolinians complaining that they cannot access local programming, such as college sports events and local news, because cable does not reach their viewing area and they cannot get a local signal through their satellite. I believe it is important for paying customers to be able to have access to local programming. As technology improves, so should service to all customers, including those in rural America.

The benefit of this merger to News Corporation is obvious—if approved, News Corporation will gain access to a satellite market in which it is not currently involved. The financial benefit for DirecTV is also apparent.

During today's questioning, however, I asked Mr. Murdoch to explain what benefits this merger may bring to current satellite customers. I was encouraged to learn that he is committed to expanding local-into-local services into markets which are difficult to reach, hoping to reach 85% of all customers by the end of the year. He also suggested that if the merger were to be consummated, News Corporation would continue towards the goal of expanding local programming into more markets that are currently not reached.

I was also glad that Mr. Murdoch mentioned, as another benefit to satellite customers, the advancement of new technologies aimed at bringing high-speed Internet access to rural America at a reasonable price and with improved quality. If the merger were to be approved, he suggested that one priority of News Corporation would be to invest in research, equipment and technology to expand broadband capabilities.

In my opinion, News Corporation is a maverick in an industry once dominated by the status quo. Mr. Murdoch's innovative approach to the media market has created competition, new program choices for consumers and a fresh, and sometimes controversial, debate. I am neither unnerved by nor apprehensive about Mr. Murdoch's successes.

As the debate on this merger moves forward, I hope those reviewing the merger application will not be swayed by personal opinions about Mr. Murdoch and the size of News Corporation. Instead, I hope the focus of this debate will be on implementing public policy that will bolster competition and provide more choices at better prices for all customers.

Chairman SENSENBRENNER. Our first witness is Rupert Murdoch, the Chairman and CEO of News Corp. News Corp. is a diverse media organization with film, newspaper, television, sports and print publishing assets. Under Mr. Murdoch's leadership, News Corp. has grown to represent some of America's best known brands, including the Fox Channel, 20th Century Fox, Movie Studio and Fox News Channel. News Corp.'s 2002 revenues, U.S. media revenues, were the sixth largest after AOL Time Warner, Viacom, Comcast, Sony and Disney.

Kevin Arquit is a partner at Simpson Thacher & Bartlett, where he focused on antitrust and competition issues. Before entering private practice, Mr. Arquit was General Counsel of the FTC and served as Director of the FTC's Bureau of Competition.

Neal Schnog is President of Uvision, an Oregon-based cable operator serving over 6,000 customers. He is also Vice Chairman of the American Cable Association, an industry group representing small-

er cable operators. Mr. Schnog has extensive experience in the cable industry, having served in a variety of positions at more than a dozen cable TV systems ranging in size from 100 to over 100,000 customers.

Our final witness is Gene Kimmelman, Senior Director for Advocacy and Public Policy for Consumers Union. Mr. Kimmelman is a frequent witness before congressional Committees on telecommunications and antitrust issues. Mr. Kimmelman testified during the Committee's 2001 hearing on the state of competition and the multichannel video distribution market. Prior to joining the Consumers Union, Mr. Kimmelman was a staff member on the Senate Judiciary Committee, for which we forgive him, and served as Legislative Director for the Consumer Federation of America, and was a consumer advocate for Public Citizen.

Would each of you please stand, raise your right hand, take the oath?

[Witnesses sworn.]

Chairman SENSENBRENNER. Let the record say that each of the witnesses answered in the affirmative. Without objection, each witness's printed statement will appear in the record. The Chair will ask each witness to confine their remarks to 5 minutes, and then we will proceed with questioning by Members of the Committee under the 5-minute rule.

Mr. Murdoch, you are first.

**TESTIMONY OF RUPERT MURDOCH, CHAIRMAN AND CEO,
THE NEWS CORPORATION, LTD.**

Mr. MURDOCH. Good morning, Chairman Sensenbrenner, Ranking Member Conyers and Members of the Committee. Thank you for the invitation to testify this morning on News Corporation's proposed acquisition of a 34 percent interest in Hughes.

This transaction will infuse DirecTV with the strategic vision, expertise and resources necessary to bring increased innovation and robust competition—

Chairman SENSENBRENNER. Mr. Murdoch, can you pull the microphone a little bit closer to you? Thank you.

Mr. MURDOCH. I'm sorry, sir. The resulting public interest benefits are manifold and substantial. Today I would like to tell you specifically why this deal will be good for consumers and good for competition. By combining the expertise and technologies of our two companies, consumers will benefit from better programming, more advanced technologies and services and greater diversity.

One of the first enhancements DirecTV subscribers will enjoy is more local television stations. News was the first proponent of local-into-local service as part of our ASkyB satellite venture 6 years ago, and it remains one of our top priorities. News is committed to dramatically increasing DirecTV's present local-into-local commitment of 100 DMAs by providing local-into-local service in as many of the 210 DMAs as possible, and to do so as soon as economically and technologically feasible.

In addition, News is exploring new technologies to expand high definition television content and aggressively build broadband services.

News will also bring a wealth of new services to DirecTV subscribers from BSkyB in Britain, including interactive news and sports, and access to online shopping, banking, games, e-mail and information services. And we will infuse Hughes with our deep and proven commitment to equal opportunity and diversity, including more diverse programming and a variety of mentoring, executive development and internship programs.

You can count on these enhancements because innovation and consumer focus is part of our company's DNA. We have a long and successful history of defying conventional wisdom and challenging market leaders, whether they be the "Big 3" broadcast networks, the previously dominant cable news channel, or the entrenched sports establishment.

We started as a small newspaper company and grew by providing competition and innovation in stale, near monopolistic markets. It is our firm intention to continue that tradition with DirecTV.

With these consumer benefits, DirecTV will become a more formidable competitor to cable and thus enhance the competitive landscape of the entire multichannel industry. To that end, I should note that there are no horizontal or vertical concerns arising from this transaction. The transaction does result in a vertical integration of assets because of the association of DirecTV's distribution platforms and News's programming interests.

But this is not anticompetitive for two reasons. First, neither company has sufficient power in its relevant market to be able to act in an anticompetitive manner. Second, neither News nor DirecTV has any incentive to engage in anticompetitive behavior. As a programmer, News's business model is predicated on achieving the widest possible distribution to maximize advertising revenue and subscriber fees. Similarly, DirecTV has every incentive to draw from the widest spectrum of attractive programming regardless of its source.

Nevertheless, we've agreed to a series of program access undertakings to eliminate any concerns over the competitive effects of this transaction, and we've asked the FCC to adopt these program access commitments as a condition of the approval of our application. Viewed from another perspective, neither News nor Hughes is among the top five media companies in the United States. News is sixth with 2.8 percent of total industry expenditures, and Hughes is eighth. Even combined, the companies would rank no higher than fifth, half the size of the market leader.

In closing, I believe this transaction represents an exciting association between two companies with the assets, experience and history of innovation to ensure DirecTV can provide better service to consumers and become an even more effective competitor.

Thank you for your attention. I look forward to your questions.

[The prepared statement of Mr. Murdoch follows:]

PREPARED STATEMENT OF RUPERT MURDOCH

Good Morning, Chairman Sensenbrenner, Ranking Member Conyers, and Members of the Committee. Thank you for the invitation to testify today regarding News Corporation's proposed acquisition of a 34% interest in Hughes Electronics Corporation.

Let me say at the outset that we believe that this acquisition has the potential to profoundly change the multichannel video marketplace in the United States to the ultimate benefit of all pay-TV customers, whether they are direct-to-home satellite or cable subscribers. It is my hope, and my goal, that as a result of this acquisition, Hughes' DIRECTV operation will be infused with the strategic vision, expertise, and resources necessary for it to bring innovation and competition to the multichannel marketplace and, of course, to the televisions of tens of millions of American viewers.

The public interest benefits of this transaction are manifold, but I would like to briefly touch on three key areas today:

First, News Corporation's outstanding track record of providing innovative new products and services to consumers, a track record that it is determined to replicate at Hughes and DIRECTV;

Second, the specific consumer benefits that will be realized from this transaction, including improvements in local-into-local service, new and improved interactive services, and the many new diversity programs News Corporation will bring to Hughes; and

Third, the absence of any horizontal or vertical merger concerns about this transaction. This transaction will only increase the already-intense competition in the programming and distribution markets, and market realities will compel our companies to continue the open and non-discriminatory practices each company has lived by. Nonetheless, to eliminate any possible concerns over the competitive effects of vertical integration, the parties have agreed as a matter of contract to significant program access commitments, and have asked the FCC to make those commitments an enforceable condition of the transfer of Hughes' DBS license.

News Corporation's track record of innovation as a content provider and as a satellite broadcaster is without parallel. Our company has a history of challenging the established—and often stagnant—media with new products and services for television viewers around the world. Perhaps our first and best-known effort to offer new choices to consumers in the broadcasting arena came with the establishment of the FOX network in 1986. FOX brought much-needed competition to the “Big 3” broadcast networks at a time when conventional wisdom said it couldn't be done. Seventeen years later, we have proved unambiguously that it could be done, with FOX reigning as the number one network so far this calendar year in the highly valued “adults 18–49” demographic. Along the way, we redefined the TV genre with shows like *The Simpsons*, *In Living Color*, *The X-Files*, and *America's Most Wanted*, and more recently *24*, *Boston Public*, *Malcolm in the Middle*, *The Bernie Mac Show*, and the biggest hit on American TV, *American Idol*.

The FOX network was launched on the back of the Fox Television Stations group, an innovator in local news and informational programming since it was first formed. Today, Fox-owned stations air more than 800 hours of regularly scheduled local news each week—an average of 23 hours per station. We have increased the amount of news on these stations by 57 percent, on average, compared to the previous owners. Viewers demand more local news, and we provide it. Fox-owned stations were often the first—and in many markets are still the only—stations to offer multiple hours of local news and informational programming each weekday morning. This commitment to local news extends well beyond the stations we own. Since 1994, Fox has assisted more than 100 affiliates in launching local newscasts.

In addition to providing greater choice and innovation in network entertainment and local news, we have also redefined the way Americans watch sports. With viewer-friendly innovations such as the “FOX Box” and the first “Surround Sound” stereo in NFL broadcasts, the catcher cam in baseball, the glowing puck in hockey, and the car-tracking graphic in NASCAR, FOX has made sports more accessible and exciting for the average fan. FOX Sports Net, launched in 1996, has provided the first and only competitive challenge to the incumbent sports channel, ESPN. Fox Sports Nets' 19 regional sports channels, reaching 79 million homes, regularly beat ESPN in several key head-to-head battles. In 2002, Major League Baseball on ESPN averaged a 1.1 rating. On Fox Sports Net, baseball scored an average 3.5 rating in the markets it covers. The NBA on ESPN has averaged a 1.2 rating during the current season. In Fox Sports Net's markets, it has rated a 2.2. The key to Fox Sports Net's success is its delivery of what sports fans want most passionately: live, local games, whether at the professional, collegiate, or high school level, coupled with outstanding national sports events and programming.

Perhaps News Corp.'s most stunning success against conventional wisdom—and our most innovative disruption of the status quo—is the Fox News Channel, launched in 1996. A chorus of doubters said CNN *owned* the cable news space and no one could possibly compete. A scant five years later, Fox News Channel overtook CNN, and since early 2002 has consistently finished first among the cable news

channels in total day ratings. Growing from 17 million subscribers at launch to almost 82 million subscribers this month, Fox News Channel boasts some of the most popular shows on cable and satellite. I think it is fair to say Fox transformed the cable news business, introducing innovative technology and programming, and bringing a fresh choice and perspective to American news viewers.

Across the dial on American television are examples of where our challenges to the status quo have made a difference for viewers and proven we could be competitive against entrenched competition. We've launched and expanded FX, a general entertainment channel; we've launched the movie channel FXM; and we've relaunched and expanded the Speed Channel, a channel devoted to auto racing enthusiasts. And in January 2001, we launched National Geographic Channel with our partner, the National Geographic Society, into nine million homes. Today, Nat Geo is the fastest-growing cable network in the nation with 43 million subscribers and is making steady progress in the ratings against the established industry leader, The Discovery Channel.

News Corp.'s track record of innovation is not limited to the United States. News Corp. will bring a wealth of innovation to Hughes and DIRECTV from its British DTH platform, BSkyB. We launched BSkyB in 1989 with only four channels of programming. In 1998, frustrated by the limitations of analog technology and determined to give viewers even wider choices, BSkyB launched a digital service that boasted 140 channels. In 1999, in order to speed the conversion to digital and to drive penetration, BSkyB offered free set-top boxes and dishes. The conversion to digital took three years and cost BSkyB nearly one billion dollars, but by 2001, when the transition to digital was complete, BSkyB's subscriber base had grown to 5 million homes. Through BSkyB's digital offering, BSkyB viewers may choose from 389 channels delivering programming 24 hours each day. They also have a vast array of new services, including world-first interactive innovations such as a TV news service that allows viewers to choose from multiple segments being broadcast simultaneously on a news channel, multiple camera angles during sporting events, or multiple screens of programming within a certain genre. In addition, BSkyB viewers have access to online shopping, banking, games, email, travel, tourism and information services. With the launch of Europe's first fully integrated digital video recorder in 2001, BSkyB customers won access to even more interactive capabilities and viewing choices.

Upon completion of this transaction, News Corp. will bring the same spirit of innovation to the DBS business in the U.S., in the process redefining the choices Americans have when they watch television. This spirit of never-say-die competition and News Corp.'s demonstrated determination to provide ever-expanding services to the public have the potential to re-energize the entire American multichannel video marketplace.

To my second point about this transaction: its benefits to consumers. Apart from a history of bringing new competition and innovation to the television industry, News Corp. has been tremendously successful in bringing tangible benefits to consumers over nearly two decades of operating both here in the United States and abroad. This transaction will be no exception, enabling us to share our best practices across our platforms and across geographical boundaries to the benefit of consumers. These benefits will be very real, and often easily quantifiable.

One of the first enhancements to DIRECTV's service that News Corp.'s investment in Hughes will bring will be more local television stations for subscribers, offering consumers a more compelling alternative to cable. News Corp., as a leading U.S. broadcaster, was the first proponent of local-into-local service as part of our American Sky Broadcasting ("ASkyB") satellite DTH venture six years ago. In fact, I testified before Congress on this very topic, urging passage of copyright legislation to allow the retransmission of local signals by DBS. ASkyB conceived and designed a DBS spot beam satellite to implement this previously unheard of idea. As a broadcast company, News Corp. was convinced then—as it is now—that DBS will be the strongest possible competitor to cable only if it can provide consumers with the local broadcast channels they have come to rely on for local news, weather, traffic and sports.

With that in mind, News Corp. is committed to dramatically increasing DIRECTV's present local-into-local commitment of 100 DMAs by providing local-into-local service in as many of the 210 DMAs as possible, and to do so as soon as economically and technologically feasible. To that end, we are already actively considering a number of alternative technologies, including using some of the Ka-band satellite capacity on Hughes Network Systems' SPACEWAY system; seamlessly incorporating digital signals from local DTV stations into DIRECTV set-top boxes equipped with DTV tuners; and by exploring and developing other emerging tech-

nologies that could be used to deliver local signals, either alone or in combination with one of the above alternatives.

In addition, News Corp. is exploring new technologies that promise to improve spectrum efficiency or otherwise increase available capacity so that DIRECTV can expand the amount of HDTV content. Options include use of Ka-band capacity, higher order modulation schemes, such as the 8PSK technology FOX uses for its broadcast distribution to affiliated stations, and further improvements in compression technology. News Corp. will urge DIRECTV to carry many more than the four HDTV channels it currently carries and the five channels that some cable operators carry. In this way, we hope to help drive the transition to digital television by providing compelling programming in a format that will encourage consumers to invest in digital television sets.

As to broadband, News Corp. will work aggressively to build on the services already provided by Hughes to make broadband available throughout the U.S., particularly in rural areas. Broadband solutions for all Americans could come from partnering with other satellite broadband providers, DSL providers, or new potential broadband providers using broadband over power line systems, or from other emerging technologies. News Corp. believes it is critical that consumers have vibrant broadband choices that compete with cable's video and broadband services on capability, quality and price.

The public will also benefit from the efficiencies and economies of scope and scale that News Corporation will bring to DIRECTV. We believe by sharing "best practices," and by using management and expertise from our worldwide satellite operations, we will be able to substantially reduce DIRECTV's annual expenses by \$65 to \$135 million annually. Other efficiencies include sharing facilities of the various subsidiaries of News Corp. and Hughes in the U.S., and developing and efficiently deploying innovations, such as next-generation set-top boxes with upgraded interactive television and digital video recorder capabilities and state-of-the-art anti-piracy techniques. When Hughes becomes part of News Corp.'s global family of DTH affiliates, it will benefit from a number of scale economies that will more efficiently defray the enormous research and development costs associated with bringing new features and services to market. Moreover, common technology standards for both hardware and software across the News Corp. DTH platforms should help to drive down consumer equipment and software costs. Through these various cost savings, DIRECTV will be able to finance more innovations in programming and technology to ensure that it achieves and maintains the highest level of service for its customers at competitive prices.

News Corp. also plans to bring to DIRECTV the "best practices" it has developed at its satellite operations in other countries. DIRECTV's "churn rate"—that is, the rate at which customers discontinue use of the service—is around 18 percent, whereas BSKyB's annual churn rate is currently 9.4 percent. By using BSKyB's "best practices" and accelerating the pace of innovation, we predict that DIRECTV should experience a 2 to 3 percent decline in its annual churn rate. We calculate that every percentage point reduction in churn will add approximately \$33 million to Hughes' earnings. With these additional financial resources, DIRECTV will be able to finance additional initiatives in research, development and marketing.

Another important element that News Corp. will bring to Hughes and DIRECTV is its deep and proven commitment to equal opportunity and diversity. Specifically, the diversity initiatives we will implement include:

- A commitment to carry more programming on DIRECTV targeted at culturally, ethnically and linguistically diverse audiences;
- An extensive training program for minority entrepreneurs seeking to develop program channels for carriage by multichannel video systems;
- A program for actively hiring and promoting minorities for management positions;
- An extensive internship programming for high school and college students;
- Improved procurement practices that ensure outreach and opportunities for minority vendors; and
- Upgraded internal and external communications, including the Hughes web site, to assist implementation of the above initiatives.

Finally, to my third point: there are no horizontal or vertical merger concerns arising from this transaction. Because this transaction involves an investment in DIRECTV, a multichannel video programming distributor with no programming interests, by News Corp., a programmer with no multichannel distribution interests, no "horizontal" competition issues arise. There will be no decrease in the number of U.S. competitors in either the multichannel video distribution market or the pro-

gramming market. To the contrary, because of News Corp.'s plans to bring "best practices" and innovations to DIRECTV, competition in these markets will intensify and consumers will be presented with more and better choices.

The transaction does result in a "vertical" integration of assets because of the association of DIRECTV's distribution platform and News Corp.'s programming assets. But this "vertical" integration is not anti-competitive for two reasons. First, neither News Corp. nor DIRECTV has sufficient power in its relevant market to be able to act in an anti-competitive manner. DIRECTV has a modest 12 percent of the national multichannel market, compared to as much as 29 percent of the market held by the largest cable operator. News Corp. has a modest 3.9 percent of the national programming channels, compared to the largest cable programmer at 15.2 percent of the channels.

Second, rational business behavior will prevent News Corp. and DIRECTV from engaging in anti-competitive behavior. As a programmer, News Corp.'s business model is predicated on achieving the widest possible distribution for our programming in order to maximize advertising revenue and subscriber fees. Any diminution in distribution reduces our ability to maximize profit from that programming. Even if we were voluntarily willing to lower our earnings potential by withholding our programming from competing distributors, we would be precluded from doing so by the FCC's program access rules. Similarly, DIRECTV has every economic incentive to draw from the widest spectrum of attractive programming, regardless of source, in order to maximize subscriber revenue. In short, it makes no business sense for either party to do anything to limit our potential customer base or our programming possibilities.

Notwithstanding these strong economic and business incentives, News Corp. and Hughes have agreed—as a matter of contract—to a series of program access undertakings to eliminate any concerns over the competitive effects of the proposed transaction. We have asked the FCC to adopt these program access commitments, which are attached to my written testimony, as a condition of the approval of our Application for Transfer of Control that was filed at the FCC on May 2. These program access commitments are largely the same as those required of cable operators, but in some respects go further. These commitments will:

- Prevent DIRECTV from discriminating against unaffiliated programmers;
- Prevent DIRECTV from entering into an exclusive arrangement with any affiliated programmer, including News Corp.; and
- Prevent News Corp. from offering any national or regional cable programming channels it controls on an exclusive basis to any distributor and from discriminating among distributors in price, terms or conditions.

These extensive commitments apply for as long as the FCC's program access rules remain in effect and News Corp. owns an interest in DIRECTV. They make it clear that News Corp. and Hughes are committed to fair, open and non-discriminatory program access practices that go well beyond what the law requires of DBS operators, cable programmers, and even cable operators.

In any event, neither News Corp. nor Hughes is among the top five media companies, by expenditure, in the United States. As you can see in the chart attached to my testimony, News Corp. is sixth with 2.8 percent of total industry expenditures, and Hughes is eighth with 2.2 percent. Even combining the expenditures of News Corp. and Hughes would place the company fifth in expenditures behind AOL Time Warner with 10.1 percent, Viacom with 6.4 percent, Comcast with 6.3 percent, and Sony at 5.3 percent. If the expenditures from Disney's theme parks were included in its total, the combination of News Corp. and Hughes would rank sixth in total "entertainment" revenues.

In closing, I believe this transaction represents an exciting association between two companies with the assets, experience and history of innovation that will ensure DIRECTV can become an even more effective competitor in the multichannel market. There will be significant public interest benefits for consumers as a result of this transaction, including bringing more local channels to more markets, innovations such as set-top boxes with next generation interactive television and digital video recorder capabilities, and a diversity program that will set the standard for the rest of the entertainment industry.

Thank you for your attention, and I look forward to your questions.

EXHIBIT F

Program Access Requirements:
News Corp. and DIRECTV Commitments

News Corp. and DIRECTV will be bound by the FCC's program access rules (otherwise applicable to vertically-integrated satellite cable programming services) regardless of whether News Corp., DIRECTV or any of their program services is deemed to be a vertically integrated satellite cable programming vendor under such rules.

In addition, News Corp. and DirecTV will make the following commitments, above and beyond those contained in the FCC's program access rules.

- News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and non-discriminatory terms and conditions.
- Neither News Corp. nor DIRECTV will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage.
- DIRECTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder. "Affiliated Program Rights Holder" includes (i) a program rights holder in which News Corp. or DIRECTV holds a non-controlling "Attributable Interest" (as determined by the FCC's program access attribution rules); and (ii) a program rights holder in which an entity holding an non-controlling Attributable Interest in News Corp. or DIRECTV holds an Attributable Interest, provided that News Corp. or DIRECTV has actual knowledge of such entity's Attributable Interest in such program rights holder.

Liberty Media owns approximately 18% of the non-voting equity of News Corp. Liberty Media currently is considered a vertically integrated programmer under the FCC's program access rules and, as such, is restricted in its ability to enter into exclusive or discriminatory agreements with respect to satellite-delivered cable programming services in which it has an Attributable Interest. In the event Liberty Media is no longer deemed a vertically integrated programmer (including by reason of the sale of its Puerto Rican cable interests) and so long as Liberty Media holds an Attributable Interest in News Corp., DIRECTV will deal with Liberty Media with respect to programming services it controls as if it continued as a vertically integrated programmer subject to the program access rules.

DIRECTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (e.g., NFL Sunday Ticket).

- Neither News Corp. nor DIRECTV (including any entity over which either exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.

These commitments will apply to News Corp. and DIRECTV for the later of (1) as long as the FCC deems News Corp. to have an Attributable Interest in DIRECTV and the FCC's program access rules are in effect (provided that if the program access rules are modified these commitments shall be modified to conform to any revised rules adopted by the FCC) or (2) if these commitments are embodied in a consent decree or other appropriate order issued by or agreement with the DOJ, FTC or FCC, for the term specified by such consent decree, order or agreement.

THE VAST MEDIA UNIVERSE

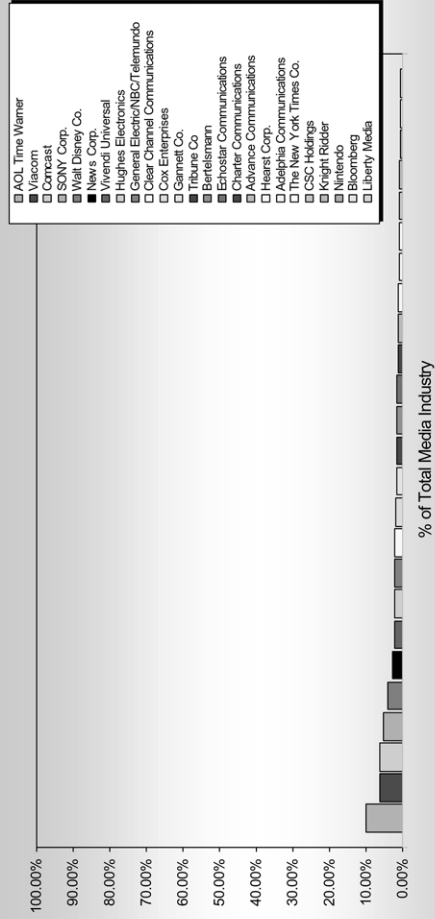
The U.S. Media Marketplace Is Highly Competitive

	Company	2002 U.S. Media Revenues (in millions)	Company Revenues as a % of Total Media Industry
1	 AOL Time Warner	\$32,630	10.1%
2	 VIACOM	\$20,670	6.4%
3	 Comcast	\$20,470	6.3%
4	 SONY SONY Corporation	\$17,090	5.3%
5	 The Walt Disney Co.	\$13,110	4.0%
6	 News Corporation	\$9,130	2.8%
7	 Vivendi Universal	\$7,580	2.3%
8	 Hughes Electronics	\$7,190	2.2%
9	 General Electric/NBC/Telemundo	\$7,150	2.2%
10	 Clear Channel Communications	\$6,920	2.1%
11	 Cox Enterprises	\$6,400	2.0%
12	 Gannett Co.	\$5,590	1.7%
13	 The Tribune Company	\$5,400	1.7%
14	 Bertelsmann	\$5,270	1.6%
15	 Echostar Communications	\$4,750	1.5%
16	 Charter Communications	\$4,570	1.4%
17	 Advance Publications	\$4,000	1.2%
18	 Hearst Corporation	\$3,990	1.2%
19	 Adelphia Communications	\$3,340	1.0%
20	 The New York Times Company	\$3,080	1.0%
21	 Cablevision Systems Corporation	\$3,070	0.9%
22	 Knight Ridder	\$2,840	0.9%
23	 Nintendo	\$2,130	0.7%
24	 Bloomberg	\$2,110	0.7%
25	 Liberty Media	\$2,080	0.6%
Totals for the Top 25 Media Companies (By Revenue)		\$200,560	62.1%

Source: Corporate SEC filings (except as noted in the End Notes).

THE VAST MEDIA UNIVERSE

% Share of U.S. Total Media Industry, By Company



❖ COMPETITION FLOURISHES AMONGST A MULTITUDE OF MAJOR MEDIA COMPANIES

- The largest 25 media companies collectively account for only 60% of the Total Media Industry.
- Even the largest media company has only a small portion of the Total Media Industry.

THE VAST MEDIA UNIVERSE**END NOTES**

1. Media include the following industry segments: broadcast television, broadcast radio, cable & satellite providers, cable & satellite programming, newspaper publishing, consumer magazine publishing, consumer book publishing, consumer Internet sites, filmed entertainment, recorded music, interactive entertainment, and outdoor advertising (the "Media"). Total U.S. expenditures (end-user spending) on the Media was estimated to be \$324.006 billion in 2002 (the "Total Media Industry"). *Source: PQ Media, LLC; Veronis Suhler Stevenson.* Company revenues for the Media are reported as a percentage of the Total Media Industry. Since most private companies do not publicly report financial performance, data on total revenues for the Media is unavailable. The Total Media Industry, which includes expenditures on both publicly- and privately-owned companies, approximates total U.S. revenue for both public and private companies operating in the Media.
2. Corporate SEC filings for AOL Time Warner, Comcast, News Corporation, CSC Holdings and Tribune Company do not separately break out revenues for certain segments (e.g., sports teams) that are not among the segments that comprise the Total Media Industry.
3. Corporate SEC filings for Viacom and Clear Channel Communications and Bertelsmann's Annual Report do not separately break out revenues for certain segments (e.g., theme parks, live entertainment and media services) that are not among the segments that comprise the Total Media Industry.
4. As reported in its 10-K, Comcast's figures include unaudited *pro forma* revenues for AT&T Broadband, which merged with Comcast in November 2002.
5. News Corp.'s figures include U.S. and Canadian revenues for both Fox Entertainment Group, Inc. and Harper Collins, but exclude revenues for the New York Post.
6. SONY, Vivendi Universal, Hughes Electronics, GE/NBC/Telemundo, CSC Holdings, Nintendo, and Liberty Media figures may include some non-U.S. revenues.
7. The figures for Cox Enterprises are 2001 revenues and have been derived from the company's web site, <http://www.coxenterprises.com>.
8. Adelphia Communications' figures are an estimate based on financial statements filed by the company with the United States Bankruptcy Court on November 25, 2002. See Mike Farrell, *Adelphia's Numbers Aren't All Bad*, Multichannel News, December 2, 2002, at 6.
9. Revenues for the following, privately-held companies have been derived from Advertising Age: Advance Publications, Hearst Corporation and Bloomberg. See *Leading Media Companies*, Advertising Age, August 19, 2002, at S-2. The revenue figures for these companies are 2001 figures and may exclude certain revenues from certain industry segments that comprise the definition of the Total Media Industry.

Securities Laws Information

In connection with the proposed transactions, General Motors Corporation ("GM"), Hughes Electronics Corporation ("Hughes") and The News Corporation Limited ("News") intend to file relevant materials with the Securities and Exchange Commission ("SEC"), including one or more registration statement(s) that contain a prospectus and proxy/consent solicitation statement. Because those documents will contain important information, investors and security holders are urged to read them, if and when they become available. When filed with the SEC, they will be available for free (along with any other documents and reports filed by GM, Hughes or News with the SEC) at the SEC's website, www.sec.gov. GM stockholders will also receive information at an appropriate time on how to obtain transaction-related documents for free from GM. When these documents become available, News stockholders may obtain these documents free of charge by directing such request to: News America Incorporated, 1211 Avenue of the Americas, 7th Floor, New York, New York 10036, attention: Investor Relations.

GM and its directors and executive officers and Hughes and certain of its executive officers may be deemed to be participants in the solicitation of proxies or consents from the holders of GM \$1-2/3 common stock and GM Class H common stock in connection with the proposed transactions. Information about the directors and executive officers of GM and their ownership of GM stock is set forth in the proxy statement for GM's 2003 annual meeting of shareholders. Participants in GM's solicitation may also be deemed to include those persons whose interests in GM or Hughes are not described in the proxy statement for GM's 2003 annual meeting. Information regarding these persons and their interests in GM and/or Hughes was filed pursuant to Rule 425 with the SEC by each of GM and Hughes on April 10, 2003. Investors may obtain additional information regarding the interests of such participants by reading the prospectus and proxy/consent solicitation statement if and when it becomes available.

This communication shall not constitute an offer to sell or the solicitation of an offer to buy any securities, nor shall there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction. No offering of securities shall be made except by means of a prospectus meeting the requirements of Section 10 of the Securities Act of 1933, as amended.

Materials included in this document contain "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. Such forward-looking statements involve known and unknown risks, uncertainties and other factors that could cause actual results to be materially different from historical results or from any future results expressed or implied by such forward-looking statements. The factors that could cause actual results of GM, Hughes and News to differ materially, many of which are beyond the control of GM, Hughes or News include, but are not limited to, the following: (1) operating costs, customer loss and business disruption, including, without limitation, difficulties in maintaining relationships with employees, customers, clients or suppliers, may be greater than expected following the transaction; (2) the regulatory approvals required for the transaction may not be obtained on the terms expected or on the anticipated schedule; (3) the effects of legislative and regulatory changes; (4) an inability to retain necessary authorizations from the FCC; (5) an increase in competition from cable as a result of digital cable or otherwise, direct broadcast satellite, other satellite system operators, and other providers of subscription television services; (6) the introduction of new technologies and competitors into the subscription television business; (7) changes in labor, programming, equipment and capital costs; (8) future acquisitions, strategic partnerships and divestitures; (9) general business and economic conditions; and (10) other risks described from time to time in periodic reports filed by GM, Hughes or News with the SEC. You are urged to consider statements that include the words "may," "will," "would," "could," "should," "believes," "estimates," "projects," "potential," "expects," "plans," "anticipates," "intends," "continues," "forecast," "designed," "goal," or the negative of those words or other comparable words to be uncertain and forward-looking. This cautionary statement applies to all forward-looking statements included in this document.

Chairman SENSENBRENNER. Thank you, Mr. Murdoch.
Mr. Arquit?

**TESTIMONY OF KEVIN J. ARQUIT, PARTNER,
SIMPSON THACHER & BARTLETT**

Mr. ARQUIT. Mr. Chairman and Members of the Committee, thank you for the opportunity to comment on the role of antitrust in the Hughes-News Corp. transaction.

At the outset, it is important to distinguish between horizontal and vertical effects.

Mr. NADLER. Mr. Chairman, it's hard to hear the witness.

Chairman SENSENBRENNER. Each of the witnesses pull the mic right in front of them, and it might work better.

Mr. ARQUIT. Okay. Is that better, sir?

At the outset it is important to distinguish between horizontal and vertical effects. By definition, horizontal combinations always have some impact on competition. After all, competition between the merging parties is eliminated. By contrast, vertical integration does not inevitably decrease competition, but does generally yield some level of efficiency by streamlining the production process. Even so, vertical relationships can be problematic, where they allow an entity to choke the competition and cut off its air supply.

This transaction is vertical in nature. To say the least, it is the polar opposite of the recent effort to merge EchoStar with DirecTV. That latter transaction would have created a merger to monopoly in some areas, and obviously cried out for Government enforcement, even in an Administration that is not commonly associated with over enforcement of the antitrust laws.

By contrast, this transaction eliminates no direct horizontal competition. The status quo is maintained. If anything, News Corp.'s history of being a maverick, shaking up business segments it enters, suggests that competition may be increased. Whatever industry participants or others may think of such market behavior, or whether it causes political delight or dismay, antitrust policy looks favorably on maverick firms because they engage in the unexpected. Uncertainty spurs competition. This leaves possible negative consequences that could result from the vertical affiliation between Fox programming and distribution through DirecTV.

There are really two questions. Will DirecTV favor Fox programming? In the alternative, will Fox programming favor DirecTV at the expense of other MVPDs? In the circumstances here, neither question creates cause for serious concern.

Taking these questions one at a time, would DirecTV favor programming from Fox? If DirecTV favors Fox programming, it could act as a bottleneck, hurting the ability of competing programmers to get distribution. However, a quick look at actual market conditions demolishes the theoretical construct. With approximately 12 percent of the market, DirecTV can ill afford to cut back in quality. Engaging in such discrimination would undermine any chance DirecTV has to compete effectively against the dominant cable operators. If DirecTV is so short-sighted as to ignore servicing its subscribers' demand for quality and selection just so it can pursue a News Corp. battle against other programming vendors, it will be sacrificing the DirecTV franchise to deliver little more than a

glancing blow to competing programming vendors. Even if DirecTV and News Corp. feel compelled to act irrationally, it will be self-destructive. DirecTV, with only 12 percent of the market, certainly cannot dictate terms to programming vendors. They would simply bypass DirecTV, knowing they have close to 90 percent of MVPD subscribers still available to them. In sum, News Corp. would be embarking on a remarkably foolish strategy of shooting itself in the head for the privilege of shooting someone else in the foot.

The second theoretical concern is whether to prop up DirecTV, News Corp. would deny its Fox programming to competing MVPDs? As with the last concern, such a strategy would be embarrassingly self-defeating. First, programming competitors would seize the opportunity to supply more programming to the market. Beyond this, News Corp. has no logical incentive to limit distribution of its programming. Viewership is its key asset. Viewership determines fees collected and advertising revenue. Why would News Corp. take a direct hit in lost viewership and revenue in exchange for the hope that some subscribers might switch to DirecTV? Take the Fox News Channel. News Corp. entered, challenging a dominant incumbent, CNN, and against the prediction of many, turned the channel into the most watched cable news provider. If News Corp. refuses to provide this programming to DirecTV's competitors, it risks losing significant share back to CNN. A simple look at the math further shows how ill advised a foreclosure strategy would be. Any incentive News Corp. may perceive in unfairly promoting DirecTV has to account for the fact that News Corp. will own only a 34 percent share. Thus, while News Corp. would absorb 100 percent of the lost programming and advertising revenue, it would recoup only about one third of any unlawful rents received by DirecTV.

It appears that News Corp. has also offered protection against antitrust concerns by agreeing to be bound by program access rules and similar rules to protect competing programmers. To the extent those commitments are enshrined in a binding consent agreement, it creates added protection, although the predominant rationale from my antitrust conclusions are based on discipline imposed by market reality.

In conclusion, a transaction of this size always requires an informed inquiry into the antitrust implications. However, given the lack of any horizontal overlap and the inability of News Corp. or DirecTV to engage in vertical foreclosure, there do not appear to exist any substantial antitrust issues with this acquisition.

[The prepared statement of Mr. Arquit follows:]

PREPARED STATEMENT OF KEVN J. ARQUIT¹

I. INTRODUCTION

Mr. Chairman, thank you for the invitation to express my views on the antitrust issues presented by the proposed acquisition of 34% of Hughes Electronics, Corporation ("Hughes") by News Corporation Limited ("News Corp."). The most specific questions arise from the vertical integration of News Corp.'s Fox media group with

¹Mr. Arquit was General Counsel of the Federal Trade Commission from 1988–1989, and Director of the FTC's Bureau of Competition from 1989–1992. He is presently a partner in the law firm of Simpson Thacher & Bartlett. This testimony reflects the individual views of Mr. Arquit. Neither he nor the law firm represents any party to the transaction, and the preparation of this testimony was not financed in whole or in part by any client.

Hughes' DirecTV direct broadcast satellite ("DBS") service. Although any acquisition of this size, and involving a market so vital as the media, requires some careful thinking before regulatory approval, this particular transaction does not appear to raise any significant potential for the lessening of competition, such as to trigger antitrust concerns.

When analyzing the antitrust implications of a transaction, it is critical to distinguish between the consequences that flow as a result of any horizontal overlap (i.e., direct competition), and the effects that may result from a vertical relationship between two companies. In the case of horizontal overlap, there is no need to search for potential effects on competition; some impact is inevitable and immediate. Of course, that does not mean that the transaction is unlawful; there may be valid efficiencies created by the combination of assets, and in the vast majority of situations there are sufficient remaining competitors in the marketplace to overwhelm, and thereby neutralize, any attempt to restrict output by the merging entities. The point remains, however, that a horizontal transaction, by definition, always eliminates at least some competition, and is thus more apt to raise antitrust issues.

By contrast, vertical combinations do not inevitably, or even commonly, reduce competition. To the contrary, vertical integration generally yields some level of efficiency—i.e., the streamlining and rationalizing of processes by which products or services are delivered to consumers. I hasten to add that vertical combinations are not always good for competition. They can facilitate the ability of the combined entity to place a chokehold on competition at multiple levels, by creating the wherewithal and incentive to refuse to deal. The result can be the cutting off of the competition's air supply. This potential exists in any number of industries, involving the combination of complementary assets. This is as true in the context of beverages and bottlers, and software and hardware providers, as it is for video programming and distribution. However, when a transaction is vertical in nature, the starting point is that the transaction does not necessarily decrease competition and the presumption is that some efficiencies result.

With that introduction, I explain my conclusion that this essentially vertical transaction is not likely to foreclose competitors of News Corp. or DirecTV, and does not raise significant antitrust concerns.² As we all know, this is not the first proposed transaction involving the DirecTV assets. Approximately six months ago, the Department of Justice ("DOJ") sought to block the proposed merger of EchoStar and DirecTV assets, resulting, ultimately, in the abandonment of the acquisition. As I will discuss in a moment, that proposed combination stands in stark contrast to this transaction.

II. COMPETITIVE ANALYSIS

The first step in an analysis of competitive effects, is identification of the relevant product and geographic markets. The DOJ consistently has analyzed the competition between and among cable operators and DBS operators as a market composed of all multichannel video programming distribution ("MVPD") systems.³ Although there may be some room to argue that the relevant market should not include low-capacity cable systems, it is difficult to articulate a conclusive economic rationale as to why consumers would not perceive all cable operators and DBS operators as reasonable enough substitutes.⁴

In any event, for purposes of this transaction, the distinction is insignificant. No matter how narrow or wide the MVPD market is defined, there is no direct overlap between the parties.⁵ Therefore, the discussion that follows is premised on an "all

²This testimony focuses on the MVPD and programming businesses. I have not reviewed other lines of business the parties may have, such as the satellite services provided by PanAmSat or the broadband services provided by Hughes Network Services.

³See, e.g., Complaint at ¶¶ 24–29, *United States v. EchoStar Communications et al*, (D.D.C. filed Oct. 31, 2002) ("EchoStar Complaint").

⁴See, e.g., *EchoStar Communications Corporation, Hughes Electronics Corporation, and General Motors Corporation*, Hearing Designation Order, 17 FCC Red. 20559, 20609 (2002) ("*EchoStar/Hughes*").

⁵It is my understanding that any MVPD horizontal overlap is indirect and certainly de minimis. Liberty Media, which has a passive stake in News Corp., also has an ownership in the cable operator Cablevision of Puerto Rico. However, according to the parties' FCC Application, filed on May 2, 2003, Liberty Media's stake will be no more than 19% in News Corp., and less than 1% in Hughes after the proposed transaction. Further, the News Corp shares held by Liberty have no voting rights except in limited issues. Therefore, Liberty Media does not and will not have any decision-making authority in News Corp. or Hughes. By the same token, DirecTV has a 5% passive equity stake in the Hallmark Channel, which does not create any meaningful horizontal overlap in the programming space.

MVPD systems” market. Further, consistent with precedents in this area, the relevant geographic market is presumed to be the franchise area of a local cable operator, since customers within that territory have the choice between the incumbent franchised cable company and the two DBS providers. In such a market, depending on the geographic location, DirecTV faces competition from one (or occasionally more) cable operators, as well as EchoStar Communications (owner of the DISH network). In areas where cable is unavailable, MVPD competition is largely between EchoStar and DirecTV.

A. Horizontal Effects

The transaction does not eliminate any direct horizontal competition between DirecTV and EchoStar or any cable operator. The number of competitors in the MVPD market and their relative market shares are not altered by the transaction. So an analysis focusing solely on horizontal issues would yield the conclusion that the transaction does not alter the status quo, let alone the competitive landscape.

If anything, reference to the Government’s Horizontal Merger Guidelines,⁶ suggests that the transaction likely will increase the competitive vigor of DirecTV. It is widely accepted that News Corp. has historically been a maverick in the media industry. The company regularly has chosen to “shake up” the business segments it has entered. Whatever industry participants or others may think of such market behavior (or whether it causes political delight or dismay) antitrust analysis looks favorably towards such maverick firms, and for sound policy reasons.⁷

When an industry is characterized by increasing levels of concentration, the tendency is for firms to start behaving oligopolistically. In other words, the fewer the competitors, the more likely each competitor will start making competitive decisions with some level of understanding as to how the remaining competitors will react. Although there is nothing unlawful, in and of itself, about such rational business decision making, it can curtail competitive vigor. But when there exists a competitor that does the unexpected, the conditions more nearly approximate that of a perfectly competitive market, where uncertainty abounds. In short, although the proposed transaction does not change the number of competitors in the MVPD market, any impact of News Corp. on the business decisions of DirecTV may well increase competition at the MVPD level.

1. *The present transaction does not raise the same antitrust issues that were present in the abandoned EchoStar/DirecTV transaction*

In October 2002, the DOJ, joined by 23 states, the District of Columbia and the Commonwealth of Puerto Rico, filed a lawsuit to block the acquisition of Hughes by EchoStar. In short, this transaction proposed the combination of the nation’s two largest DBS providers, and, in my view created one of the most obvious and compelling cases for Government challenge in recent history.

The DOJ’s argument in opposing the transaction was straightforward.⁸ The merger would have reduced the number of competitive choices available to consumers in the MVPD market from three (Hughes’ DirecTV, EchoStar’s DISH network, and cable) to two where cable is available. In non-cable areas, DOJ alleged that the proposed transaction was quite simply a merger to monopoly, resulting in one company controlling all three full continental U.S. satellite positions, and making it virtually the exclusive gatekeeper for nationwide direct broadcast satellite services.⁹

Clearly, the proposed partial acquisition of Hughes by News Corp. does not present the same issues. *EchoStar/Hughes* was a horizontal concentration between two competitors in a highly concentrated market. By contrast, the *News Corp./Hughes* transaction is a vertical integration of a supplier and a distributor. Thus, while the DOJ predicted in *EchoStar/Hughes* that the beneficial products of the intense competition between DirecTV and DISH (for example, reduced programming prices, more attractive programming packages, reduced equipment costs, and free installation) would be lost post-merger, there are no similar concerns here. DirecTV will still compete head-to-head with DISH and, where available, cable. The market position of competitors in the MVPD market will therefore be unaffected by the proposed transaction.

⁶United States Dept. of Justice and Federal Trade Comm’n. Horizontal Merger Guidelines (1992) (“Merger Guidelines”).

⁷Merger Guidelines §§ 2.12 and 4.

⁸See EchoStar Complaint at ¶¶ 37–59.

⁹The merger proponents argued forcefully that the combination of the two primary DBS services would in fact spur even more horizontal competition vis-&-vis cable, by creating a larger, more robust, DBS, and would bring together resources that would foster further innovation.

B. Vertical Issues

What remains to be examined is the possible anticompetitive effect that could flow from the vertical affiliation between the programming business of News Corp. and the distribution business of DirecTV. Therefore, the antitrust inquiry needs to focus on any incentive or ability that News Corp. or DirecTV will have as a result of a partial overlap in ownership between these businesses. Will DirecTV have the incentive or the ability to favor programming from News Corp. such that News Corp.'s programming competitors will be at a competitive disadvantage? In the alternative, will News Corp. have the incentive or the ability to favor DirecTV at the expense of other MVPDs such that DirecTV will have an anticompetitive advantage?

Under the facts of this case, neither of these theories appears to present a realistic antitrust concern. Given the resulting market structure, neither News Corp. nor DirecTV appears to have the incentive or the ability meaningfully to discriminate against competitors

1. Would DirecTV favor programming from News Corp.?

I would like to start by outlining a theoretical antitrust concern from the vertical affiliation: if DirecTV favors programming from News Corp. and either refuses to carry programming from competitors or carries competing programs under onerous terms, News Corp.'s programming would gain an advantage against such competitors. Whereas News Corp.'s programming would be free to contract for access on all distribution channels available, its competitors would be denied the ability to reach the DirecTV subscribers on competitive terms. Therefore, depending on the market strength of DirecTV, News Corp. would be able to decrease competition in the market or markets for programming.

This theoretical construct, however, breaks down when one factors in present market conditions. By refusing to deal with competing programmers on competitive terms, DirecTV takes the risk that consumers will find its service less valuable because it does not carry the programming sought by consumers. Therefore, for this concern to materialize, News Corp. and DirecTV need to be convinced that the strategy will result in increased profits for News Corp. and that these profits will not be offset by an even larger detrimental effect on DirecTV.

If DirecTV were a monopolist, I would tell you that the inquiry would have to dig deeper because under those circumstances, a strategy to foreclose News Corp.'s competitors might actually pay off. It might turn out that even as a monopolist, DirecTV and News Corp. do not in fact have the ability or the incentive to engage in a foreclosure strategy, but it certainly is a theoretical and mathematical possibility. As a monopolist, DirecTV likely would not lose that many subscribers by refusing to carry some programming desired by consumers; and News Corp.'s programming would have a significant competitive advantage by having unhindered access to the monopolist distributor.

Of course, the marketplace, as it exists, presents a very different picture. The FCC recently concluded in its Annual Report to Congress that cable distribution still constitutes over 75% of the MVPD market and that "cable television still is the dominant technology for the delivery of video programming to consumers in the MVPD market place."¹⁰ With approximately 12% of the MVPD market,¹¹ it appears unlikely that DirecTV could effect a successful anticompetitive programming foreclosure strategy here.

Indeed, the concern about the strength of *cable* distribution underlies the program access rules¹² adopted by Congress and the FCC to prohibit cable operators from discriminating against non-affiliated programmers: as long as cable operators dominate delivery of programming, a vertically integrated programmer will have the ability to foreclose its programming competitors from the market.¹³

These FCC findings also support the observation that DirecTV has no apparent incentive to discriminate against non-affiliated programming, because it would undermine any chance DirecTV has in competing against the dominant cable operators. DirecTV is not immune to competition in any area of the country, and overall, it controls only 12% of the national MVPD market. Even in areas where DirecTV does not face an incumbent cable operator, DirecTV faces competition from

¹⁰ See Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report, 17 FCC Red. 26901, ¶4 (2002) (Ἐἵναι ἡ Παρέμβαση Προμηθευτή Προπονητή).

¹¹ Ninth Cable Competition Report, ¶131.

¹² See, 47 CFR §§ 76.1000–1003.

¹³ See Federal Communication Commission, Implementation of the Cable Television Consumer Protection and Competition Act of 1992—Sunset of Exclusive Contract Prohibition, 17 FCC Red. 12124, 12144–45 (2002).

EchoStar. DirecTV needs to provide competitive quality and selection of programming to compete successfully against the incumbent cable operators and EchoStar. If DirecTV foregoes servicing its subscribers' demand for quality and selection in order to pursue a News Corp. battle against other programming vendors, it will be sacrificing the DirecTV business to deliver little more than a glancing blow to the unaffiliated programming vendors. In short, DirecTV and News Corp. do not appear to have the incentive to engage in conduct that will be detrimental to the non-affiliated programming vendors.

Even if DirecTV and News Corp. feel compelled to follow what appears to be an irrational strategy, DirecTV does not have the ability to inflict harm on non-affiliated programming vendors by refusing to deal with them. DirecTV alone, with only 12% of the market, certainly cannot dictate terms to the programming vendors; the programming vendors simply would refuse to accept unreasonable terms because they have close to 90% of the cable and DBS subscribers still available to them.

2. *Would News Corp. Favor Distribution Through DirecTV?*

The vertical integration of News Corp. programming with DirecTV theoretically could create an incentive for News Corp. to advantage DirecTV by denying News Corp. programming to DirecTV competitors at competitive terms. However, the ability to engage in such anticompetitive behavior is constrained by programming competitors, who would likely seize the opportunity to supply more programming to the market. MVPD operators choose to carry programming that will facilitate their market penetration: it is unclear that Fox has any essential or unique programming in that regard. Moreover, News Corp. programming does not in aggregate represent a significant percentage of the programming market. Indeed, competitors such as AOL Time Warner, Viacom, and The Walt Disney Co. each possess a greater share of the media programming business. The wide availability of substitute programming therefore greatly minimizes the risk of foreclosure in the programming market.

Another flaw with this theoretical concern is the premise that, in the U.S. market, News Corp. has an incentive to cease distribution of its programming through competing MVPDs. Viewership is the key asset for News Corp.; viewership determines not only the fees collected from the MVPDs but also the advertising revenue. It is not clear why News Corp. would disrupt its current distribution system, significantly risk a reduction in viewership and revenue for the distant promise that subscribers might switch to DirecTV. In any event, whatever the desire of News Corp. to unfairly promote DirecTV may be, it would have to factor in that News Corp. will own only 34% of DirecTV. Therefore, while News Corp. would absorb 100% of the lost programming and advertising revenue from denying programming to competing MVPDs, it would recoup only about a third of any unlawful rents that result from advantaging DirecTV.

Take the Fox News Channel. News Corp. entered this segment of programming challenging a dominant incumbent, i.e. CNN, and, contrary to the prediction of many, has turned the channel into the most watched cable news provider.¹⁴ If News Corp. refuses to provide this programming to DirecTV's competitors, it risks losing significant share back to CNN, without any guarantee that consumers would switch to DirecTV simply because they prefer Fox News Channel over CNN. Even with respect to regional sports programming, News Corp. appears to have strong incentives to continue to distribute through DirecTV competitors. In the regional markets where News Corp. has sports programming, to the extent DirecTV's market share is roughly the same as elsewhere (i.e., 12%), News Corp. would have to risk 88% of the market to discriminate against DirecTV's competitors.

With a 12% market share, DirecTV does not have—and is not likely to gain—sufficient subscribers to enable Fox to sustain its current level of license fees, and the related advertising revenue, should the distribution of Fox programming be in any way curtailed post-merger.

3. *Commitment to be Bound by Program Access Rules*

Of course, all of these discussions about the vertical issues may prove to be merely academic. I understand that the parties to the transaction have expressed their willingness to abide by the program access rules of the FCC and incorporate appropriate terms into a consent decree with the regulatory agencies.¹⁵ The program access rules are designed to protect non-cable MVPDs like DBS providers, and technically apply only to cable operators and to programming vendors that are affiliated with cable operators—not DBS operators. (It is my understanding, however, that as

¹⁴ Application of General Motors Corporation, Hughes Electronics, and News Corporation Limited, Consolidated Application for Authority to Transfer Control at 25, filed May 2, 2003

¹⁵ *Id.* at Attachment G.

a result of Liberty Media's minority stake in News Corp. and in some cable operators, News Corp.'s programming is subject to the program access rules.)

The rules prohibit vertically-integrated programming vendors from discriminating in the prices or terms and conditions of sale of programming to cable operators and other MVPDs. The rules also prohibit any cable operator that has an attributable interest in a programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including prices, terms, and conditions of sale or delivery of satellite-delivered programming to any competing MVPD. Finally, under the rules, cable operators generally are prohibited from entering into exclusive distribution arrangements with vertically-integrated programming vendors.

Of course, since the rules apply only to "cable operators" and their affiliates, these restrictions presumably would not otherwise apply to DirecTV, or to News Corp. in the event Liberty Media divests its interest in News Corp. or the cable operators. However, according to their FCC application, the parties are willing to subject their operations to the antitrust safeguards provided by these rules irrespective of Liberty Media's stake in News Corp. or cable operators, and more generally undertake to subject DirecTV to all of the restrictions that apply to cable operators. Also, again according to the application to the FCC, the companies agree to the following in addition to the program access rules:

1. Neither News Corp. nor DirecTV will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage.
2. News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions.
3. Neither News Corp. nor DirecTV (including any entity over which either exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.

In light of the lack of incentives or ability to engage in vertical foreclosure, the companies' commitments may be unnecessary. However, they provide added assurance that there will be no anticompetitive effects, i.e., that News Corp. would foreclose other MVPDs or DirecTV would freeze out other programmers. The parties thus appear to commit that neither News Corp. nor DirecTV will enter into any exclusive deals or discriminate against any MVPD or programming vendor.

Of course, the commitments not to discriminate against other programmers or other MVPDs inevitably will be criticized by some as leaving a loophole for News Corp. to raise prices to all MVPDs and "reimburse" DirecTV for the price hike through either some distribution or other internal accounting mechanism. Putting aside the facts that News Corp. will own only 34% of DirecTV,¹⁶ and that, as discussed above, News Corp. lacks the power to raise fees to MVPDs, such an argument assumes that the FCC regulations and the administrative adjudication procedures provided by the program access rules cannot effectively prevent abuse. The FCC has considered a number of other cases involving vertical issues in MVPD transactions, and has consistently found that its program access rules are a sufficient protection against potential abuse.¹⁷

III. POTENTIAL EFFICIENCIES RESULTING FROM THE PROPOSED TRANSACTION

In addition to injecting a maverick firm into the MVPD market, the companies have identified expected synergies not only in reduction of operating expenses but also in the form of implementation of new service and better customer service. In particular, the companies expect to benefit from News Corp.'s extensive experience abroad in the field of DBS and implementation of new related services such as interactive television applications. Similarly, News Corp. has a history of making local programming a central element of its business model. Therefore, it would not be surprising to see DirecTV accelerate its local-into-local programming as a way to expand customer service and quality of programming.

The combination of News Corp.'s DBS business outside of the United States with the DirecTV business likely will also create economies of scale with respect to re-

¹⁶The financials of DirecTV likely will be kept separate from News Corp. making any circumvention of the program access commitments harder to implement and easier to detect.

¹⁷See, e.g., *Comcast Corporation, AT&T Corp., and AT&T Comcast Corporation*, 17 FCC Rcd 23246, 23286 (2002); *Telecommunications, Inc. and AT&T*, 14 FCC Rcd 3160, 3180 (1999).

search and development of new and innovative technologies. Further, the ability to coordinate development, marketing and delivery of new programming likely will streamline and rationalize the service to the consumer.

IV. CONCLUSION

As I mentioned before, a transaction of this size always requires an informed inquiry into the antitrust implications. However, the facts of this transaction dispel concerns as to any substantial antitrust issues. First, the lack of any horizontal overlap and the likely immediate efficiencies argue for cautious regulatory scrutiny. Second, any potential for vertical foreclosure appears unlikely because the parties do not have the incentive or the ability (market power), to engage in conduct that would foreclose other MVPDs or programming vendors. Finally, the parties have expressed a willingness to enter into a consent decree that tracks and adds to the regulations the FCC put in place to tackle the same antitrust concerns that arise when cable companies vertically affiliate with programming vendors. Therefore, there appears to be no reason to oppose the transaction on antitrust grounds.

Chairman SENSENBRENNER. Thank you, Mr. Arquit.
Mr. Schnog? And please pull the microphone in front of you.

TESTIMONY OF NEAL SCHNOG, VICE CHAIRMAN, AMERICAN CABLE ASSOCIATION, PRESIDENT, UVISION, LLC

Mr. SCHNOG. Thank you, Mr. Chairman. As the President and Chief Executive Officer of Uvision, an independent cable business serving 8,000 customers in rural Oregon, I come here representing the American Cable Association, a group that represents small cable operators, not 8 million customers, not 800,000 customers, not 11 million customers, but 8,000 in our case.

ACA represents more than 1,000 independent cable businesses, serving almost 8 million customers in smaller markets and rural areas across the United States. Our American Cable Association serves customers in every State in nearly every congressional district, and none of us own any programming interests.

ACA opposes this merger. The Federal Government should not let this fox into the DirecTV henhouse. Here's why. DirecTV says it needs this merger to compete against cable. This is fiction. In small towns and rural areas where my company provides service, competition with DirecTV has been vigorous for years and remains intense. Unless the merger is denied, the competitive landscape in smaller markets and rural areas will be forever tilted toward Fox and DirecTV. This will drive my company and thousands of others like it out of the marketplace, leaving your constituents with no choice.

Like the robber barons of the past, Fox will have every incentive to hurt small cable companies and push our customers to DirecTV. Fox will have an arsenal of content at its disposal: A broadcast network, television stations, programming services, DBS distribution and much, much more. If past is prologue, Fox's anticompetitive behavior is all the proof needed to oppose the merger. For example, if many of our companies want to carry a local Fox Broadcast station, Fox forces them to carry several additional Fox programming channels. Just to get a local broadcast station, our customers have to pay for a range of an additional Fox programming services. Fox also prohibits our companies from offering regional sports programs or other channels on an a la carte or tier basis, forcing our constituents to pay for programming that they don't want. Finally, Fox prevents transparency through contractual gag orders. This pro-

hibits any disclosure of Fox's onerous rates and terms to my customers or even to the U.S. Congress.

In one breath, Fox says there is no danger to competition in the merger if it's approved, but in the next it proposes some conditions. Fox says it will provide its satellite programming to my company on the same terms and conditions it would sell DirecTV. But this condition only extends the Fox's satellite programming. Fox says nothing about its television networks, its broadcast programming, NFL Sunday Ticket or any other media assets Fox controls or could control. Fox has every incentive to use these content assets to foreclose competition from small cable companies. Regardless of Fox's conditions, competition in smaller markets and rural areas will remain easy prey. If the Federal Government accepts these meager constraints, consumers throughout America will be the ones out-foxed.

If this merger proceeds, the reality will be like the Fox show "Joe Millionaire." The merger has superficial appeal, and its stars are smooth talkers. They even have great Australian accents. But at the end of the show, the ugly truth will emerge. For television viewers in small towns and rural areas, the merger will be like the closing of the Royal Theater in "The Last Picture Show" and begin the certain end to true competition.

Thank you.

[The prepared statement of Mr. Schnog follows:]

PREPARED STATEMENT OF NEAL SCHNOG

I. INTRODUCTION

Thank you, Mr. Chairman.

My name is Neal Schnog, and I am the president and chief operating officer of UVISION, LLC, an independent cable business currently serving 8,000 customers in small towns and rural areas in Oregon.

I also serve as the vice chairman of the American Cable Association, which represents more than 1,000 independent cable businesses serving almost 8 million customers primarily in smaller markets and rural areas across the United States. In fact, our American Cable Association members serve customers in every state and U.S. territory and also in nearly every congressional district.

ACA vehemently opposes this proposed merger.

Unlike big companies you hear about, ACA members are not affiliated with programming suppliers, television networks, big cable, broadcast, satellite and telephone companies, major ISPs or other media conglomerates. We focus on smaller market cable and communications services, often in markets that the bigger companies chose not to serve. Because we live and work in these rural communities, we know how important it is to have advanced telecommunications services available and to be a provider of choice in these communities.

ACA members are leading the industry in delivering advanced services in smaller markets. Far from living on the wrong side of the digital divide, millions of customers served by independent cable companies enjoy access to digital cable and broadband Internet services that are not available in some urban areas. Some ACA member systems have begun to deliver DTV broadcast signals as well, doing our part to move the transition forward.

We also look forward to providing newer, advanced services to our customers in rural America too. Advanced services like digital broadcast television, high definition television, video-on-demand and cable and Internet telephony, to name a few.

As you know, most of today's headlines in the communications world are about the large companies, such as the Fox/News Corp./DirecTV merger and the media giants created by the mergers of the 1990s and beyond.

Just for the record, my small company is *not* the "giant entrenched cable monopoly" that others talk about so frequently. Rather, being on this panel makes me feel like a David among many Goliaths. The American Cable Association represents no

Goliaths. We're simply small businesses in cable that happen to serve customers in rural America.

We're here to speak for the millions of small-town customers and thousands of small-town businesses that are represented by every member of this committee.

Quite frankly and ironically, we're the smaller-market and rural competitor to what may soon become the "giant entrenched, vertically integrated satellite conglomerate"—Fox, News Corp., and DirecTV.

I hope my testimony here today will help you serve your constituents by understanding the critical issues facing the multichannel video programming and distribution industry and the negative effects that continue to occur as a result of increasing media consolidation.

These issues will have a significant impact on all Americans and could have a devastating effect on smaller markets and rural communities where our ACA members employ thousands and serve millions. I therefore ask for your consideration and hope you will agree that the industry is in need of congressional and regulatory review.

II. COMPETITION AND CHOICE ARE THE VICTIMS OF INCREASING CONCENTRATION OF MEDIA OWNERSHIP.

To me, the real benefit of this hearing is the opportunity to highlight the current status of customer choice in the multi-video services market, *because competition really means customer choice*. No choice, no competition. However, the irony here is that the status of competition and customer choice today, especially in rural areas and small towns, is already significantly limited because it is governed by an unlikely cast of players that do not live in rural America, do not focus on rural Americans' needs, and who have found anti-competitive means to extract enormous wealth from the pockets of rural consumers and businesses.

Unless there is significant congressional and regulatory review of these issues, the situation is sure to get worse. Consumer choice and competition may be wiped out in the wake of the mergers creating these mighty communications giants. The proposed acquisition of DirecTV by FOX is a perfect example of the many things that are broken. Let me tell you why.

There are three very important issues that threaten consumer choice in smaller markets and rural America and that will derail the progress to provide advanced services in smaller markets:

1. *The abusive conduct of a handful of media conglomerates toward smaller market distributors and their customers.* The media giants are using their vastly increasing control of content, pricing, terms, conditions and placement requirements to control what the consumer sees and how much he or she pays. The News/Corp. Fox team is near the top of this short list. *Congress must act to address the worsening structural programming problems that are forcing consumers to pay more while taking away any choice.*
2. *The disproportionate burden of regulation on smaller, independent cable companies,* like mine in rural America, compared to the free regulatory ride enjoyed by giant multinational satellite powerhouse. *Congress and the FCC must reduce or balance these regulatory burdens with DBS to foster and protect full and fair competition in smaller markets and rural areas.*
3. *In most other industries the consolidated market power and anti-competitive behavior of the programming media conglomerates, including Fox, would likely violate federal anti-trust laws or at least invite close scrutiny by Congress and the federal government.* This anti-competitive behavior will have a greater impact in smaller, rural markets where Fox/News Corp.'s worldwide market dominance and pricing power can quickly drive small competitors out of town. *Therefore, Congress should apply federal anti-trust laws to the anti-competitive practices of Fox and others.*
4. *The adverse effect of the proposed Fox-News Corp.-DirecTV merger, which will limit current competition in U.S. markets—particularly in smaller and rural markets—by consolidating enormous, vertically-integrated content and control in the hands of one company—the merged Fox/News Corp./DirecTV empire.* If this merger is ultimately approved, then at the very least the Federal Communications Commission and Department of Justice must place significant conditions on this merger to ensure fair access to News Corp. affiliated satellite and broadcast programming. The conditions News Corp. have proposed in their first FCC filing fall far short of what is required. But even beyond strict conditions, *Congress should also extend and apply current pro-*

gram access laws covering vertically integrated cable operators to vertically integrated satellite operators.

Before addressing the merger and its negative effects on our members and consumers in small towns and rural areas, it is important to review current practices employed by the large conglomerates, including Fox/News Corp.

III. KEY ISSUES

- 1. The abusive and anti-competitive conduct of a handful of media conglomerates, including Fox/News Corp., is threatening the ability of cable systems, particularly in smaller markets, to compete. More importantly, these abuses are driving consumer costs up while taking away choice. Congress must act to address the worsening structural programming problems caused by increasing media concentration.**

From our standpoint, this hearing provides an important and appropriate opportunity to highlight how little customer choice exists today in the multichannel video services market, especially in rural America. The fact is that the status of competition and customer choice today, especially in rural areas and small towns, is already significantly diminished because it is governed by an unlikely cast of players who neither live in rural America, nor focus on its needs.

This unlikely cast includes several major media conglomerates that are mandating the cost and content of most of the services we provide in smaller markets. These include Fox/News Corp.(DirecTV), Disney/ABC/ESPN, General Electric/NBC, CBS Viacom/UPN, and AOL/Time Warner/WB. For smaller markets cable systems, this is a fundamental problem that directly impacts our ability to provide a viable, competitive service to our customers. These major media conglomerates, which we call **OPEC, the Organization of Programming Extortion Companies**, have found through media consolidation the means to use market power to extract ever-increasing profits from consumers and businesses in smaller markets.

Unless there is significant congressional and regulatory action to address these issues, the situation will only worsen. Without your intervention, consumer choice and competition, not to mention the deployment of advanced telecommunications services in rural areas, will disappear in the wake of this merger frenzy.

A vitally important question here: Who controls what your constituents see on their TV sets? Not a small cable business like mine or any one of our ACA members. Customers and local franchise authorities are unaware of this, but their television choices are controlled by the five OPEC companies.

Over the past five years we have seen an explosive consolidation in the programming industry that has led to sharply increased prices, less freedom to offer popular content, and little customer awareness as to why they are forced to buy the channels they do.

For example, ESPN's fifth 20% increase in five years was announced just this past week, and Fox Sports isn't far behind and closing fast.

Imagine how your Committee would react if it were my cable company or any other cable operator that raised its rates 20% a year for five years in a row—an increase of almost 250% over five years. Frankly, the same indignation you would feel if my company raised rates like this must be focused on ESPN and other programmers, like Fox Sports, that raise rates like this *every year*.

The fact is that programming rates for 14 of the major cable programming networks have risen 66.6% over the past five years—an increase of more than 5 times the Consumer Price Index (CPI) over the same period.

In ESPN's case, one day after ESPN announced last week its fifth consecutive annual 20% increase, ESPN's parent company, Disney, announced a \$400 million revenue increase for the 2nd Quarter of 2003, largely attributed to revenue growth at ESPN and other Disney programming networks.

Now let's turn to Fox. For a typical independent cable business in rural areas Fox Sports is the second most expensive service after ESPN—exceeding even HBO (Home Box Office).

If you want to know why cable rates are increasing, this is a big reason why.

But there's more.

Obviously, some of our customers want ESPN. But ABC-Disney will not generally let us buy just one service. Fox won't either in the area of retransmission consent. Oftentimes, in order to get the local ABC or Fox affiliate, Disney and Fox will force us through retransmission consent to take and pay for other channels we know our customers don't want.

This abuse of retransmission consent goes farther—in order to get consent to carry a local broadcast station in one market, our members are forced to carry Dis-

ney or Fox's satellite programming in other markets, where Disney and Fox do not even own the broadcast station.

For example, is it really in the public interest for all of my customers to pay for recycled soap operas, a programming service for which most of them have absolutely no interest, just so some of my customers can be permitted to watch their ABC affiliate?

Adding to the absurdity of the situation, these conditions for carriage often outlive the terms of the retransmission consent period for the local broadcast station by many years. As a result, these mandated conditions clog a cable system's channel capacity with OPEC programming while denying that capacity to independent, non-OPEC programmers. The end result is that these mandated OPEC conditions increase costs and decrease choice for consumers.

It gets worse. One solution might be to offer the expensive services in tiers or a la carte. This would allow consumers to choose whether or not they wish to pay for the expensive services. But all of the OPEC programming companies, including Fox, force their programming onto the lowest, basic levels of service, making your constituents pay for all of their programming whether they want it or not. We must ask: Is this good for the consumer? Is this in the public interest? Is this why these companies get free spectrum?

Consolidation has turned retransmission consent into extortion. Even more appalling is that fact that the OPEC companies embed in their contracts various "non-disclosure" terms. These provisions prohibit cable operators from telling any customer, even the local franchise authority or your Committee, the rates and terms for the distribution of the OPEC programming. Thus, rate increases and unfair bundling practices are kept hidden from the public and even from Congress. That is not the foundation for an open, functional and fully competitive marketplace, or one that is transparent and constructed to best serve consumers.

I am sure you all remember the retransmission consent showdown in New York City between Time Warner and Disney over this very issue.

After that enormous struggle between industry titans, imagine the odds a small company like mine has when negotiating with Fox, especially an even bigger, stronger post-merger Fox.

The five major OPEC programmers control all broadcast networks and at least 50 other of the most popular stations. More than 90% of cable systems offer 30-to-90 channels, which, as you can see, are dominated by OPEC programmers.

In fact, on your own House cable system 60% of the widely distributed channels on it are controlled by the OPEC media conglomerates.

The irony here is that at a time when Congress wants our small cable businesses to provide our customers with *more* choice and *greater* value, media conglomerates like Fox/News Corp./DirecTV, Disney/ABC/ESPN and the other OPEC companies are *restricting choice and raising costs*.

If our smaller businesses and our customers are ever to regain any measure of control over the spiraling rates imposed by these voracious conglomerates, then Congress must intervene.

The members of the American Cable Association and independent cable's buying group, the National Cable Television Cooperative, have for years sought meaningful dialogue with Fox/News Corp. and the OPEC programmers, but to no avail.

More than a decade of debate and discussion on these issues with them has led to no positive change in their behavior.

To break the stranglehold of control by Fox/News Corp. and the OPEC programmers and to give consumers and independent cable businesses any choice and control, Congress should act in five specific areas:

- **ensure the freedom to unbundle OPEC programming;**
- **revamp the laws dealing with retransmission consent and program access;**
- **require the transparency and disclosure of programming costs;**

Unbundling: Today the OPEC programmers tie and bundle their services in such a way that to obtain one service our customers are forced to pay for other services they don't want.

Congress should act to ensure that Fox and the other programming conglomerates cannot force consumers and cable businesses to take bundled services or require that these services be carried on the lowest levels of service.

If the programming conglomerates had exercised any self-control to stop this conduct, we wouldn't be here today asking Congress to act. But the abuse goes on.

Congress should amend telecommunications laws to provide that no programming provider can require that its services be carried only on the basic or expanded basic

level of service. Rather, to give consumers choice and to allow the market to determine what gets on TV, programmers should be required to make their services available as part of a separate programming tier, or even a la carte.

The template for this congressional action has already been created. For example, both Cablevision Systems and the Yankees Entertainment Sports Network (YES), are now allowing consumers to buy higher-priced programming services on either a tier or as a single, a la carte channel.

However, this fundamental change to give consumers more choice through tiering and a la carte will not occur without congressional action.

In the case of Cablevision and YES, it took the actions and efforts of the New Jersey Senate, U.S. Senator Frank Lautenberg, New York City Mayor Michael Bloomberg and New York State Attorney General Elliott Spitzer to compel this result.

If it takes this kind of combined political pressure to force parties of *equal* bargaining power together, what chance do consumers in smaller markets and rural areas have to see similar improvements if this Fox is allowed to buy the hen house. Frankly, none.

Therefore, Congress must help us give consumers greater choice by amending the Communications Act to allow us the right to offer all programming on a tiered or a la carte basis.

Retransmission Consent: Today, as a result of unprecedented media consolidation, the OPEC programmers abuse retransmission consent laws simply to line their pockets. They do this by forcing your constituents to pay for unwanted programming in exchange for receiving their local, free over-the-air broadcast stations.

ACA has provided detailed evidence of these abuses to the Federal Communications Commission and has asked the FCC to undertake an inquiry into these abusive retransmission consent practices. The FCC has so far not acted on this petition. We ask the Congress to urge the FCC to take immediate action on this inquiry.

The retransmission consent laws when enacted in 1992 were designed to put local broadcasters on a more equal competitive footing with cable operators. Since then, unforeseen media consolidation has turned this process on its head. Now, Fox and other media conglomerates are using the retransmission consent laws to evade market forces in order to artificially inflate the revenues from their satellite programmers. The practical impact of this evasion by the media conglomerates is that rural and smaller market consumers have less choice and higher costs, effectively subsidizing urban markets.

Congress should amend the retransmission consent laws to protect our consumers from being forced to pay for unwanted satellite programming just to see their local broadcast stations.

Transparency and Disclosure: What consumer, local franchising authority or congressional office knows what it costs to watch TV? The answer is not one. That's because the OPEC conglomerates resist transparency by hiding their abusive practices under the cloak of confidentiality requirements.

Who gets the blame when programmers force unpopular or costly programming on our basic tiers? Not them, but us.

As ESPN's increase of nearly 250% over the last five years demonstrates, programming prices continue to escalate far in excess of the rate of inflation, raking in enormous sums from consumers. It's greed run amok. One way to rein in the greed of programmers is to require transparency.

Congress should amend the Communications Act to require programmers to make annual disclosures to local franchise authorities and the Federal Communications Commission. These disclosures should include what programmers charge cable businesses and how they mandate bundling or placement of their services.

Moreover, Congress should direct the FCC to compile every year a comprehensive Programming Price Index to show Congress and consumers how much they are truly being charged to watch television. Every three years the FCC should also compile and publish a Retransmission Consent Index to show consumers what it truly costs them to receive their local network television stations.

Until there is transparency in the programming marketplace, consumers and their local providers of service will have little control over what is seen on TV, when it is seen on TV, or how much it will cost.

2. Smaller, independent cable companies face a disproportionate burden of regulation, compared to the free regulatory ride enjoyed by the giant satellite companies. Congress should reduce independent cable's regulatory burden or balance it with satellite's.

We continually hear representatives of the direct broadcast satellite industry say how Congress should help DBS compete against the "giant, cable monopoly" by reducing or eliminating the DBS regulatory burden.

However, contrary to these DBS cries, two facts are clear:

First, as we have already outlined, the new Fox/News Corp./DirecTV juggernaut will assemble an unparalleled array of content and distribution assets. Absent clear enforceable restrictions, the conglomerate will expand the use of this massive power to the detriment of choice, competition and consumers in rural America.

Second, my company and the nearly 1,000 other small, independent cable businesses in the American Cable Association are obviously not the "cable giants" that DBS says it must compete against. Rather, we are and will be the competitor in smaller markets and rural areas. That's why preserving competition in rural markets is vital.

But it's more than that. Right now direct broadcast satellite enjoys favored regulatory treatment that gives it a great advantage in the rural marketplace. Consider the following list and ask if this regulatory balance is fair. The average ACA member company serves 8,000 subscribers, more than 9,992,000 fewer subscribers than the post-merger DirecTV. Fox and DirecTV cannot seriously maintain that they need governmental help to compete against smaller market cable companies.

REGULATORY BURDENS

SMALL CABLE

(Avg. 8,000 Subscribers)

- Must-Carry in all Markets markets
- Retransmission Consent
- Emergency Alert Requirements
- Obligations
- Tier Buy-Through
- Franchise Fees
- Local Taxes
- Signal Leakage/CLI
- Rate Regulation
- Mandatory Carriage of Broadcast on Basic
- Privacy Obligations
- Customer Service Obligations
- Public Interest Obligations
- Service Notice Provisions
- Closed Captioning
- Billing Requirements
- Pole Attachment Fees
- Public File Requirements

FOX/DIRECTV

(10,000,000 Subscribers)

- *Must-Carry only in selected
- *Retransmission Consent
- *Limited Public Interest

In smaller markets and rural areas, the regulatory disparity that exists between independent cable and DBS must be addressed if Congress and federal policymakers want to ensure that multiple providers of video service are there to provide choice to consumers. This means that Congress should reduce, or at least equalize, the regulatory burdens on smaller cable.

3. Congress should apply federal anti-trust laws to the anti-competitive behavior of the OPEC programmers, including Fox/News Corp.

The actions of the programming conglomerates, including Fox/News Corp., to tie their services and gouge consumers implicate core anti-trust principals. Current fed-

eral anti-trust laws are designed to prohibit contracts and combinations in restraint of trade, and to prohibit price discrimination where it has an anti-competitive effect.

If programming were any other business, the tying, bundling and price fixing that goes on year after year would have been prohibited on anti-trust grounds by either Congress or the Department of Justice.

Why then are the programming conglomerates allowed unfettered ability to perpetrate the same harmful actions on consumers without consequence? There is no good reason.

As a result, *Congress should carefully scrutinize potentially harmful consequences from the vast increase in market power by Fox/News Corp, which has consistently exhibited anti-competitive behavior. Even if this merger is blocked, Congress should apply federal anti-trust laws to this anti-competitive behavior.*

Just because consumers can't touch a programming service on TV doesn't mean that it's not bought or sold like any other good or commodity consumers purchase. It is a "good" for anti-trust purposes that is tied and bundled just like any other commodity.

4. The adverse effect of the proposed Fox-News Corp.-DirecTV merger will limit current competition and choice in U.S. markets—particularly in smaller and rural markets. The Federal Communications Commission and Department of Justice must place significant conditions on this merger, and Congress should also extend and apply current program access laws to vertically integrated satellite operators.

Customers will also face less choice as a result of the vertically integrated satellite conglomerate that would be created from a Fox-News Corp.-DirecTV merger.

The merger of Fox, News Corp. and DirecTV will create perhaps the world's largest vertically integrated programming distributor. This multi-national behemoth will possess global reach and control a television broadcast network, scores of broadcast affiliates, a significant number of cable and satellite programming channels, and a complete satellite distribution system with DirecTV's more than 10 million customers. These facts alone will give Fox the ability to control access to programming, limit customer choice, raise programming prices, and eliminate competition in rural markets.

The threat by a merged Fox/News Corp./DirecTV to use its programming leverage against other competitors is not theoretical. Upon completion of the merger, the conglomerate will have exclusive control over certain sporting events, including the NFL's Sunday Ticket and numerous regional sports networks.

This Committee has a long history of exploring antitrust activities and anti-competitive behavior. In today's marketplace, our business is akin to the wild west, in which the large robber barons are free to impose their will, especially on consumers.

Last Friday, News Corp. proposed some "voluntary conditions" in its first FCC filing on the merger. These do not go nearly far enough. Even with the proposed conditions, News Corp. and its many broadcast and programming affiliates will still have an arsenal to increase costs and reduce choice for rural consumers.

Because of these concerns, we believe the government must place strict and easily enforceable conditions on any such merger. In addition, Congress should amend the program access laws to extend them to vertically integrated satellite entities, like Fox, just as these laws are applied to vertically integrated cable entities.

IV. CONCLUSION

Each one of the foregoing issues directly affects the market's ability to: (1) provide competition and choice in smaller markets; (2) give consumers control over what they see on television and how much they pay for it; and, (3) deploy advanced new services in rural communities.

My company and the members of the American Cable Association are here today alongside the giants of the television, cable, satellite and telecommunications world. Why should anyone here listen to what we have to say?

Because the nature of our businesses makes us uniquely sensitive to the needs of small and rural markets. We serve nearly 8 million consumers in nearly all congressional districts and, in fact, every state represented on this Committee.

The irony here is that the impact of these media ownership issues, if not addressed by Congress, will have the opposite outcome to what Congress desires. This potential outcome will not provide advanced new services, competition and choice for consumers in the smaller and rural marketplaces.

This merger is emblematic of these issues and the unintended consequences that will result and, most importantly, ultimately cause great harm to television viewers, particularly in small towns and rural areas.

The American Cable Association and its members are committed to working with the Committee to solve these important issues.

I would like to sincerely thank the Committee again for allowing me to speak before you today.

Must Take TV

Who Controls Your TV Set?

Did you know that more often than not, if you want one of these channels you **MUST** take the whole package?

CBS/Viacom/UPN (15):

- *BET
- *TV Land
- *TNN
- *Comedy
- *VH1
- *MTV2
- *Sundance
- *Noggin
- *BET Jazz
- *CMT
- *TMC
- *Flx
- *MTV
- *Showtime
- *Nickelodeon

AOL/Time Warner/WB (12):

- *Cartoon
- *Cinemax
- *CNN
- *Boomerang
- *Turner Classic
- *TNT
- *Turner South
- *CNNI
- *CourtTV
- *HBO
- *Headline News
- *TBS

GE/NBC (10):

- *AMC
- *Bravo
- *CNBC
- *History
- *A&E
- *MSNBC
- *Paxson
- *Telemundo
- *ShopNBC
- *Biography

NEWS CORP./FOX/DirectTV (10):

- *Fx
- *FoxM
- *FoxNews
- *Golf
- *Fox Kids
- *National Geographic
- *FoxSportsNet
- *FoxSports World
- *HealthNet
- *SpeedVsn

Disney/ABC/ESPN (10):

- *Lifetime
- *ABC Family
- *ESPN
- *ESPN News
- *Toon Disney
- *Disney Channel
- *ESPN Deportes
- *ESPN2
- *ESPN Classic
- *SoapNet

Front

U.S. Capitol Cable System House Channel Lineup

- 2 CNBC/PM News (General Electric)
- 3 House Floor Proceedings C-SPAN
- 4 WRC - NBC Washington (General Electric)
- 5 WTTG - FOX Washington (News Corp/DirectTV)
- 6 WBFF/Local Programs - FOX Baltimore (News Corp/DirectTV)
- 7 WJLA - ABC Washington (Disney/ESPN)
- 8 Senate Floor Proceedings C-SPAN2 - Hearings
- 9 WUSA - CBS Washington - Hearings (Viacom)
- 10 CNN - Cable News Network - Hearings (AOL Time Warner)
- 11 Weather/PM News/NBC Balt. - Hearings (General Electric)
- 12 WETA - PBS Washington
- 13 NASA / WJZ - CBS Baltimore (Viacom)
- 14 WPIX - WB New York (AOL Time Warner)
- 15 C-SPAN3
- 16 MSNBC - NBC Network (General Electric)
- 17 WDCA - UPN Washington/House/Library of Congress/Court TV (Viacom)
- 18 FOX News Network (News Corp/DirectTV)
- 20 WMPT - PBS Annapolis
- 21 C-SPAN
- 22 Univision (Spanish)
- 23 WHUT - PBS Howard University
- 24 Multiviewer - Committee Hearings
- 25 House Information - Committee Hearings
- 26 HTS - Home Team Sports - Committee Hearings
- 27 TDC - The Discovery Channel - Committee Hearings
- 28 News Channel 8 - IND Washington - Committee Hearings
- 29 WGN - IND Chicago - Committee Hearings
- 30 Local Programs - Committee Hearings
- 31 Local Programs - Committee Hearings
- 32 Local Programs - Committee Hearings
- 33 Local Programs - Committee Hearings
- 35 ESPN - Sports Network (Disney/ESPN)
- 36 Headline News - Cable News Network (AOL Time Warner)
- 36 WTBS - Independent Atlanta (AOL Time Warner)

**16 of 27 widely distributed channels are
owned by media conglomerates!
That's 60%!**

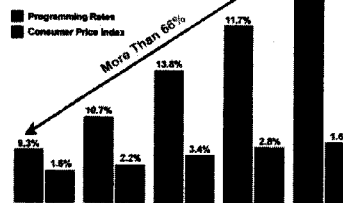


Back

Media Conglomerates Control Your Dial!

- ★ 60% of House channel lineup is controlled by five media conglomerates!
- ★ Media conglomerates tie, bundle and hold programming hostage through retransmission consent, taking away consumer choice and forcing cable rates up.
- ★ Major media conglomerates - Disney/ABC/ESPN; CBS/Viacom/UPN; General Electric/NBC; NewsCorp./Fox/DirectTV; AOL Time Warner/WB.

Programming Rates vs. CPI



- ★ Programming costs for 14 top cable networks have risen 65.6% over the past five years—an increase of more than 5 times the Consumer Price Index.
- ★ According to the U.S. Department of Labor, the Consumer Price Index has risen 12.1% over the same period.
- ★ Enormous programming rate increases by media conglomerates are aimed at smaller, rural cable businesses and their customers.

About the ACA

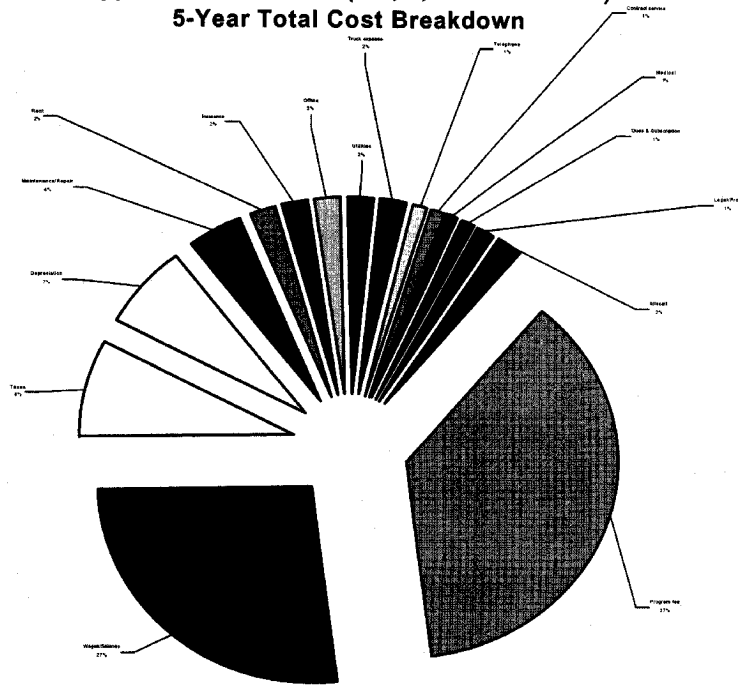
The American Cable Association represents the sole voice of independent cable television businesses working in smaller towns and rural America. ACA has represented independent cable since 1993 when these businesses joined together to create their own voice in Washington.

ACA represents more than 1,000 independent businesses that serve nearly seven million customers in small towns and rural areas all across America. Virtually all of ACA's members live and work in areas across the so-called "digital divide."

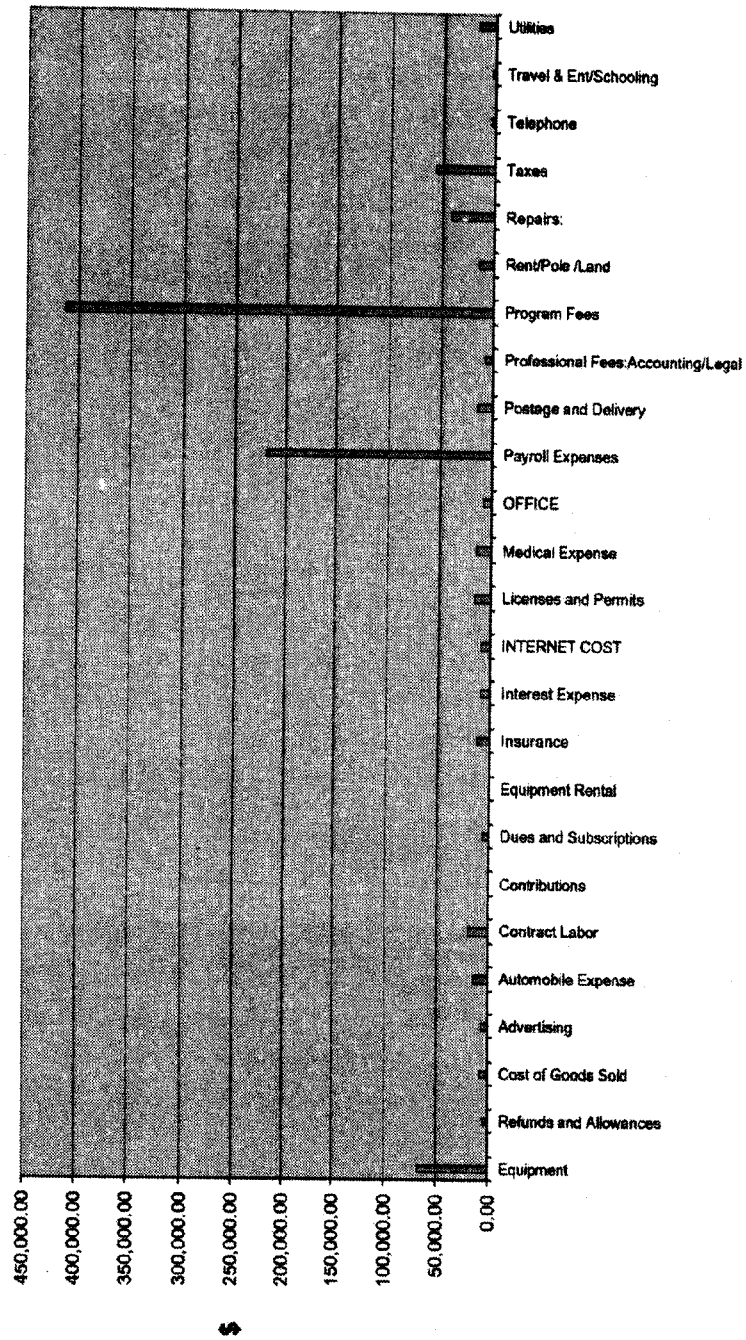


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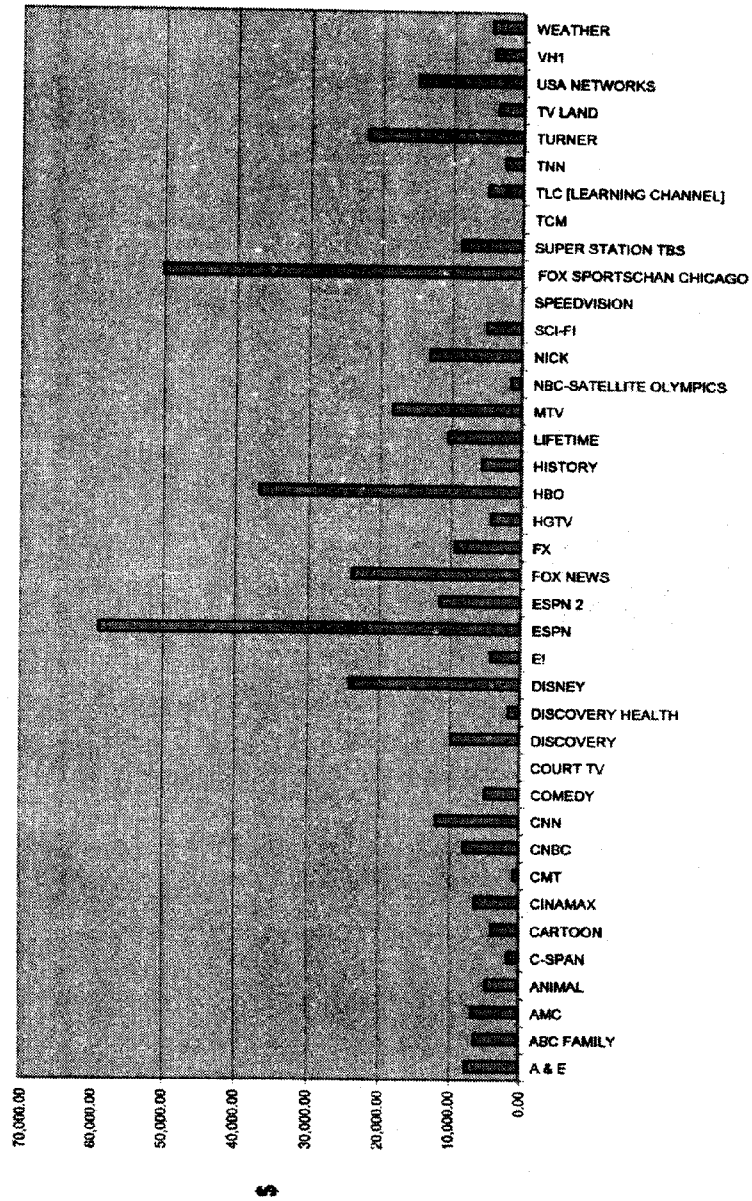
**Typical ACA Member (i.e., 1,500-2499 Subs)
5-Year Total Cost Breakdown**



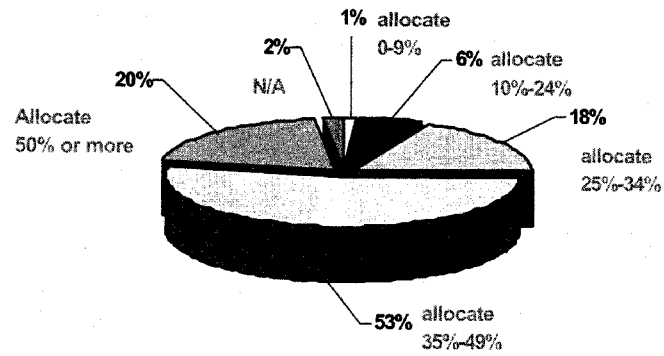
Typical ACA Member (1,500 - 2,499 Subs) 2002 Total Costs



Typical ACA Member (1,500 - 2,499 Subs) 2002 Total Programming Costs



**ACA Members'
% of Total Expenses
Allocated to Programming**



N/A = data not available

Chairman SENSENBRENNER. Thank you very much.
Mr. Kimmelman?

**TESTIMONY OF GENE KIMMELMAN, SENIOR DIRECTOR FOR
ADVOCACY AND PUBLIC POLICY, CONSUMERS UNION**

Mr. KIMMELMAN. Thank you, Mr. Chairman. On behalf of Consumers Union, the print and online publisher of Consumer Reports Magazine, I appreciate the opportunity to appear before you this morning.

Satellite was supposed to be the competitive silver bullet that was going to bring down the cable monopolies, and even with substantial growth in satellite, we've seen cable rates rise 50 percent since you launched deregulation of the cable industry in 1996. The GAO testified before the Senate Commerce Committee on Tuesday and indicated that their preliminary conclusion was that satellite has not been able to discipline cable's pricing at monopolistic rates.

At this point it appears that only a very aggressive, cutthroat competitive spirit in the satellite industry could possibly compete cable rates down. Is that likely to happen with this proposed merger between News Corp. and DirecTV? I'm afraid not. The last time I testified with Mr. Murdoch, I supported his satellite venture. This morning I'm afraid I will not be able to do so.

Mr. Arquit indicated a history of competitive activities. I will note that that's not consistent with what the Justice Department thinks in a complaint involving the Primestar transaction, the Justice Department found that Mr. Murdoch appeared to be colluding with the cable industry, not attempting to compete with them.

Let's look at this transaction, at what News Corp. holds and how it could affect competition and consumers. News Corp. owns 35 local broadcast stations, we believe above the national ownership cap established by the FCC, that the FCC's been turning away from enforcing. It owns a national television network with affiliates across the country. It has market power, contrary to what Mr. Arquit said, through its retransmission rights of bundling local programming with guaranteed carriage with all of the remainder of its programming, something sanctioned by law that would not necessarily be appropriate under normal market conditions under antitrust.

Fox owns the News Channel, Fox News Channel. It owns FX and other properties. It owns studios that can support this large distribution channel in both cable and broadcast. It owns more than 20 regional sports channels with rights to 67 teams in the NBA, the NHL, Major League Baseball, major package of Sunday NFL, college football games, basketball games. Otherwise commonly viewed as marquee programming in antitrust, something it doesn't appear Mr. Arquit looked at carefully. Must-have programming, you can't watch the Super Bowl 2 weeks later and think you're getting the same value as watching it when it happens.

Now, many Wall Street analysts believe that with this mass of programming assets—and we agree with this—News Corp. won't drive down and won't have incentives to drive down cable rates or satellite rates, and his promises do nothing to prevent prices from going up. Instead, it has the opposite incentive, make its money from all its programming, charge higher prices to cable operators,

charge higher prices to itself and to its one satellite competitor. I did not note Mr. Murdoch ever in his testimony indicating that he was intending to drive his prices or compete down cable prices through his transaction. In other words, I'm afraid this deal is truly bad for consumers.

And how would these promises be enforced? We appreciate the effort to put up front some nondiscriminatory principles and abide by access to programming. That's laudable on behalf of News Corp., but it does nothing to prevent them from charging themselves a high price and everyone else a high price for all of their programming. Cable pays more. Satellite pays more. Consumers of both pay more. That is not a good deal for consumers.

And what is discrimination? I'm afraid the FCC has been woefully inadequate in even defining that in the past. We believe this is an area where the Department of Justice would need to weigh in with much more severe, much more restrictive conditions in order for this merger not to harm consumers or competition.

But this is only the tip of the iceberg. We believe News Corp. is over its national ownership cap for broadcast stations, and we're afraid the FCC is about to let them own even more, about to let them own even more local broadcast stations in each local market around the country, and allow them to combine those assets with a dominant newspaper in each of those markets. That would lead to an avalanche of mergers and consolidation that is nothing short of a threat to the major sources of news and information that American people rely upon in their local community.

We urge you to prevent that from happening through this transaction and the FCC's relaxation of ownership rules. Thank you.

[The prepared statement of Mr. Kimmelman follows:]

PREPARED STATEMENT OF GENE KIMMELMAN

SUMMARY

Today consumers are not receiving the fruits that a competitive cable and satellite marketplace should deliver, and consumers are likely to suffer further harm if anti-trust officials do not impose substantial conditions on the proposed deal between News Corp. and DirecTV. Since passage of the 1996 Telecommunications Act, cable rates have risen over 50%,¹ and according to the FCC, satellite competition is not helping to keep those rates down.

We are pleased to see that the combined News Corp./DirecTV has agreed to offer access to their programming as part of the acquisition.² However this promise must be expanded to prevent other forms of anti-competitive discrimination, and must be enforceable through appropriate Dept. of Justice oversight mechanisms.

Even given the terms of what News Corp. is willing to concede by way of program access, substantial danger remains. First, there is a danger that News Corp. will discriminate against non-affiliated programmers in determining what programming to offer on its DirecTV satellite system. News Corp. could also pressure cable operators to do the same in return for more favorable carriage terms for News Corp. owned programming.

¹Bureau of Labor Statistics, Consumer Price Index (March 2003). From 1996 until March 2003, CPI increased 19.3% while cable prices rose 50.3%, 2.6 times faster than inflation.

²"As part of the acquisition, News Corp. and DIRECTV has agreed to abide by FCC program access regulations, for as long as those regulations are in place and for as long as News Corp. and Fox hold an interest in DIRECTV. . . . Specifically, News Corp. will continue to make all of its national and regional programming available to all multi-channel distributors on a non-exclusive basis and on non-discriminatory prices, terms and conditions. Neither News Corp. nor DIRECTV will discriminate against unaffiliated programming services with respect to the price, terms or conditions of carriage on the DIRECTV platform." News Corporation Press Release, "News Corp. Agrees to Acquire 34% of Hughes Electronics for \$6.6 Billion in Cash and Stock," Apr. 9, 2003.

Second, the agreement preserves the right to a variety of exclusive carriage arrangements, including distribution of Liberty Media programming, as well as sports programming where News Corp. enjoys substantial market power. Liberty Media owns approximately 18% of News Corp., and News Corp. has interests in several Liberty properties, indicating a close relationship between the two. It is hard to understand how such exclusive arrangements involving a company with such massive market power would not have a detrimental impact on competition in video programming. Antitrust officials must prevent these types of behavior.

The recently announced proposed merger between the News Corporation ("News Corp./Fox") and Hughes Electronics Corporation's satellite television unit DIRECTV ("DirecTV"), combined with the Federal Communications Commission's (FCC) current efforts to relax or eliminate media ownership rules that restrict ownership of multiple television stations, newspapers and radio stations both locally and nationally, threaten to harm meaningful competition between media companies. Most importantly, this lack of competition will mean that control of media that Americans rely upon most for news, information and entertainment could eventually be placed in the hands of a few powerful media giants.

Consider the powerful interaction of the FCC's rush to lift media ownership rules and the proposed merger between a major network and the largest direct broadcast satellite (DBS) network. In the next month, the FCC is likely to relax ownership rules in a manner that would open the door to further concentration of ownership in a few hands, consolidation of outlets in national chains and conglomeration of control over different types of media. The FCC is considering:

- Relaxing the ban on news/broadcast cross-ownership would allow broadcasters to buy newspapers in the same communities they own local stations (even when there is only one dominant newspaper in that community). News Corp./Fox already has cross ownership ventures.
- Raising or eliminating the cap on how many television stations national TV networks may own (which was set at a level of stations servicing 35% of the population by Congress in 1996) would extend national network control over local stations. News Corp./Fox already far exceeds the cap, as does Viacom/CBS.
- Letting a single TV broadcaster own more than 2 stations in a single market. News Corp./Fox already owns 2 broadcast stations in New York, Los Angeles, Dallas, Washington, D.C., Houston, Minneapolis, Phoenix, and Orlando.
- Although less likely, permitting national TV networks to buy each other (e.g., Fox purchase NBC or Viacom/CBS purchase Disney/ABC).

While the antitrust laws can and should be used to limit potential competitive abuses resulting from the News Corp./DirecTV merger, these laws are not enough to prevent the excessive consolidation in the marketplace of ideas that would result from any combination of transactions under these relaxed ownership rules. Antitrust has never been used effectively to promote competition in and across media where there is no clear way—like advertising prices—of measuring competition/diversity in news sources, information and points of view presented through the media.

Consumers Union³ and the Consumer Federation of America⁴ believe the Dept. of Justice should impose significant conditions on the News Corp./DirecTV deal, and Congress should review and alter the laws that enabled industry consolidation spurred by excessive deregulation to weaken or undermine competitive conditions in media markets. The News Corp./DirecTV merger is likely to lead to higher prices for both satellite TV and cable TV, since the combined company can maximize its earnings by inflating the prices it charges for its broad array of popular program-

³ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from non-commercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 4 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

⁴ The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

ming that all cable and satellite customers purchase. And this transaction, in conjunction with relaxed media ownership rules, will spur a wave of mergers among the remaining national broadcast networks, satellite and cable giants.

We believe it is time for Congress to intervene and finally deliver more choices and lower prices for the media services consumers want, and to prevent excessive relaxation of media ownership which threatens the critical watchdog function media companies play in our nation's democracy. It is time for Congress to drop the rhetoric and look at the reality of deregulated video markets. Congress should:

- Reconsider its grant of retransmission rights to broadcasters, where a broadcaster also owns a second means of video distribution.
- Let consumers pick the TV channels they want for a fair price.
- Prevent all forms of discrimination by those who control digital TV distribution systems and those who control the most popular programming in a manner which prevents competition in the video marketplace.
- Strengthen, rather than weaken, media ownership rules, to prevent companies from owning the most popular sources of news and information in both the local and the national markets.

THE NEWS CORPORATION/DIRECTV MERGER

If competition in the multichannel video market had performed up to its hope and hype, the NewsCorp./Fox/DirectTV merger might not be so threatening. But in light of the failure of deregulation, it presents a problem for public policy that cannot be ignored. There are two points of power in the marketplace—distribution and program production. The problem with a combination of News Corp./Fox and DirecTV is that it combines the two.

The reach of News Corp./Fox's media empire is truly staggering. The following are highlights of some News Corp./Fox properties in the U.S.:

- Broadcast Television Stations (35 stations, including two broadcast stations in New York, Los Angeles, Dallas, Washington DC, Houston, Minneapolis, Phoenix and Orlando)
- Filmed Entertainment (20th Century Fox Film Corp., Fox 2000 Pictures, Fox Searchlight Pictures, Fox Music, 20th Century Fox Home Entertainment, Fox Interactive, 20th Century Fox Television, Fox Television Studios, 20th Television, Regency Television and Blue Sky Studios)
- Cable Network Programming (Fox News Channel—the most watched cable news channel, Fox Kids Channel, FX, Fox Movie Channel, Fox Sports Networks, Fox Regional Sports Networks, Fox Sports World, Speed Channel, Golf Channel, Fox Pan American Sports, National Geographic Channel, and the Heath Network)
- Publishing (New York Post, the Weekly Standard, HarperCollins Publishers, Regan Books, Amistad Press, William Morrow & Co., Avon Books, and Gemstar-TV Guide International)
- Sports Teams and Stadiums (Los Angeles Dodgers, and partial ownership in the New York Knicks, New York Rangers, LA Kings, LA Lakers, Dodger Stadium, Staples Center, and Madison Square Garden)

News Corp./Fox's merger with DirecTV adds a new, nationwide television distribution system to News Corp./Fox's programming/production arsenal. DirecTV is the nation's largest satellite television distribution system, with more than 11 million customers and the ability to serve all communities in the United States.

News Corp./Fox's vast holdings provide it with leverage in several ways. "The biggest, most powerful weapon News Corp./Fox has is a four-way leverage against cable operators, competing with satellite and using the requirement that cable get retransmission consent to carry Fox-owned TV stations, while potentially leveraging price for Fox-owned regional sports networks and its national cable and broadcast networks"⁵

One of News Corp./Fox's most important weapons is significant control over regional and national sports programming. Mr. Murdoch often describes sports programming as his "battering ram"⁶ to attack pay television markets around the

⁵Diane Mermigas, "News Corp.'s DirecTV Monolith," *Mermigas on Media Newsletter*, (Apr. 16, 2003), quoting Tom Wolzien, a Sanford Bernstein Media Analyst.

⁶David D. Kirkpatrick, "Murdoch's First Step: Make Sports Fans Pay," *The New York Times*, Apr. 14, 2003.

world. As David D. Kirkpatrick noted in an April 14, 2003 *New York Times* article regarding Mr. Murdoch's control over sports programming:

In the United States, News Corp./Fox's Entertainment subsidiary now also controls the national broadcast rights to Major League Baseball, half the Nascar racing season and every third Super Bowl. On cable, Fox controls the regional rights to 67 of 80 teams in the basketball, hockey and baseball leagues as well as several major packages of college basketball and football games, which it broadcasts on more than 20 Fox regional sports cable networks around the country. By acquiring DirecTV, Mr. Murdoch gains the exclusive right to broadcast the entire slate of Sunday NFL games as well.

With DirecTV, Mr. Murdoch can start a new channel with immediate access to its subscribers, currently 11 million. He has other leverage in Fox News, now the most popular cable news channel, and essential local stations in most major markets around the country.⁷

It is important to consider the ramifications of Mr. Murdoch's control of over 40% of Fox broadcast stations nationwide, control of 11.2 million satellite subscribers, and his stranglehold over regional sports programming. With those extensive holdings, News Corp./Fox is in a position to determine what new programming comes to market, and to undercut competitive programming. The company will be able to decide what programming it does not want to carry and may be able to indirectly pressure cable operators (by offering a lower price for Fox programming as an inducement) not to carry programming that competes with Fox offerings. We believe Mr. Murdoch has a right as an owner to put whatever he wants on his system, but with the FCC moving to relax media ownership rules, companies like News Corp./Fox will have the ability to control key sources of news and information in an unprecedented manner.

The merger between News Corp./Fox and DirecTV is extremely unlikely to stop skyrocketing cable rates and could very well exacerbate the problem. According to David Kirkpatrick's *New York Times* article:⁸

some analysts said the structure of the deal suggested Mr. Murdoch hoped to use DirecTV mainly to punish other pay television companies and benefit his programming businesses. The *Fox Entertainment Group*, an 80 percent-owned subsidiary of News Corporation, will own a 34 percent stake in DirecTV's parent, creating the potential for programming deals that favor Fox over DirecTV. "My sense is that the major purpose for News Corporation controlling DirecTV is to use it as a tactical weapon against the cable companies to get them to pay up for its proprietary programming," said Robert Kaimowitz, chief executive of the investment fund Bull Path Capital Management.

While News Corp./Fox has agreed to abide by the FCC's program access requirements, this pledge could end up being nothing more than a tool for pumping up cable prices. That is, while News Corp./Fox agrees to make its programming available on non-discriminatory terms and conditions, there is absolutely nothing that would prevent News Corp./Fox from raising the price that it charges itself on its satellite system, in return for increased revenues from the other 70 million cable households. If a cable system refuses to pay the increased price, then News Corp./Fox will be able to threaten cable operators to use its newly acquired satellite system to capture market share away from cable in those communities.

An article in the *Washington Post*⁹ recently detailed the way this might work:

For instance, News Corp./Fox raised the cost of his Fox Sports content to some cable systems by more than 30 percent this year, according to one cable operator. Like most officials interviewed yesterday, he refused to be identified, saying he had to continue dealing with News Corp./Fox.

Most recently, in Florida, News Corp./Fox pulled its Fox Sports regional sports programming off of competitor Time Warner Cable's system over a rate dispute. News Corp./Fox wanted to charge more than Time Warner was willing to pay, but the conflict was resolved and service restored. "If this happens when Rupert owns DirecTV, you can assume DirecTV will go into the market and just pound away at the cable system," said one cable channel executive.

⁷Id., Emphasis added.

⁸David Kirkpatrick, "By Acquiring DirecTV, Murdoch Gets Upper Hand." *The New York Times*, Apr. 10, 2003.

⁹Frank Ahrens, "Murdoch's DirecTV Deal Scares Rivals." *Washington Post*, Apr. 11, 2003.

And price is only the beginning of the problems in this industry. Even in the 500-channel cable universe, control of prime time programming rests in the hands of a very few media companies. Given the enormous power that will be concentrated in News Corp./Fox as a result of the DirecTV transaction, not only will the combined entity be able to insist on top dollar for its programming, it will be able to determine who makes it and who fails in the programming marketplace.

CABLE RATES HAVE ESCALATED AND SATELLITE COMPETITION HAS NOT
KEPT THEM UNDER CONTROL

Despite the growth of satellite TV, the promise of meaningful competition to cable TV monopolies remains unfulfilled. Cable rates are up 50% since Congress passed the 1996 Telecommunications Act, nearly three times as fast as inflation.¹⁰ We welcome the possibility that satellite would aggressively cut its price and compete with cable, thereby keeping cable rates in check, but for several reasons that is unlikely to happen.

Satellite competition has failed to prevent price increases on cable because cable and satellite occupy somewhat different product spaces. First and foremost, the lack of local channels on satellite systems in many communities prevents satellite from being a substitute for cable; in fact, many satellite subscribers also purchase cable service for the express purpose of receiving local channels. And while many larger communities now receive local broadcast channels from satellite, service is not as attractive as cable in several respects and many consumers simply cannot subscribe. Many urban consumers cannot receive satellite services because of line of sight problems, or because they live in a multi-tenant dwelling unit where only one side of the building faces south.

Restrictions on multiple TV set hookups also make satellite more costly. The most recent data on the average price for monthly satellite service indicates that consumers pay between \$44 and \$80 a month to receive programming comparable to basic cable programming. This monthly fee often includes two separate charges above the monthly fee for basic satellite programming—one fee to hook a receiver up to more than one television in the household, and another fee so consumers are able to receive their local broadcast channels.

Satellite customers often subscribe to receive high-end services not provided (until the recent advent of digital cable) on cable systems, such as high-end sports packages, out of region programming, and foreign language channels. In essence, it is an expensive—but valuable—product for consumers that want to receive hundreds of channels.

If satellite were a close substitute for cable, one would expect that it would have a large effect on cable. In fact, the FCC's own findings and data have contradicted the cable industry claims for years. The FCC found that satellite only "exerts a small (shown by the small magnitude of DBS coefficient) but statistically significant influence on the demand for cable service."¹¹ In the same econometric estimation, the FCC concluded that the "the demand for cable service is somewhat price elastic (i.e. has a price elasticity of minus 1.45) and suggests that there are substitutes for cable."¹² This elasticity is not very large and the FCC recognizes that in using the adjective "somewhat." The FCC also attempted to estimate a price effect between satellite and cable. If cable and satellite were close substitutes providing stiff competition, one would also expect to see a price effect. Most discussions of in economics texts state that substitutes exhibit a positive cross elasticity.¹³ The FCC can find

¹⁰Bureau of Labor Statistics, Consumer Price Index (March 2003). From 1996 until March 2003, CPI increased 19.3% while cable prices rose 50.3%, 2.6 times faster than inflation.

¹¹Report on Cable Industry Prices, February 14, 2002, p. 36.

¹²Report on Cable Industry Prices, February 14, 2001, p. 36.

¹³Pearce, George, *The Dictionary of Modern Economics* (MIT Press, Cambridge, 1984), p. 94. Cross Elasticity of Demand. The responsiveness of quantity demanded of one good to a change in the price of another good. Where goods i and j are substitutes the cross elasticity will be positive—i.e. a fall in the price of good j will result in a fall in the demand for good i as j is substituted for i. If the goods are complements the cross elasticity will be negative. Where i and j are not related, the cross elasticity will be zero. Taylor, John, B., *Economics* (Houghton Mifflin, Boston, 1998), p. 59.

A sharp decrease in the price of motor scooters or rollerblades will decrease the demand for bicycles. Why? Because buying these related goods becomes relatively more attractive than buying bicycles. Motor scooters or rollerblades are examples of substitutes for bicycles. A substitute is a good that provides some of the same uses or enjoyment as another good. Butter and margarine are substitutes. In general, the demand for a good will increase if the price of a substitute for the good rises, and the demand for a good will decrease if the price of a substitute falls.

Bannock, Graham, R.E. Banock and Evan Davis, *Dictionary of Economics* (Penguin, London, 1987).

none. In fact, it found quite the opposite. The higher the penetration of satellite, the higher the price of cable.¹⁴

The most recent annual report on cable prices shows that the presence of DBS has no statistically significant or substantial effect on cable prices, penetration or quality.¹⁵ This is true when measured as the level of penetration of satellite across all cable systems, or when isolating only areas where satellite has achieved a relatively high penetration.¹⁶ At the same time, ownership of multiple systems by a single entity, large size and clustering of cable systems results in higher prices.¹⁷ Vertical integration with programming results in fewer channels being offered (which restricts competition for affiliated programs).¹⁸

In other words, one could not imagine a more negative finding for intermodal competition or industry competition from the FCC's own data. All of the concerns expressed about concentrated, vertically integrated distribution networks are observed and the presence of intermodal competition has little or no power to correct these problems. The claims that the cable industry makes about the benefits of clustering and large size—measured as price effects—are contradicted by the data. In fact, only intramodal, head-to-head competition appears to have the expected effects. The presence of wireline cable competitors lowers price and increases the quality of service.

While we hope that satellite will ultimately have a price disciplining effect in those communities where satellite offers local broadcast stations it is clear that the single most important variable in cable prices is whether there is a cable overbuilder in a particular community. Wire-to-wire competition does hold down cable rates and satellite does not seem to do the trick. The U.S. General Accounting office describes this phenomenon:

Our model results do not indicate that the provision of local broadcast channels by DBS companies is associated with lower cable prices. In contrast, the presence of a second cable franchise (known as an overbuilder) does appear to constrain cable prices. In franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider.¹⁹

In other words, where there are two satellite and one cable company in a market, prices are 17 percent higher than where there are two cable companies and two satellite providers in a market. If we had this type of competition nationwide, consumers could save more than \$5 billion a year on their cable bills.

Substitutes. Products that at least partly satisfy the same needs of consumers. Products are defined as substitutes in terms of cross-price effects between them. If, when the price of records goes up, sales of compact discs rise, compact discs are said to be a substitute for records, because consumers can to some extent satisfy the need served by records with compact discs. This account is complicated by the fact that, when the price of an item changes, it affects both the REAL INCOME of consumers and the relative prices of different commodities. Strictly, one product is a substitute for another if it enjoys increased demand when the other's prices rises and the consumer's income is raised just enough to compensate for the drop in living standards caused (pp. 390–391).

Cross-price elasticity of demand. The proportionate change in the quantity demanded of one good divided by the proportionate change in the price of another good. If the two goods are SUBSTITUTES (e.g. butter and margarine), this ELASTICITY is positive. For instance, if the price of margarine increases, the demand for butter will increase (p. 99).

¹⁴ Report on Cable Prices, p. 11.

¹⁵ Federal Communications Commission, 2002b.

¹⁶ Federal Communications Commission, 2001b, describes the DBS variable as the level of subscription. Federal Communications Commission, 2002b, uses the DBS dummy variable.

¹⁷ The cluster variable was included in the Federal Communications Commission 2000a and 2001b Price reports. Its behavior contradicted the FCC theory. It has been dropped from the 2002 report. The MSO size was included in the 2002 report. System size has been included in all three reports.

¹⁸ Vertical integration was included in Federal Communications Commission, 2002b.

¹⁹ U.S. General Accounting Office, *Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate: Issues in Providing Cable and Satellite Television Services.* October 2002. In an important clarifying footnote, the report finds that:

“This was a larger effect than that found by FCC in its 2002 *Report on Cable Industry Prices* (FCC 02–107). Using an econometric model, FCC found that cable prices were about 7 percent lower in franchise areas when there was an overbuilder. One possible explanation for the difference in results is that we conducted further analysis of the competitive status of franchises that were reported by FCC to have an overbuilder. We found several instances where overbuilding may not have existed although FCC reported the presence of an overbuilder, and we found a few cases where overbuilders appeared to exist although FCC had not reported them. We adjusted our measurement of overbuilder status accordingly.

PROGRAM PRODUCTION

The failure of competition in the cable and satellite distribution market is matched by the failure of competition in the TV production market. In the 1980s, as channel capacity grew, there was enormous expansion and development of new content from numerous studios. Policymakers attributed the lack of concentration in the production industry to market forces and pushed for the elimination of the Financial Interest in Syndication rules (Fin-Syn) that limited network ownership and syndication rights over programming. The policymakers were wrong.

Following the elimination of the Fin-Syn rules in the early 1990s, the major networks have consolidated their hold over popular programming. The market no longer looks as promisingly competitive or diverse as it once did. Tom Wolzien, Senior Media Analyst for Bernstein Research, paints the picture vividly—he details the return of the “old programming oligopoly:”

Last season ABC, CBS and NBC split about 23% [of television ratings] . . . But if the viewing of all properties owned by the parent companies—Disney, NBC, and Viacom—is totaled, those companies now directly control television sets in over a third of the TV households. Add AOL, Fox and networks likely to see consolidation over the next few years (Discovery, A&E, EW Scripps, etc.), and five companies or fewer would control roughly the same percentage of TV households in prime time as the three net[work]s did 40 years ago. The programming oligopoly appears to be in a process of rebirth.²⁰

In addition, the number of independent studios in existence has dwindled dramatically since the mid-1980s. In 1985, there were 25 independent television production studios; there was little drop-off in that number between 1985 and 1992. In 2002, however, only 5 independent television studios remained. In addition, in the ten-year period between 1992 and 2002, the number of prime time television hours per week produced by network studios increased over 200%, whereas the number of prime time television hours per week produced by independent studios decreased 63%.²¹

Diversity of production sources has “eroded to the point of near extinction. In 1992, only 15 percent of new series were produced for a network by a company it controlled. Last year, the percentage of shows produced by controlled companies more than quintupled to 77 percent. In 1992, 16 new series were produced independently of conglomerate control, last year there was one.”²²

The ease with which broadcasters blew away the independent programmers should sound a strong cautionary alarm for Congress. The alarm can only become louder when we look at the development of programming in the cable market. One simple message comes through: those with rights to distribution systems win.

Of the 26 top cable channels in subscribers’ and prime time ratings, all but one of them (the Weather Channel) has ownership interest of either a cable MSO or a broadcast network. In other words, it appears that you must either own a wire or have transmission rights to be in the top tier of cable networks. Four entities—News Corp./Fox (including cross ownership interests in and from Liberty) AOL Time Warner, ABC/Disney and CBS/Viacom—account for 20 of these channels.

Of the 39 new cable networks created since 1992, only 6 do not involve ownership by a cable operator or a national TV broadcaster. Sixteen of these networks have ownership by the top four programmers. Eight involve other MSOs and 10 involve other TV broadcasters. Similarly, a recent cable analysis identified eleven networks that have achieved substantial success since the passage of the 1992 Act. Every one of these is affiliated with an entity that has guaranteed carriage on cable systems.²³

Moreover, each of the dominant programmers has guaranteed access to carriage on cable systems—either by ownership of the wires (cable operators) or by carriage rights conferred by Congress (broadcasters).

- AOL Time Warner has ownership in cable systems reaching over 12 million subscribers and cable networks with over 550 million subscribers.

²⁰Tom Wolzien, “*Returning Oligopoly of Media Content Threatens Cable’s Power.*” The Long View, Bernstein Research (Feb. 7, 2003). Emphasis added.

²¹Coalition for Program Diversity, Jan. 28, 2003.

²²Victoria Riskin, President of Writers Guild of America, West. *Remarks at FCC EnBanc Hearing, Richmond, VA* (Feb. 27, 2003).

²³Federal Communications Commission, *Ninth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB docket No. 02–145 (Dec. 31, 2002).

- Liberty Media owns some cable systems and has rights on Comcast systems and owns cable networks with approximately 880 million subscribers. Liberty owns almost 20% of News Corp./Fox.
- Disney/ABC has must carry-retransmission rights and ownership in cable networks reaching almost 700 million subscribers.
- Viacom/CBS has must carry-retransmission rights and ownership in cable networks reaching approximately 625 million subscribers.
- Fox (has must carry-retransmission and ownership in cable networks reaching approximately 370 million subscribers and a substantial cross ownership interest with Liberty).

These five entities have ownership rights in 21 of the top 25 cable networks based on subscribers and prime time ratings. They account for over 60 percent of subscribers to cable networks, rendering this market a tight oligopoly. Other entities with ownership or carriage rights account for four of the five remaining most popular cable networks. The only network in the top 25 without such a connection is the Weather Channel. It certainly provides a great public service, but is hardly a hotbed for development of original programming or civic discourse. Entities with guaranteed access to distribution over cable account for 80 percent of the top networks and about 80 percent of all subscribers' viewing choices on cable systems.

In the world of broadcast and cable networks, almost three-quarters of them are owned by six corporate entities.²⁴ The four major TV networks, NBC, CBS, ABC, Fox, and the two dominant cable providers, AOL Time Warner (which also owns a broadcast network) and Liberty (with an ownership and carriage relationship with Comcast and Fox), completely dominate the tuner. Moreover, these entities are thoroughly interconnected through joint ventures.

If distribution rights win then an entity like News Corp./Fox/DirecTV would create a powerhouse with guaranteed transmission rights on all three of the technologies used to distribute TV to the home. It will own broadcast stations, have must carry/retransmission rights on cable and satellite because of the broadcast licenses it holds, and own the largest satellite network. This is an immense power of distribution for a company that is vertically integrated into both broadcast and cable programming.

In the 1992 Cable Act, Congress recognized that the Federal government "has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals . . . of providing a fair, efficient, and equitable distribution of broadcast services."²⁵ Congress also recognized that "[t]here is a substantial government interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."²⁶

These governmental interests, as well as a finding that "[c]able television systems often are the single most efficient distribution system for television programming," formed the original rationale behind Retransmission Consent. Because a majority of the country was receiving broadcast television service through cable, it was necessary to require that cable systems carry local broadcast signals. However, a merger between News Corp./Fox and DirecTV would change the landscape against which Retransmission Consent was created. Given that this transaction will provide News Corp./Fox with assets that no local broadcaster had in 1992 when Retransmission Consent was originally put in place—it will have a satellite distribution system capable of reaching a majority of the country—it seems that the original logic behind the rule is strained in the present circumstances. Not only will News Corp./Fox own its own transmission system, but it also owns other programming that it bundles with its network programming, which may give it too much market power in negoti-

²⁴ One of the more ironic arguments offered by the cable operators feeds off of the observation that broadcast networks have carriage rights. They argue that even if cable operators foreclosed their channels to independent programmers, these programmers could sell to the broadcast networks. This ignores the fact that cable operators control the vast majority of video distribution capacity. There are approximately 60 channels per cable operator on a national average basis (Federal Communications Commission, 2002b, p. 10). There are approximately 8 broadcast stations per DMA on a national average basis (BIA Financial, 2002). Each broadcast station has must carry rights for one station. They can bargain for more, particularly in the digital space, but the cable operators control more stations there as well. In other words, if we foreclose 85 percent of the channels, the programmers will be able to compete to sell to the remaining 15 percent of the channels. Needless to say, this prospect does not excite independent programmers.

²⁵ Public Law 102-385, Section 2(a)(9).

²⁶ Public Law 102-385, Section 2(a)(12).

ating cable and other carriage agreements. Congress should revisit the necessity of Retransmission Consent as it pertains to stations owned and operated by News Corp./Fox.

CONCLUSION

Consumers Union and Consumer Federation of America believe that the Dept. of Justice should impose substantial conditions on this deal which will otherwise be harmful to competition in the video programming market—harm that will be borne on the backs of consumers.

Congress should impose a new set of nondiscrimination requirements that would enable all media distributors and consumers to purchase video programming and related services on an individual—as opposed to bundled—basis under terms that maximize competition and choice in the marketplace. Congress must reexamine the enormous market power and leverage that Retransmission Consent provides broadcast programmers—particularly one like News Corp. which, as a result of the merger with DirecTV, will own a new nationwide video distribution system (in addition to its over-the-air broadcast distribution system). And Congress should require cable and satellite operators to offer consumers the right to select the channels they want to receive at a fair price—in other words, require an a la carte program offering from all video distributors. Since the average household watches only about a dozen channels of video programming, this requirement could empower consumers to help discipline excesses in cable (or satellite) pricing, and could possibly spur more competition.

Congress must also carefully consider all the ramifications associated with the rulemakings on media ownership. Specifically, given that the FCC has announced an intended June 2nd decision date on media ownership rules, Congress should insist on seeing the FCC's proposal before any decision is finalized.

If media ownership limits are significantly relaxed or eliminated by the FCC then the News Corp./DirecTV deal may look almost harmless in comparison to an avalanche of media mergers that ensue. It is completely unfair to force American consumers to accept inflated cable rates and inadequate TV competition. But excess consolidation in the news media is even worse: the mass media provides Americans the information and news they need to participate fully in our democratic society. Without ownership rules that effectively limit consolidation in media markets, one company or individual in a town could control the most popular newspaper, TV and radio stations, and possibly even a cable system, giving it dominant influence and power over the content and slant of news. This could reduce the diversity of cultural and political discussion in that community.

The cost of excessive media consolidation and further media deregulation is very high. The cost of market failure in media markets is the price we pay when stories are *not* told, when sleazy business deals and bad accounting practices do *not* surface, when the watchdog decides that it would rather gnaw on the bone of softer news than chase down the more complicated realities that must be uncovered to make democracy function.

Chairman SENSENBRENNER. The gentleman's time has expired.

Due to the large turnout today, the Chair is going to strictly enforce the 5-minute rule, and I am informed by the cloakroom that we are due to have some votes about 11 o'clock. So the Chair will recognize himself for 5 minutes.

First of all, I would like to make the observation that according to the corporate SEC filings, News Corp. ranks sixth in the U.S. media marketplace in total revenues, 2.8 percent of the total media industry. I think everybody knows how extensive News Corp.'s media holdings are, and yet that only nets 2.8 percent of the total industry, and with the proposed merger, it definitely would not get above 5 percent.

As most of the people on the Committee and some of the witnesses know, I was not a fan of the proposed merger between DirecTV and EchoStar and stated so in the hearing that this Committee held on December 4, 2001. I note that Charlie Ergen, who is EchoStar's Chief Executive, and who will be the head of the corporation of the principal competition for satellite services, should

this merger go through, stated publicly in the Financial Times of yesterday, that he thought that Mr. Murdoch's company would manage DirecTV better than Hughes by controlling piracy, which would benefit the entire satellite TV industry.

Mr. Murdoch, would you like to comment on Mr. Ergen's statement and inform the Committee how you think that you can better control piracy than apparently the Hughes Company has done?

Mr. MURDOCH. Thank you, Mr. Chairman. This is a matter of some dispute, as a matter of fact, between DirecTV and News Corporation at the moment. But we supply, for instance, the—all the anti-piracy devices and encryption for Hughes in their Latin America activities, and they have never been cracked there at all. We also do it in Britain, where we suffer from no piracy. We think we have know-how and the ability to follow through on that.

Chairman SENSENBRENNER. My final question—

Mr. MURDOCH. And if I can just say this. I believe that there's between one and one-and-a-half million pirates out there now getting the signals for token prices.

Chairman SENSENBRENNER. My final question is that there has been an overriding concern that News Corp. will use its superior programming capability to be able to foist allegedly expensive programs over satellite TV and onto cable television which is not owned by News Corp. Can you describe what types of protections you envision to prevent that from happening?

Mr. MURDOCH. Thank you for describing them as superior. The fact is that Hughes will still be owned 66 percent by the public. All related party transactions will be vetted by an audit committee, which will be manned totally by independent directors, and there is no other way that we can take advantage of DirecTV with unfair pricing against DirecTV, or should we say milk it in any way.

Chairman SENSENBRENNER. Thank you very much.

The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. I commend you for assembling today's hearing on a very timely subject, and I want to join with you in welcoming the witnesses and thank them for their very well-prepared testimony.

Mr. Murdoch, I want to commend you for agreeing to abide by program access rules, even though you do not own cable properties and would not under the law strictly be required to abide by program access. And I think that is a start. But I don't think it goes quite far enough in addressing the concerns that there is a potential that your ownership of both content and a means of multi-channel video distribution can lead to anticompetitive conduct.

The first point I would note is that your agreement to abide by program access rules is not permanent in nature, and would only co-exist with the existence of the Federal Communications Commission's continuation of the program access requirements. I have some concern that at some point, perhaps in the not-too-distant future when the current rules expire, that the Commission may be led not to renew them. The purpose of those rules at the outset was to make satellite a viable competitor with cable, by assuring that satellite companies could get access to very popular cable programs. The satellite industry is doing pretty well. It's got about 20 million subscribers today, and as local-into-local service has ex-

panded to more of the 211 television markets around the country, and I rather suspect that your total subscribership will increase dramatically, perhaps to double the current amount. When that happens, if that happens, I have some doubt that the FCC would continue to program access rules. And under the agreement that you have made, your obligation to abide by program access would therefore expire.

So my first question to you is whether or not you would agree to abide by the program access rules on a permanent basis, even if their continuation is not renewed by the FCC. Your acquisition of a one-third interest in Hughes will be permanent in nature. Perhaps this commitment to program access for all of your potential distributors should also be permanent. Would you agree to that?

Mr. MURDOCH. Thank you, Congressman Boucher. No, we would not agree to that. We do not think it would be fair for us to be committed to abide by a rule which none of our competitors would be affected by, so we would put ourselves at a permanent disadvantage to all of our competition if we accepted your suggestion.

Mr. BOUCHER. All right, thank you. I have a second question of you. The program access commitment only applies to your cable channels. It would not apply to your broadcast television. Therefore you would be in a position potentially to deny retransmission consent for your News Corp. originated programming to EchoStar, to cable companies, or perhaps you could charge EchoStar or cable companies a higher price for retransmission consent than you would charge to DirecTV. What comfort should we take in that kind of structure, and what kind of commitment would you be willing to make that you would not engage in that kind of conduct? Would you, for example, be willing to accept a commitment that you would simply not charge retransmission consent fees to anyone?

Mr. MURDOCH. No, I wouldn't. Congressman, the question of retransmission fees and the justice behind all the free broadcasters having some payments or some consideration for their very expensive programming is a subject we needn't get into now. But as far as we're concerned, I just point out that it would be madness if I were to deny EchoStar the Fox signal, the Fox stations. It would cost us at least \$400 million a year. And I'm sure that Mr. Ergen could do other things to me in retaliation which would cost me another \$400 million a year. So it's just not realistic when you think about it.

Mr. BOUCHER. Well, the concern I have is perhaps that you would not in a blanket way simply deny retransmission to the competitors, to DirecTV, but that you might charge a substantially higher price.

I thank you for coming here this morning. Unfortunately, you haven't done very much to alleviate my concerns, and these shall be expressed perhaps in a different forum.

Mr. Kimmelman, I have just a moment remaining. Let me ask you to comment on the problems that arise through the potential misapplication of retransmission consent by News Corp.

Mr. KIMMELMAN. Well, the danger here, Mr. Boucher, is that you take a channel that's a broadcast channel that you in Congress deemed was so important for the public to get in 1992, that every

cable operator either had to automatically carry it or negotiate with the broadcast owner for carriage since cable was the dominant transmission mechanism by which the public was receiving local signals. Now we see a whole cachet of cable channels being bundled with that local programming, and now one of the broadcasters, in the form of News Corp., has a separate distribution channel, a satellite system with nationwide coverage it did not have in 1992, by which it can send its signal to everyone in the country as well. The rationale for giving that power of retransmission, I would submit in this case, is no longer there and ought to be revisited.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Murdoch, if I understood Mr. Conyers' opening statement correct, News Corp. has 20 percent of the market share, and either you or the Chairman, one indicated that your percentage of media revenue was 2.8 percent. That would appear to me, if you have 20 percent of the market share, your percentage would be in excess of 2.8 percent. What am I missing?

Mr. MURDOCH. I think the 2.8 percent is for the whole media industry in the United States. I think Mr. Conyers was talking about our viewership, that is 20 percent of people, 20 percent of all the viewing—

Mr. COBLE. Okay.

Mr. MURDOCH.—is to say, which I would research and like to answer Mr. Conyers another time, because I certainly can't believe it. I would love it to be true.

Mr. COBLE. Mr. Murdoch, tell us the benefits that this merger will bring to current satellite customers, and, in particular, rural customers who may not have access to cable services now.

Mr. MURDOCH. Congressman, we are absolutely committed to extend the local-into-local, so that everybody today getting satellite television will be able eventually to get their own local stations on the satellite, all in the one service.

Also we are committed—I have to be slightly vaguer about this—in saying that we are determined to bring broadband to every home in America and particularly in rural America. Hughes has already spent \$1.5 billion in developing a new system. It's not launched yet. There's still several hundred million dollars to go on that. There are some doubts about its economic feasibility as a consumer proposition. There are other people putting up satellites who feel they can do it much more cheaply. I think broadband, as a matter of opinion, will be a commodity.

But there are other technologies and very exciting technologies being developed at the moment, such as using the power grids, allied to the new Wi-Fi technology. We are actively investigating that and the possibility of introducing that technology and selling it alongside DirecTV as a bundle.

Mr. COBLE. Thank you, Mr. Murdoch.

Mr. Arquit and Mr. Kimmelman, let me put this question to you all. I'd like to know how much of the satellite market DirecTV currently has, and how much EchoStar currently controls, A. And B, if this merger were to, in fact, be consummated, is it your belief that EchoStar could effectively compete for satellite customers

against an entity as large and diverse as News Corp.? Mr. Arquit and then Mr. Kimmelman.

Mr. ARQUIT. If I understood your question, Congressman, as I understand it, in a total MVPD market, that DirecTV has somewhere around 12 percent, and EchoStar has 8 or 9 percent. So if you break that down in terms of—if you're looking at just direct broadcast satellite, which I understood your question to be, it would suggest that DirecTV is the larger of the two players.

To respond to the second part of your question, I do believe they would be able to compete effectively, and it is for the reason that—when I think when you look at News Corp., I don't, as a former antitrust enforcer, we never really looked at people's promises as such. We looked at what market conditions would require them to do. And here because they gain so much from their programming revenues, and, I think, Mr. Kimmelman missed the point when he talked about the fact that Fox has some strength in some areas. Surely they do with things like regional sports. I mentioned the Fox News Service. But for every person that they take away, for every time that they deny access to some other one, like EchoStar, to go to your point—

Mr. COBLE. Mr. Arquit, my time has expired. Let me hear from Mr. Kimmelman. We want to give him equal time. Thank you.

Mr. KIMMELMAN. Thank you, Mr. Coble. I would suggest that the danger is much less likely to be outright refusal to deal with a competitor as much as raising the input costs of key programming, some of the most popular programming, sports, news, the network, to drive up the costs of their competitor. I think that's the greatest danger. And I think the most likely result is you will see—you'll see just an avalanche of other mergers involving EchoStar as well, to go vertical, to try to respond to this combination.

Mr. COBLE. Thank you all, gentlemen, for being with us.

Mr. Chairman, I yield back.

Chairman SENSENBRENNER. The other gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I thank the Chairman and Ranking Member for convening the hearing.

Mr. Schnog, you seem to be left out of this discussion here, and I'm trying to figure out whether you have a different perspective than the EchoStar people who are big, and all of the big folks, or whether you are the beneficiary of the same kind of power that other cable stations have. Can you help me understand how you are different than any other cable company?

Mr. SCHNOG. Yes, I would love to do that. I think first that you have to look at the group that I represent and the size of our company. With 8,000 customers, we have zero market clout. Mr. Murdoch—

Mr. WATT. So—

Mr. SCHNOG.—could live with us or without us. I mean in the morning he could wake up, have breakfast and never know that we ever existed and would never have anything to do with his empire or anything to do with the financial statement.

I think the most important thing to say, as I've listened to this, is I go back to Mr. Boucher's comments, and quite important to say a lot of the things that are going on, already small cable operators

like myself are being bounced around in retransmission consent discussions in smaller markets, where they're already using their leverage and already extorting money for us.

And one of the big fictions I keep hearing is, "Boy, if we don't sell it to everybody, we're going to lose money."

No. If he sells it to DirecTV and nobody else, all the customers go to DirecTV. He never loses a viewer. Come on.

Wait a minute. What happens is the viewer from our distribution channel to his. He just makes twice the money. So we're—I mean—

Mr. WATT. Wait a minute. Wait, wait. I think I got your message there. Let me try to figure out how this is different from other providers of programming. I take it you don't provide any kind of programming—you don't produce any kind of programming.

Mr. SCHNOG. Not a whit.

Mr. WATT. Are they tying or bundling when they provide programming to you?

Mr. SCHNOG. They are, especially in local markets. For instance, if you were in a market where you wanted to gain access to—

Mr. WATT. How is that different than what you say Mr. Murdoch's merger will allow to be done? It's already happening to you, right?

Mr. SCHNOG. Well, it's already happening. What's going to happen, it is our belief, it's just going to get much worse. Now you're not just looking at local stations, you're looking at the fact that he can go in and bring his own distribution network in, and now in the negotiation, if you say, "Hey, listen, you've just gone too far," and the threat being, "I'll take you off." He says, "Well, that's all right. I'll just, you know, I'd rather have you do that because now people go to my distribution system instead."

Mr. WATT. Mr. Murdoch, I guess I understand how you would not want to vex Mr. Ergen, whoever he is, at EchoStar. What do you have to say about whether you want to vex Mr. Schnog, the little guy? What's your response to what he said. I can't hear you.

Mr. MURDOCH. I beg your pardon. I said I have no wish to vex Mr. Schnog at all. But we, as a matter of business principle, want to be seen in every single home we can. We live by the ratings—

Mr. WATT. If you cut him off, won't his customers just come to DirecTV?

Mr. MURDOCH. I don't think it's as easy as that. There's many other customers enjoying many other things.

Let me say about these smaller cable systems. There are about what we would call 1,000 small cable operators. 300 of them are affected by Fox Television stations. We have 35 or—I think 35 stations in all, and we therefore have negotiations on retransmission with a total of 300, not with Mr. Schnog. We have just completed, very satisfactorily, negotiations on retransmission for another 3 years with all 300. 150 of those have less than 1,000 customers. We said, "Just take the signal. Don't worry about a negotiation." The other 150 we had very—

Mr. WATT. You mean you gave it to them?

Mr. MURDOCH. Yes. And the other 150, you have small negotiation, you probably find they're taking Fox News, and you say, "Well, it would be nice if you could take the National Geographic

Channel which we're trying to establish as a competitor to Discovery." And you see if they can fit it on, or what they do. You know, each negotiation is slightly different from the next one.

Chairman SENSENBRENNER. The time of the gentleman has expired. The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Murdoch, let me direct my first couple of questions to you, and the first is to ask you to respond to one of the concerns mentioned by Mr. Kimmelman. He said in his prepared testimony that the agreement preserves the right to a variety of exclusive carriage arrangements such as sports programming, where News Corp. enjoys substantial market power. Wouldn't that be at some disadvantage to consumers?

Mr. MURDOCH. Yes. I don't think that's true at all. The only exclusive programming that is there on DirecTV was done before my time, which was to purchase from the NFL what's known as the Direct Sunday Ticket. The NFL chose to bundle that product and make an exclusive offering to the highest satellite bidder, and there was competition between EchoStar and Direct and DirecTV won the competition, and loses a lot of money, I can assure you.

Mr. SMITH. Mr. Murdoch, my second question goes back to the earlier proposed merger between EchoStar and DirecTV. One of the primary justifications was to provide local TV service in all 210 television markets across the country, and at the time merger opponents claimed that separately EchoStar and DirecTV already each serve 210 markets. So is it the satellite capacity or a cost issue that prevents you from serving all of those 210 TV markets?

Mr. MURDOCH. It's both. We can actually go out to many more than we do at the moment. We believe that new compression techniques and so on. But there is only a certain amount of spectrum which Direct Television has or which EchoStar has.

Mr. SMITH. So you're saying it's primarily capacity that prevents—

Mr. MURDOCH. Capacity is a problem. Cost is too—it is very costly. I think there are ways that we're going to try and examine that. I intend to approach Mr. Ergen and see if we can't share some of the costs, because we duplicate.

Mr. SMITH. How many markets do you expect to get into? Do you expect to cover all 210 at some point or not?

Mr. MURDOCH. As close as I can. I don't know whether I'll be down to 190, but currently we'll be—by the end of this year we'll be covering 85 percent of American homes. We will certainly go well into the 90's.

Mr. SMITH. Thank you, Mr. Murdoch.

Mr. Schnog, let me direct my last question to you, and that is that the American Cable Association, in an April 11th news release, said only that the Fox News Corp./DirecTV deal must be closely scrutinized. Today the ACA, quote, "vehemently opposes this proposed merger." Why the change? Why the escalation between this month and last month?

Mr. SCHNOG. I think as we scrutinize the whole deal and what we see coming down the road, it's bad for everybody. It just doesn't work. It means higher prices for consumers. It means higher programming costs for us as operators that we're just going to have

to pass along. It means that we hear about retransmission consent negotiations that are supposedly done, but I know of dozens and dozens of small cable operators that are still, you know, in month to month agreements with Mr. Murdoch's stations, because they can't reach even retransmission consent deals, and with that going on, we say to ourselves, this is a bad deal. This is a company that maybe we should all watch out for. I mean this is really a fox in the henhouse, and it's time for us to say, no, just forget it.

Mr. SMITH. Thank you, Mr. Schnog.

Mr. Chairman, thank you.

Chairman SENSENBRENNER. Thank you. I thought that in Australia there were more crocs than foxes.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, I have two questions for Mr. Murdoch which I'll ask together. They're both based on an article in the Columbia Journalism Review of May/June 1998, which I'm going to read excerpts of. It says as follows: News Corporation's been able to keep its worldwide corporate tax rate surprisingly low, roughly one-fifth those paid by Disney, Time Warner and Viacom, largely shifting income through an almost unfathomable web to low tax or no tax havens in places as far flung as the Cayman Islands, Fiji and even Cuba. Virtually no other media organization has followed up on this story.

Farhi—who's identified in the story—says when he began his own reporting, he found that no one would talk to him, not even Murdoch's competitors. Similarly, CJR found competitors refusing to speak for the record. Some noted ruefully how the range of possible employers has narrowed with media consolidation. And further elsewhere in the article: He wields his media as instruments of influence with politicians who can aid him and savages his competitors in his news columns. If ever someone demonstrated the dangers of mass power being concentrated in few hands, it would be Murdoch.

And further as examples of this: The recently retired East Asia editor of the Times—of London, that is—Jonathan Mursky, had told the January Freedom Forum gathering that the paper, quote, "had simply decided because of Murdoch's interests not to cover China in a serious way." Mursky also said he has a standard—a transcript, rather—of a 1997 conversation between the Times Editor, Peter Stoddard and the Chinese Vice Premier, in which Stoddard apologizes for having inquired about a Chinese dissident.

Murdoch's British tabloid, The Sun, recently reversed its opposition to the controversial Millennial Dome, an enormous exhibition built in London after Murdoch's British Sky Broadcasting Satellite Service became a key investor. The English reading public had seen this before. Murdoch's firing of editors Harold Evans of the Times and Andrew Neal, the Sunday Times, were both widely felt to be over reporting by the papers that angered the Tory Government during a period when Government decisions were massively enriching the tycoon.

Those are quotes from this Columbia Journalism Review story. My question is: To what extent is this not true, that is, that you're using shifting of income to foreign locales to evade U.S. taxes? And do you use your influence as a result of all these media properties

to influence governments in their decisions on your commercial aspects, and why if in fact you're evading taxes and thus getting an unfair competitive advantage with respect to your media competitors, and using concentrated media power to distort the politics of the U.S. and other nations for your own commercial purposes, if this is true, why do you think Congress should grant your corporation the ability to control even further our domestic airwaves?

Mr. MURDOCH. Well, Congressman Nadler, I can assure you that the Columbia Journalism Review is famously misinformed on the subject. They have some paranoia—

Mr. NADLER. Has there been a—

Mr. MURDOCH. Those facts are not there and we're very happy to show you anything about our tax returns.

As for today, because we've eaten up a lot of tax losses because we started many things and made big losses, we are now paying about 30 percent of all our income, operating profits in taxes, which is about average for an American company.

Mr. NADLER. So you never used or you're no longer using tax havens?

Mr. MURDOCH. We might have in the past. I'm not denying that, but not to the extent stated there.

Mr. NADLER. Has there been a detailed refutation published of the specific allegations—and I've only read a couple of them; there are a lot more in here—that the Columbia Journalism Review makes both with respect to the taxes and with respect to alleged use of media influence to—let me just finish—to not cover things embarrassing to the Chinese Government, for instance, or to not cover things embarrassing to other governments in return for commercial concessions?

Mr. MURDOCH. The answer is no to both questions.

Mr. NADLER. There has not been a refutation.

Mr. MURDOCH. We're quite prepared to put something on the record later if you like.

Mr. NADLER. I think you misunderstood my question.

Mr. MURDOCH. My—my—

Mr. NADLER. Excuse me. My question was, has there been a refutation published of this?

Mr. MURDOCH. No.

Mr. NADLER. There has not been?

Mr. MURDOCH. No, not that I know of.

As for using our political influence in our newspapers or television to favor investments, that is nonsense. As for the investment in the Dome, that was some sponsorship by Sky which all the rest of our newspapers attacked as ridiculous. We're not going to work in some monolithic way like that.

And as for China, that's absolutely not the case. You get the odd disaffected journalist who will say anything about anybody.

Mr. NADLER. Could you give us—

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. Could I have 30 seconds additional time?

Chairman SENSENBRENNER. Well, we're going to be having votes sometime between 11:15 and 11:45, and the Chair announced that he was going to enforce the 5-minute rule strictly in order to allow as many Members as possible to ask questions before the bell rang.

The gentleman from Indiana, Mr. Pence?

Mr. PENCE. Thank you, Mr. Chairman, and thank you for holding this hearing. It is certainly an extremely illuminating debate, and I'm particularly grateful for all the panelists, and especially so for Mr. Murdoch.

I feel as though I'm in the minority up here, Mr. Murdoch, and that's probably apparent from your seat. I'm a free market conservative, and I want to applaud your ingenuity and express my gratitude for your willingness to risk your personal resources in ways that I think have genuinely added diversity to the American debate. If you haven't already read *Atlas Shrugged* by Ayn Rand, you probably should. I'm tempted to greet you as John Galt today, but I hope not.

I want to clarify with you, Mr. Murdoch, a couple of basic facts. My understanding is that News Corp. at this time ranks sixth overall in communications in the United States, which is 2.8 percent, I believe, according to your testimony, of communications revenues. After the merger I think also your testimony, which may be somewhat in dispute among the panel, is that those revenues, based on 2002 numbers, will likely not exceed 5 percent of the marketplace. A part of me wants to ask what's all the fuss about when 95 percent of the market will remain in the hands of others, but I won't.

I guess my question to you, Mr. Murdoch, is apart from the fact that News Corp. wasn't involved in the EchoStar/DirecTV merger, what was wrong from your standpoint and public statements that you made about that merger from an antitrust standpoint, and what's different about News Corp.'s purchase that we're considering today?

Mr. MURDOCH. Well, it was simply establishing a monopoly, and all our advice had been that it was illegal, as it proved to be. We had nothing personally against Mr. Ergen, who I admire as a very fine operator and a very competitor. But the—it was very different.

And this, we're going to bring to Direct Television a lot of new skills, and a great deal more energy, and we're going to really drive it as hard as we can to be competitive with cable.

Mr. PENCE. And specifically the monopoly would derive if EchoStar's 8.9 percent I think someone testified, and DirecTV's 12 percent, but that would be a monopoly in that particular segment of the television programming and distribution market?

Mr. MURDOCH. Well, in that segment, yes, and in satellite it certainly would. Mr. Ergen is now growing faster than Direct Television and has about 10 percent of the market, according to the figures he released this week, whereas I think DirecTV is now at 12, 12½ percent.

Mr. PENCE. Very good. Well, I want to thank the entire panel for their testimony, and I'll yield back the balance of my time in the interest of the others, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Let me thank the very fine presentations that have been made by this hearing this morning.

Allow me first of all to acknowledge, Mr. Murdoch, two very outstanding employees of your organization. I particularly want to acknowledge them because the concerns that I have are far reaching, realizing that I will not be able to cover all of them in this hearing and also the posture and position of the Judiciary Committee with respect to impact on this merger, and so I will join in the comments of Congressman Boucher, that I will express my position in the necessary agencies as this process moves forward.

But I think it's important to note the very fine work of Angela McGlowan and Misty Wilson, who have worked very hard to ensure that there is diversity in front of the camera and behind the camera, and might I also note that Juan Williams represents probably the best breath of fresh air that you could offer us on Sunday morning. I hope that you can increase that.

I do want to note for the record that it seems that this merger generates concerns that News Corp. may use its market position in satellite to harm its competitors up and down the distribution chain, and as well, that this approval of the merger of this size could also lead other media companies to try and buy ever more assets to compete with News Corp. It is clear if you look at the testimony of Mr. Kimmelman—and I thank you—that, in fact, the ownership is truly staggering. And I am a zealot as it relates to the first amendment. I believe in the ability to freely express your viewpoints. You do so well in the Fox News Channel, to my disagreement vigorously, and the New York Post. And those are the two most prominent contents that we see. You seem to be against everything that is minority, everything that is progressive, but that is the first amendment.

My concern, Mr. Murdoch, is one, your ownership is staggering. You are going to have impact on the content. The question is: Are you going to allow CNN to remain on DirecTV, because it is certainly one of the more vigorous competitors of Fox News Channel? And again, that's only a small aspect, but I think it is a question I would like to ask you, whether or not this merger will only propel more major ownerships, conglomerates, which really brings down the first amendment. It quashes the first amendment. It quashes content, different opinion. And whether or not you are going to impact this market position in the satellite to harm its competitors up and down the distribution chain? Could you give me those, the content question, and as well the distribution and up and down the chain, please?

Mr. MURDOCH. Of course we're going to keep CNN on the air, and we want—you know, just to have as much diversity in programming as is possible in every sense. We believe that the strength of satellite is its ability to give the public choice, choice in every way, of entertainment, of news, of views, and we will continue to do that. I don't concede to you what you said about Fox News. Why? I mean Congressman Nadler's a very regular guest and a very welcome one.

Mr. NADLER. Thank you.

Mr. MURDOCH. And we have all viewpoints there.

Ms. JACKSON LEE. I'd love to see more of Congressman Nadler and keep promoting him, and I will do so as well, but I maintain my position that it's very narrowly focused and provocative. But

again, remember what I said, the first amendment is something that I value.

My question again, however, is your ownership is staggering. Do you not feel that this merger only contributes to the fact that there will be more and more conglomerates, and again, a bringing down of the diversity of opinion by the first amendment content is a question. So you don't feel that this merger that you're offering is going to again propel this question of large ownership of the media, and that is not a positive for this Nation.

Mr. MURDOCH. I think there's just tremendous competition everywhere. I'm well aware that I'm looked upon as more prominently than I deserve in size. That's because we've been a catalyst for change, because we've come in and we've challenged the big entrenched monopolies like the networks, like CNN, or like ESPN, and you know, that draws attention and a lot of animosity and fear.

Ms. JACKSON LEE. Thank you.

Mr. Kimmelman, can you quickly just comment on that, please?

Thank you, Mr. Murdoch.

Mr. KIMMELMAN. I'm amused at the News Corp. definition of what the media market is. Consumer Reports is part of their media market, as they define it. Every radio station, every Internet site in the country. It's no surprise that they have such a small share when you include Sony and everybody else in this as well.

This is—the key issue here in terms of excess control over viewpoints presented, you have to look at where people get news and information. Prime time television, prime time news. It's predominantly the network and these new cable news channels. This, I think, consolidates a lot of power. It is not a monolith, I agree with Mr. Murdoch, and I agree he puts different points of view on the air. But he shouldn't be ashamed of saying there's a bias. We think every media has a bias, and that's all part of the first amendment public debate.

I think there's a danger you will see more consolidation among others who want to put content with the distribution channel to challenge him, and I fear it's too few entrepreneurs with something we cherish the most, diversity of viewpoints, competition in the media, to really feel our democratic process.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I'd like to thank the panel for being back. We've had several of the people on this panel before.

Mr. Murdoch, welcome. We had your friend, Charlie Ergen, the last time we had a panel like this, and I believe he was actually sitting in the seat that you're now in.

And Mr. Chairman, I'd like to offer for the record, ask unanimous consent to introduce into the record a Financial Times article called EchoStar lauds Murdoch Move. And if I might read the first two paragraphs, I think you might enjoy this, Mr. Murdoch.

Mr. MURDOCH. Thank you.

[The material referred to follows:]

Financial Times

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Wednesday, May 7, 2003

EchoStar lauds Murdoch move - BROADCASTING.

By CHRISTOPHER GRIMES.

Charlie Ergen, EchoStar's chief executive, said yesterday that News Corp's acquisition of DirecTV could help expand the satellite television industry - although he acknowledged he faced a formidable new rival.

If regulators approve News Corp's bid for Hughes' DirecTV unit, it could strengthen the satellite industry's position against cable, Mr Ergen said. "It is clear News Corp's entry would be a negative for cable. It may or may not be a negative for EchoStar."

News Corp, which also owns television programming through its Fox arm, will have new clout with cable operators once it owns distribution, Mr Ergen said.

"It will be bad for people in cable who do not go along with what (News Corp) wants to do," he said. Mr Ergen fought a battle with News Corp for control of DirecTV but his \$18bn bid was thwarted by regulators. EchoStar was forced to pay a \$600m break-up fee, which contributed to a \$690m charge in the fourth quarter.

News Corp's \$6.6bn bid for DirecTV was approved by Hughes' parent, General Motors, last month.

In spite of the competition over DirecTV, Mr Ergen said he had a "personal relationship" with Mr Murdoch that was better than his relationship with Hughes, DirecTV's current owners.

He indicated that Mr Murdoch's company would manage DirecTV better than Hughes by controlling piracy - which would benefit the entire satellite TV industry. Mr Murdoch would also use his political clout to push for "more consumer-friendly laws for satellite".

Mr Murdoch is to testify at a Congressional hearing on Thursday to win over

lawmakers to his purchase of DirecTV.

Overall, the deal would be a "mixed bag" for EchoStar, Mr Ergen said.

His comments came as EchoStar reported a \$58m net profit for the first quarter, reversing a loss in the first quarter a year earlier.

The company added 350,000 new subscribers, an improvement over the 335,000 it added in the first quarter of 2002. The strong subscriber growth helped push revenue up 23 per cent to \$1.36bn.

Earnings before interest, taxes, depreciation and amortisation rose \$100m to \$277m in the first quarter.

Merrill Lynch analyst Marc Nabi said EchoStar's results reflected "solid expense control and churn management".

EchoStar shares rose \$1.64, or \$5.35, to \$32.27 in midday trading in New York.

Mr. CANNON. And if you could comment on it. Charlie Ergen, EchoStar's Chief Executive Officer, and I might say one of the toughest guys I've ever bumped into in business, bright, smart, said yesterday that News Corp.'s acquisition of DirecTV could help expand the satellite television industry, although he acknowledged he faced a formidable new rival. Congratulations. If regulators approve News Corp.'s bid for Hughes's DirecTV unit, it could strengthen the satellite industry's position against cable, Mr. Ergen said. It's clear News Corp.'s entry would be a negative for cable. It may or may not be a negative for EchoStar.

This guy's a tough competitor. Do you want to comment on his statements there?

Mr. MURDOCH. Well, I agree with it and welcome it. We will, of course, be a tough competitor of his I hope, but he is, as you say, one of the toughest around. For instance, he runs a much lower cost operation than Direct. He charges less, and he makes more money per customer. Nothing wrong with that. I'm just saying he runs an extremely vigorous—he's one of the best operators in the world, and it's going to be an interesting test of our powers.

Mr. CANNON. I for one am thrilled that we have two of the great competitors of the world competing to get more people access to more programming and more capability. I'm just fascinated to feel that Fox is narrowly focused. I like to think in terms of the broad market appeal that that channel's had and the huge new audience it's brought to bear on your channel, because I think it actually appeals to people and would disagree with the prior statements that it is narrow. I really enjoy it.

You know, one of the problems that we had before about this is that the influence it had or the effect it would have had to have on satellite channels as it related to rural America, where often—I'm not in rural America, but I'm in sub-suburban America, and I can't get cable very—it has not worked out. Could you talk a little bit about what the benefits of this deal would be for rural customers?

Mr. MURDOCH. I think it means there will be real competition. We will be competing with EchoStar on every level, with the amount of high definition programming, who can get there first with local-into-local broadcasting, on price, on service, which is most important of all of this. There's great frustration very often with customers of cable. I think there is sometimes with satellite companies. They don't get the telephone answered, they don't get their queries answered. There's a great deal to do to improve ourselves and to give Mr. Ergen a real test.

Mr. CANNON. I might just point out from personal experience, that I have some sons who are really into soccer, and they wanted satellite because it's where they could get some of the great soccer programs, and so I actually got on the phone and went through the process, and it could really use a high dose of service. I won't say which group it was that I called on that, but I'll just tell you that they could work a lot better. And we have great new ways of doing it. This is the kind of thing, I tried to do it online and you couldn't get the basic information you need online.

If I might just ask, what other consumer benefits do you think will be derived from this deal?

Mr. MURDOCH. Well, I think of greater competition, a much faster move to high definition television. We believe that high definition will be the driver to get the American public to adapt digital.

Mr. CANNON. If you don't mind, I'm going to cut you off because I'm about to lose my time, and I just want to say thank you for getting into this industry, thank you for being such a heck of a competitor. Thank you for putting a guy like Charlie Ergen on his very best behavior and his most aggressive behavior. I look forward to seeing a satellite industry that is robust and that informs virtually all the rest of our commercial communication and content, and I think that this is a great thing. Thank you for what you've done and for the risk you've taken, and I wish you the best in success as it goes forward.

Mr. MURDOCH. Thank you, Congressman.

Mr. CANNON. Mr. Chairman, I yield back the balance.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. Murdoch, we're not going to let you quit while you're ahead. The gentleman from New York, Mr. Weiner. [Laughter.]

Mr. WEINER. Thank you. Thank you, Mr. Chairman.

Mr. CANNON. Mr. Chairman, will there be a second round?

Chairman SENSENBRENNER. No.

Mr. WEINER. Well, I love the New York Post. Channel 5 is great. Channel 9, love those guys. Actually, I'm predisposed, frankly, in these types of issues, to be concerned about how media has become too concentrated, but I'll be very honest with you, I'm not sure I understand. The objections seem to fall into two camps. Mr. Schnog seems to object to competition at all. Let me just paraphrase and then you'll get a chance to respond, because it is the incumbent cable company, for a lot of reasons, there's no way practically for a cable company to come in and compete, the infrastructure, the investment that would be necessary.

Mr. Kimmelman's testimony, who I'm a big fan of, but it seems contradictory. You started your testimony by saying that there hasn't been competition to keep rates down. Yet, this is an opportunity for a competitor to cable to emerge. One that has some technological advantages, but some with very big disadvantages not being the incumbent. We actually had a test of the notion that there was competition for cable in New York recently, when the New York Yankees were kept off the air because of a dispute about placement. Now, as a Mets fan, they could still be having the dispute, and I wouldn't care. [Laughter.]

But I think that what DirecTV did is then came in and vigorously competed for those customers. Some left. Some didn't because they couldn't for technological reasons. Some didn't because they liked the incumbent's system.

How is it, putting aside the fact that prices have gone up—and some would argue that prices went up after deregulation because they were held artificially low by regulation which was necessary then because there wasn't a viable option. It seems to me counter-intuitive that you would not want to create more stronger competitors for the cable monopoly. Tell me why this doesn't do that.

Mr. KIMMELMAN. Mr. Weiner, we would absolutely want to create more competitors, and it's just sad to us, the structure of this deal. Let me point out on the issue of whether cable rates are too high

or too low, the GAO reported Tuesday in the Senate Commerce Committee, preliminarily, that where there are two cable companies serving a community and two satellite companies, prices are 17 percent lower for the same channels, the same infrastructure, the same services. Where there's two satellite and one cable, so—

Mr. WEINER. But where there are more competitors, yeah, you're going to have lower prices. This is an industry that grew out of advances in technology. They're still catching up, I think. There are still glitches in the system. For example, a lot of places can switch to their satellite if they want to get their local broadcasts, depends how difficult that is technologically. But on the issue that I'm asking about, it seems to me cable is realistically not going to compete with other cable. There's too much of a capital investment involved, and frankly, it's an antiquated technology. God bless you, but it's an old technology.

Why isn't it that we should be in Congress and the Justice Department fighting to make sure there are more powerful satellite guys to give real competition?

Mr. KIMMELMAN. I think you should be trying to get more players in the satellite market. This deal does not work this way. This deal combines a national over the air network with free given away licenses and guaranteed carriage on all cable systems with one of only two satellite players in the market. We need more players. I agree with you completely. The problem here is that this company can maximize its profits more by raising its programming prices, both on its own systems and on cable systems, then it can by trying to drive down—

Mr. WEINER. Yeah, but hold on a second. Right now if you—who has the deal with Blockbuster? Is that you guys or the other one?

Mr. MURDOCH. I think Direct has it.

Mr. WEINER. The competition now is based on price. I mean you go in, every advertisement, only 99 bucks, we'll give you whatever it is. Competition based on price is going on now. Competition based on depth of service is going on now. It just—it's counter-intuitive from a consumer—yes, you know, maybe Mr. Murdoch is not the dream owner of this thing. I mean I can see, you know, more of this reality junk on 2,000 stations rather than 30— [Laughter.]

But isn't the issue from the perspective of my constituents, let's get another player in there to compete, to keep Mr. Schnog—not him in particular, but his brethren honest? I mean—

Mr. KIMMELMAN. I think Mr. Murdoch is a wonderful entrepreneur. I have nothing against him. I think the problem is that there is competition at the high end of the market for big packages of services. We've studied it. The GAO just looked at it. For the basic, expanded basic tier of service, satellite has done nothing to hold down cable prices.

Mr. WEINER. Let me make—is there any competition you would support?

Mr. SCHNOG. I support all competition, and actually, as one of your brethren put it, Darwinistic down and dirty competition. The problem is not at the distributor level. There's lots of us now. There is cable TV operators. There's two satellite operators.

Mr. WEINER. Who's your competitor in your neighborhood?

Mr. SCHNOG. We've got two satellite operators. We've got ourselves. We've got the telephone company who's telling us now that they're going to definitely deliver video. But let's not go there. Let's go to where the problem stems, and the problem is not there. It's in the programming market. There are five, six companies that control all the major programming assets in the world, this country, and when you look at this 2.8 percent of the market, that's not what it is. Look at your own House Capitol cable system. He's got three of the channels on there. With most of those channels being in-house things, that's way more than 2½ percent. We're talking more like 20 percent of what's here in your own cable system. In my cable system it's about 20 percent, and my customers, when I look at what my programming costs me, 25 percent of what my programming costs me goes back to that company. The rest of it goes to Disney, ABC. It goes back to GE. It goes back to AOL Time Warner. And those five, six huge, mega media companies control what the costs of our cable TV and what you end up buying is.

The hard part of this whole thing is that you as a consumer never see the cost. None of you realize that when ESPN raised its rate 20 percent, which will go in July, that means that in my consumer's household, 52 cents per household more will go back to them. That won't come to me. It comes straight out of our pocket. It goes straight back to ABC. This happens year in and year out. So if I do a 52-cent rate increase, I'm the bad guy? Well, why not—why don't we just get it to the point where everything is open on this, really a Darwinistic level, competitive playing field, where when these guys who own the programming assets raise the rates, you as the consumer can see it. That is the problem.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman, and thank you very much for putting together this hearing. And it is clear that the News Corporation's acquisition of DirecTV would mark the first time that the owner of a national broadcast network was also in a position to control a national, multinational video programming distribution platform. And I think the issues of media consolidation and cross-ownership are really more nuanced than advocates on either side generally acknowledge. But I think this merger certainly raises questions about the leverage News Corp. would have over competing programmers and distributors.

Mr. Murdoch, one of the concerns that you've heard this morning about consolidation in the media industry is that the owners of the large distribution platforms will have incentives to favor their own programming. Now, I understand that you have an agreement that you will keep programming, but we also heard you say, I think a little earlier, that this wouldn't be permanent; in other words, it would depend upon the circumstances; in other words, if there were changes at the FCC, then you would not want to put yourself at a competitive disadvantage, which certainly would be understandable.

I think Members of this Committee want to know how we'll guarantee this nondiscriminatory treatment. How will it be enforced? How will it be interpreted in a situation where Disney, for example, is seeking to tie renewal of distribution for ESPN to agreement

to carry additional Disney-owned channels? I'm not sure that it's good—a good thing to guarantee carriage for Disney, but at a minimum, I'm curious about how you are—how your commitments that you've made will deal fairly with your competitors, although I was interested to hear you talk about EchoStar. And did I hear you say that programming is actually cheaper with EchoStar?

Mr. MURDOCH. They have cheaper packages that they offer to the public, yes.

Mr. MEEHAN. Because I get a little nervous—

Mr. MURDOCH. They are very price competitive with everybody. I would just like to comment, if I may, a little bit—

Mr. MEEHAN. Sure.

Mr. MURDOCH. At the bottom of this question of the pricing of basic cable and really, you know, the problem here is sports and people who have exclusive sports. ESPN has an enormously—after many years of struggle, has an enormously big list of exclusive sports. They charge for it—they put their rates up very aggressively, and they make very, very large profits.

I would just say rather than break it up and say let's have a sports tier, that would have to be mandated by Congress. It could not be done without total agreement within the industry, which would be impossible.

I believe that if ESPN continues on its present course or Disney does, other competitors will arise, and you will find that market-place discipline will come in and hold their prices at more reasonable levels.

As for our own sports networks, so to speak, it's a little federation of about 19 what we call regional sports networks. We actually own 10 of those, and we're in partnership obviously in—very often a non-controlling partnership in another 9. Mr. Ergen, if I may quote him—I'm sure he wouldn't mind me quoting him—saying that he hoped that we would stay absolutely in business there because, otherwise, every sports team would be following the Yankees and wanting \$2 from every home. That would end up with his sportscasts for local sports and every MSO's going to about \$8 in every market in the country; whereas, now it's somewhere between \$1 and \$1.50. And we think that—and there are a lot of problems with these RSNs and how they work. But they do hold—and they do aggregate the sports rights, and they do hold the prices down.

Mr. MEEHAN. I get a little nervous when you indicated that his programming was cheap, because I'm a subscriber to DirecTV, and as a consumer I get a little concerned. Let me ask you, how many people purchase the NFL Ticket? And to what extent does that influence the number of subscribers DirecTV has been able to get?

Mr. MURDOCH. I don't know enough about it. It's, I think, between a million two and a million five. It is a very, very expensive loss leader. The prices will be going up on that. There's no question about that.

Mr. MEEHAN. When is that—it is a contract that's up, I think, soon?

Mr. MURDOCH. The contract has just been renewed for 5 years at a very, very big increase. And it remains exclusive to them for 3 years only.

Mr. MEEHAN. And when these—Mr. Kimmelman, when these—the NFL negotiates their package and puts it out available, is this—does this have a negative impact on consumers? Or what could we draw from—

Mr. KIMMELMAN. One of our biggest concerns on this is something that is never raised, which is antitrust immunity for Major League Baseball, which has special antitrust protections under the 1961 Sports Broadcasting Act for negotiating league packages for professional sports. It is monopoly power at the point of sale on the leagues that can drive up a very high price. I think it's very hard to argue, even if you have two or three or five distribution systems, that you can keep the price of sports down because that's really at the other side. Mr. Murdoch knows—he owns a team—how the owners bargain for this. They bargain as a league. So that's difficult.

One other point just to raise, on programming, ESPN or any others, what people often fail to consider is that the high price of the programming is often substantially if not completely offset by higher advertising revenue that comes in paid to the cable operators, although maybe not in small towns as much, but in general, and to the cable distributors; that there is an awfully big offset because advertisers pay for eyeballs. They pay higher prices. So when the programming price goes up, the revenue increases as well.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I think this is a very useful hearing airing the, I think, rather complicated issues that are presented here. And I think certainly we want vigorous competition in the marketplace and aggressive prices that will follow. And one of the things that I'm interested in, it seems to me that News Corp. is trying to address that issue with its offer of voluntary efforts.

I was wondering, however, Mr. Schnog in his testimony outlined kind of lack of disclosures in the programming industry, and I'm wondering, Mr. Murdoch, if the programmers don't disclose what they charge cable and satellite operators, how will News Corp.'s promises be enforced, the voluntary—

Mr. MURDOCH. I didn't understand Mr. Schnog on that, Congresswoman. I think everybody knows pretty basically what the prices are. People get what they can get. They give sometimes discounts for size, for quantity. But I can tell you now, for instance, that Fox News gets half the price of what CNN gets because CNN was there 10 years earlier.

Ms. LOFGREN. So that—

Mr. MURDOCH. We all know these figures.

Ms. LOFGREN. Would that be posted with the FCC, what everybody kinds of knows is kind of a loose standard?

Mr. MURDOCH. No, I don't think so, but it's there for—I mean, we're—there are no secrets, really, about what everybody is selling their—

Ms. LOFGREN. So if there's no secrets, why wouldn't it be—

Mr. MURDOCH. It could be posted.

Ms. LOFGREN. It could be posted, and that would—and it seems to me if the—just listening to this, if the—if the voluntary compliance offer is really the safeguard for the public, we need to have some benchmarks so that they can be enforced and that that would be a very important aspect to this.

Mr. MURDOCH. This question of retransmission, it depends—it's laid down by the FCC that it is quite correct, if we can't get money for our signals, that we can trade with other programming, and on the basis always that it be done in good faith.

If someone like Mr. Schnog feels that a local station is not behaving in good faith, or a network or whatever, he's perfectly free to go to the FCC and ask for them to—

Ms. LOFGREN. Of course. I'm just concerned that if this goes forward and somebody feels that way, that there's, you know, information by which the behavior can be measured that's transparent to the public as well as to the business community.

Mr. MURDOCH. I certainly don't mind publishing what our rates are. I think they have been published, but they can be published again.

Ms. LOFGREN. Mr. Schnog, did you—you look like you—

Mr. SCHNOG. I was just—I mean, I've got my Fox agreements in my hotel room that say I can't disclose anything. I can bring them in for you and show you. I mean, it says it right in the agreement. I mean, I don't know how untransparent it could be. I mean, every operator knows that—you know, I mean, ask the guys at NCTC, which is the cooperative for us small cable operators. I mean, it says we can't disclose it.

Mr. MURDOCH. Well, that's very often at the request of the operators, but if they wish to—

Mr. SCHNOG. I mean, I mean, if he—if you're saying we can bring it all out and put it all out in the open—

Ms. LOFGREN. Well, it sounds like Mr. Murdoch is saying that that would change in the future.

Mr. SCHNOG. That would be great. It would be terrific.

Ms. LOFGREN. And that might give some—

Mr. SCHNOG. I mean, can we get a signature on that today?

Ms. LOFGREN. Well, I don't think that's the role of the Judiciary Committee, but just to air issues. And I'd like to ask kind of a—and I know we've got a vote going on. But I'm very interested in the aspect of broadband coming into communities that currently can't get broadband very well. Right now I have DSL lines in both coasts, and because the phone companies are regulated, I can set up an 802.11b network in my home, and once I've paid for the DSL line, you know, there aren't additional charges because I've, you know, installed 802.11b, or a or b or g, whatever the next generation will be.

Cable companies have taken a position that I think is just simply wrong that when they bring the pipe to the home and when a homeowner installs an 802.11b network, that somehow the cable company is owed additional funding, which I think is a preposterous point of view.

I'm wondering, Mr. Murdoch, which position you would take as a satellite provider of broadband, the phone company position or the cable company position?

Mr. MURDOCH. Well, I think the phone company position, but I'd need to study it. I really am not an expert on this one.

Ms. LOFGREN. All right. That—

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. LOFGREN. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. We have 40 minutes—the 45 minutes of votes. The gentlewoman from California, Ms. Waters, the gentleman from Virginia, Mr. Scott, have not asked any questions. Do either of you—are either of you able—and Mr. Conyers, too. Are any of the three of you able to come back after 45 minutes?

Mr. CONYERS. I certainly am, Mr. Chairman.

Chairman SENSENBRENNER. Okay. Ms. Waters?

Ms. WATERS. Yes.

Chairman SENSENBRENNER. Mr. Scott?

Mr. SCOTT. Yes.

Chairman SENSENBRENNER. Okay. Now let me ask the witnesses. Are you able to stick around for about 45 minutes while we go and vote?

Mr. MURDOCH. I am, sir.

Mr. KIMMELMAN. I am.

Chairman SENSENBRENNER. Okay. Then the Committee is recessed, and after the last vote, please be prompt in coming back.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

Mr. Murdoch? Mr. Murdoch?

Mr. MURDOCH. Yes, sir?

Mr. SCOTT. Thank you. How many African American-owned channels are there on DirecTV at this point?

Mr. MURDOCH. I have no idea.

Mr. SCOTT. Will the merger make it more or less likely that there will be more?

Mr. MURDOCH. More likely. We have made a very firm commitment in our submission here that we'll be mentoring people and starting channels in the business of running channels, and we expect things will arise out of that. But it's a development process, and anything that has quality we'll be very happy to make room for.

Mr. SCOTT. Are you aware of any African American-owned channels on DirecTV? Or you don't know?

Mr. MURDOCH. I don't know.

Mr. SCOTT. Well—

Mr. MURDOCH. I mean, BET was, but it's no longer African American-owned.

Mr. SCOTT. Why don't we let you answer that for the—why don't we let you answer that for the record later on so that—if you don't have the information, it's unfair to have you guess.

Chairman SENSENBRENNER. The information request will be included in the record when it's submitted.

Mr. SCOTT. Thank you, Mr. Chairman.

And I'd like all of the witnesses to comment on the question of what the merger will do to costs to the consumer, whether the costs will go up or down to the consumer if the merger is allowed.

Mr. ARQUIT. I would think that overall that the costs would go down, and, of course, by costs, I mean it in the economic sense, that it's not just dollar price but quality. Generally, with vertical integration—

Mr. SCOTT. The quality would go down?

Mr. ARQUIT. No. Quality would go up and price down. It's a quality-adjusted price, might be a more precise way to describe it. But with the increase in efficiency and possibly the increase in local-to-local and some of these other types of phenomena and the competition that would result, it would put more pressure on companies like EchoStar and the incumbent cable operators.

So, clearly, outside of the equation, which hasn't been focused on very much today, there's the other side of the equation as to what are the chances for discrimination and the like. And you have programming discrimination. You have to factor the two against each other, because I think that from a financial standpoint that there's very little incentive for News Corp. to favor programming and DirecTV. They only get—they only own 24 percent of DirecTV, so they give up 100 cents on the dollar when they take programming off somebody else, off the cable, to get a third of a dollar from DirecTV, and DirecTV's only 12 percent of the market. So on the anticompetitive side, it seems like things are pretty slim, and on the procompetitive side, the innovations they can bring into the market are likely to force others to do the same.

Mr. SCHNOG. Congressman Scott, unfortunately, I've never seen a cable rate or a satellite rate ever go down, and they're going to continue to go up and up and up. And—

Mr. SCOTT. Well, will the merger make it likely they'll go up further?

Mr. SCHNOG. Absolutely, and much faster. I mean, one of the most—one of the biggest reasons is retransmission consent in itself, and, you know, I'm sorry but Mr. Murdoch, I think, is mistaken and his staff is mistaken. We know of 12 instances, at least, where people are still trying at this point, before the merger, to negotiate retransmission consent agreements, and that's driving up the price. Now with this extra lever, it would just make it worse. And, I mean, this is something that I think, you know, it's already happening, it's just going to get worse as we concentrate the media.

What's going to happen is the five people with the five companies that control most of the media in the United States still can get together among themselves, but when it comes down to the bottom line, they're all looking to get more revenue and more out of the content that they own, and bring it to their own pockets. And that goes straight through the distribution system. Small cable operators like me—I'm not Comcast. I'm not a giant company. We're a little, tiny—1,000 small companies across the Nation who get these rate increases that—for programming that we have no control over. And it's just going to get worse. Prices are going to go up. It gets passed on to our consumers. And, you know, it'll just continue to skyrocket.

Mr. SCOTT. I think two other people want to comment, and you'll get the final word, Mr. Murdoch.

Mr. KIMMELMAN. Yes, Mr. Scott, I think it's very likely prices will go up, and because of this merger, what it does is it takes Mr. Murdoch's very popular programming, and it doesn't do what Mr. Arquit was diverting attention to. It's not going to be put only on DirecTV. It gives him the opportunity to raise prices to all cable operators. If any cable operator refuses to carry the Fox Network, Fox News, a regional sports channel, he'll have it on DirecTV in that community. He will benefit immediately. He'll probably give away dishes for free. That cable operator can't survive very long losing customers in that environment.

The prices will go up. Cable will have to pay. Satellite customers will have to pay as well.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Waters?

Mr. SCOTT. Mr. Chairman?

Ms. WATERS. Thank you very much, Mr. Chairman. Yes?

Mr. SCOTT. Mr. Chairman, I'd ask unanimous consent that Mr. Murdoch be given 30 seconds to respond to the question.

Chairman SENSENBRENNER. Do you wish to respond?

Mr. MURDOCH. I'd just like to say that these retransmission agreements are always—a rule by the FCC, have to be done in good faith, and it's up to the cable operator if they feel it's not being done in good faith. Mr. Schnog is misinformed. We have reached agreement with every one of the 300 small operators in his association who deal with Fox stations. In his case, he's dealing with Fox-affiliated stations, which we have no ownership of.

Chairman SENSENBRENNER. The gentlewoman from California.

Ms. WATERS. Thank you very much.

Mr. Murdoch, as you know, Congress has no direct role in the approval or disapproval of mergers, but the FCC and the Department of Justice must determine whether or not a merger is in the public interest, and DOJ, I guess, has some role in analyzing whether or not the—the anticompetitive potential. And that's what I'm concerned about, whether or not the merger is in the public's best interest.

You're the head of a huge media conglomerate with annual revenue in 2002 of \$15.2 billion. News Corp. owns a movie studio, Fox Broadcasting, a cable news channel, Fox News Channel, a book publisher, an Asian television station, StarTV, BSkyB, a British broadcaster, the Los Angeles Dodgers, and other properties.

You're also well known for holding highly conservative views, political views. Many media commentators believe that these political views color the news coverage that Fox News Channel provides. Many Americans, including myself, believe that Fox News Channel, when they use the term "fair and balanced reporting," it's really a code word for conservative bias, and that Fox News Channel is an adjunct and a cheerleader for this Administration.

Clearly, there are few liberal voices who have a prominent role in Fox News Channel programming. Several commentators have spoken about a Fox effect that is causing other news organizations to reorient their own programming toward more conservative views. I believe, and many other Americans believe, that diversity

of opinion and expression in news programming is critically important. I believe that it is imperative to ensure that we do not promote policies or practices that promote media consolidation where the effect of those practices could be to reduce the number of voices in the media.

I certainly see why it is in the private interests of News Corp. to pursue its proposed transaction with DirecTV, but why should we be supportive of a transaction that could reduce diversity of opinion and result in fewer voices in news programming? How do you explain the absence of liberal voices on Fox News Channel? Do you contend that you're just responding to public taste? Or is Fox News Channel simply reflecting your own personal views? Or is there some other explanation that I don't understand?

What conceivable reason do we have to believe that the proposed transaction will even maintain the existing level of diversity in news programming, let alone promote diversity of opinion? I understand that you're thinking about expanding your news in this merger. I suppose if I—as I believe, that you promote the views of this Administration and you were a cheerleader for the war—I happen to be a liberal. And why is it in the best interest of people to the left or liberals, or whatever they want to call us, to help you to consolidate in ways that your conservative views will be more and more dominant, we will get shut out? I'm worried that as you go before DOJ, and maybe—I don't know if Mr. Ashcroft is your friend or not—his conservative views will be reflected in your programming. So why should we—why should we support this even though we don't have direct responsibility for approval or disapproval? Maybe some of us should make a hell of a lot more noise than we're making because you're scaring the hell out of me.

Mr. MURDOCH. Thank you, Congresswoman. I can assure you that we are bringing diversity of opinion. We are—there is diversity of opinion on Fox News. You may disagree with that. We have many liberals there, many liberals are invited. We have liberal commentators, as we have conservative ones.

Ms. WATERS. Who are your liberal commentators?

Mr. MURDOCH. Alan Colmes, for one. Greta van Susteren. You know, it's in the eye of the beholder, I guess.

I know you've had problems—you've made statements about Mr. O'Reilly. All I can tell you is that I can't control him, and I don't think anyone can, and he's a pretty equal opportunity beater-upper of people.

Fox News is absolutely new. Before that, there was no diversity. There was CNN. There was the three big networks. Even last night, I believe, the head of CBS News said the problem is we're all too alike. The only one that's broken out is Fox News by being different. We would say that's by being fair.

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

May I ask you a question? If Baghdad Bob can be found, could you put him on so that we could get a little more humor?

Mr. MURDOCH. I'd be delighted.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you very much, Mr. Chairman.

Mr. Murdoch, you've been quoted as describing sports programming as your battering ram to attack pay television industries using a portfolio of exclusive broadcasts to demand higher programming fees and win subscribers for your satellite services.

How do we know that that's not going to happen since you've been quoted as saying it already?

Mr. MURDOCH. Oh, I think it's happening all right—right now. That was said actually in the context of Britain where we were able to buy and put on the National Soccer League, which was not on free television, and it proved extremely effective.

Here, we managed to buy at great cost some years ago the NFC from the NFL, the rights for the Fox Network. And there's no doubt that that did more to establish the Fox Network, particularly amongst our small affiliates, than any other—

Mr. CONYERS. But you can use sports—

Mr. MURDOCH. So I would agree with you—

Mr. CONYERS.—to beat your way into any other market you want. That's the full point, right?

Mr. MURDOCH. Sports is a very popular form of programming.

Mr. CONYERS. I'm aware. Okay. Now, let's talk about how we count here in antitrust principles. We count by markets, not by counting up all the programming and say we're 2 percent. You're 50 percent in sports, maybe more. And so you come to us as a little teeny, weeny guy just trying to get through on a lot of stuff. You're a big guy in a world of high rollers and big people. You're one of the biggies now.

So you don't have to give us all of this poor mouth stuff. I mean, we know where you are in the scheme of things.

Mr. MURDOCH. Can I respond?

Mr. CONYERS. Briefly, yes.

Mr. MURDOCH. The football—let's take football for one—

Mr. CONYERS. Okay.

Mr. MURDOCH.—key sport. The NFL sells four packages: three to free television where there are four bidders, and one to ESPN on Sunday night. We have one out of four of those packages.

Mr. CONYERS. So you're a little buy in sports even.

Mr. MURDOCH. No, I think it—I think we have the best package, NFC. We're very happy with that. I'm not coming to you saying I'm small. I'm just saying, relatively, the market—

Mr. CONYERS. Do you know who controls the whole deal in Washington?

Mr. MURDOCH. I beg your pardon?

Mr. CONYERS. Do you know who controls this in Washington sports if you want to see the Detroit Lions? You.

All right. Let me ask you this. Let me ask—who wants to see the Detroit Lions? Okay. [Laughter.]

I'll see you after the hearing.

Mr. MURDOCH. I thought it was Comcast who controlled it.

Mr. CONYERS. Your commitments require you to offer—

Mr. MURDOCH. I don't control—

Mr. CONYERS.—your programming to other distributors on the same basis as you offer it to DirecTV. Are you going to do that with respect to other programming DirecTV acquires?

Mr. MURDOCH. Yes, absolutely.

Mr. CONYERS. Okay. Competitors, affiliates, interest groups say that Fox is already in violation of the 35-percent ownership cap. Did you know that?

Mr. MURDOCH. Yes. It is operating under a waiver, as is CBS and a number of other people. We, I think, cover 37 percent.

Mr. CONYERS. Okay. Are you willing to offer your sports programming on an a la carte basis?

Mr. MURDOCH. I'm not prepared to commit. It is a very interesting question. We certainly could not do it without the whole industry doing it. It would make sports extremely expensive to sports lovers, and it may reduce or at least hold the prices of the other basic—

Mr. CONYERS. Okay. I get it.

Mr. MURDOCH. It's an interesting—we do it that way in—

Mr. CONYERS. Let's talk about it some more.

Mr. MURDOCH. It's never been done in—

Mr. CONYERS. Mr. Arquit, have you ever opposed a vertical merger when you were with FTC?

Mr. ARQUIT. Yes, I believe that I did, sir.

Mr. CONYERS. How many?

Mr. ARQUIT. I believe, if I can think—

Mr. CONYERS. Name them.

Mr. ARQUIT. Well, one had to do with—I'm going back now 10 years, but one I can recall had to do with Shell Oil and some assets that existed in Hawaii. I cannot remember the precise situation where—the precise name of the case, but I certainly remember that.

Mr. CONYERS. Okay. I'll give you one or two.

Mr. ARQUIT. I'm happy to—

Chairman SENSENBRENNER. The gentlemen's time has expired.

The gentleman from Iowa, Mr. King?

Mr. KING. Thank you, Mr. Chairman.

First, I'd want to offer that there's a tremendous amount of opportunity in the communications field that has been offered to us in the last decade or so, and I was very observant of the coverage that we saw of this war and the balance that came from a particular network, and you know that I'm appreciative of that. There's been significant opportunities for the public because of competition that's been brought into this industry and initiated much by Mr. Murdoch. And I'd direct my first question to you, Mr. Murdoch, and that would be that you've answered the questions on a la carte offer for sports programs. But that is a consistent criticism that we hear from all of the cable providers, which is how does a person select what they want and pay for what they want as opposed to having to take the broad package. And I understand it's an industry question. But what can be done to give consumers more options with that regard so that they don't have to take such a broad package and can limit some of their investment in their monthly fees?

Mr. MURDOCH. Well, the first thing, it would have to be industry-wide, and it would have to be—we'd need some special clearance from the Department of Justice to talk to each other on such a subject.

I'm not against it in principle, but I think that it would be very difficult to effect. We'd certainly have to get the agreement to people like Disney with ESPN to put them in a special tier. And they'd certainly want a much higher price to be in that tier.

I would predict that if you had all the sports programming that's available today in a separate tier, it would be an expensive tier. But, of course, the basic tier could come down \$2 or \$3, quite possibly. You know, you can have—there's always been in America the idea that you spread to a local community all the sports that you possibly can.

Mr. KING. Does the competition that exists in the marketplace today or the competition that would exist, provided that you're able to go ahead with your initiative, does that allow for a scenario by which consumer choice would push this and it could be developed as a consumer choice option because of the competition? Will free enterprise move us toward fixing that?

Mr. MURDOCH. yeah, I think it could—it could be, but it would be—all I can say is it's something which we'd have to experiment within separate markets to start with. It could be a very, very dangerous handicap to take on if we were to say we were the only ones with tiered sports.

Mr. KING. I would just encourage the industry to take a good look at that. If there's a consistent criticism, that would be it. I understand the circumstances by which this has been brought out.

Thank you, Mr. Murdoch, and to Mr. Schnog, if I could direct my next question to you, I represent a very rural district, and it's 286 towns in 32 counties, the western third of Iowa. And our difficulty is in access to services, and we also know that competition brings technology. And so with this proposed transaction, how would you view the effect on my consumers in the region that I represent?

Mr. SCHNOG. Well, I think in your region what happens is that the money that's small entrepreneurs, like most of our companies are, a thousand very small companies—as a matter of fact, I know one of your constituents who has 3,500 customers in that area. All of a sudden this money goes to programming and is sucked out of their companies and is not being invested back into the systems in your area. And I believe that broadband cable television has tremendous technological opportunities where it can be deployed. But if the money is sucked out, it's going to be that much more difficult to deploy. And, you know, I think that's absolutely going to happen.

And, by the way, I'll tell you, if I had a sports tier, I could probably—I was just calculating it up. I could probably drop my basic rate by 5.60 right now this second. I mean, that's what the sports is costing us just net cost.

Now, the tier would have to be pretty expensive, no question, but I wonder: Is it right for every consumer in America, you know, to go ahead and pay in their cable bill that much so that 30 percent of us can watch what we want to see and, you know, make Michael Jordan millions of dollars? But that's a whole other question.

Mr. KING. Well, what about, though, those folks that are out on the end of the line, the hardest ones to reach, the last meter on the electric line, and what about their access to high-speed Internet services as well? How do we get that to all those people out on the end?

Mr. SCHNOG. Well, I think there's a lot of things that we can do. We're already serving very, very rural consumers. You know, I would—I know that there is money now available through the rural telecom bills that can go out to help serve them, and there is satellite available in those areas as well. I don't think satellite availability is going to disappear if, you know, this merger doesn't happen. And so there'll be lots of competing technologies, and I think that's a great thing to have.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. KING. Thank you, Mr. Schnog.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Let me express my personal appreciation to all four of the witnesses today for their patience. I think this has been a very informative hearing relative to this issue, and I would hope that the transcript will be read by the folks in the Justice Department who will have the ultimate say on this.

Mr. Murdoch, let me say that when my wife doesn't get a good dose of Fox News every day, she gets pretty grumpy. [Laughter.]

So there are some of us that do appreciate what you put on the air.

Mr. MURDOCH. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. There being no further business before the Committee, the Committee stands adjourned.

[Whereupon, at 12:34 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD



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RUPERT MURDOCH, A.C.
CHAIRMAN AND CHIEF EXECUTIVE

June 3, 2003

Chairman Jim Sensenbrenner, Jr.
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Sensenbrenner:

Enclosed is a copy of the transcript of the Judiciary Committee's May 8, 2003 oversight hearing on "Direct Broadcast Satellite Service in the Multichannel Video Distribution Market" that is marked to indicate the technical, grammatical and typographic changes to my testimony. In addition, I would like to correct the following aspects of my testimony:

1. Page 42: The number of small cable systems affected by Fox Television Stations is approximately 450. For specifics on the status on retransmission consent negotiations with those systems, please see the attached letter transmitted to the FCC on May 30, 2003.
2. Page 72: The rates cable programmers charge cable operators for programming services is highly confidential and proprietary information. If Fox were the only entity publishing those rates, it would put Fox at a severe competitive disadvantage. After careful consideration, we cannot agree to make that information publicly available. However, the FCC's program access rules include detailed complaint procedures that allow the Commission to scrutinize the pricing of any vertically integrated cable programmer, including Fox, that has been charged with discriminatory pricing by an MVPD.
3. Page 86: News Corp. and DIRECTV have agreed to make all cable programming services they own or control available on a non-exclusive, non-discriminatory basis. However, we do not have the right or ability to extend that commitment to programming services carried by DIRECTV that are owned or controlled by third parties.

I have also attached my written responses to questions submitted for the record from Representatives Boucher and Scott. Thank you for the opportunity to appear at the May 8 hearing and to make these corrections.

Sincerely,

Rupert Murdoch

attachments

The News Corporation Limited

MR. RUPERT MURDOCH'S RESPONSE TO QUESTIONS SUBMITTED BY
REPRESENTATIVE RICK BOUCHER

1. Do you support the provision in the FCC's proposed cable "plug and play" rule that would ban the use of selectable output controls by both cable companies and DBS companies, including Direct TV?

No, we do not. As we have stated in the past, although we had originally proposed, in the early stages of the 5C/MPAA negotiations, a selectable output control mechanism by which content owners could turn off a "hacked" 1394/5C digital interconnect (which can be used to connect set-top boxes to digital recorders and thereby facilitate copying of copiable content) in favor of "unhacked" interconnects, we are no longer seeking this particular selectable output capability either as part of the 5C license or in the OpenCable PHILA agreement.

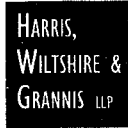
We continue to believe that other kinds of selectable output control (e.g., the ability to turn off unprotected analog outputs as a condition for providing content in earlier windows than it is now offered) would both facilitate new content-delivery business models as well as help combat piracy and signal theft. Therefore, we believe that any MVPD has a legitimate interest in including selectable output control capability in their set-top boxes. The conditions for use of such a capability would continue to be subject to arms' length negotiation between individual MVPDs and content providers, just as they are now, and we see no reason why the introduction of OpenCable devices into the market should foreclose such negotiations. Thus, we have argued that the OpenCable PHILA agreement should include this capability so that it can continue to be a legitimate subject for negotiation between content providers and MSOs, just as it is for content providers and DBS companies, in both cases with customers being the ultimate beneficiaries.

In sum, for us, the basic issue is whether MVPD subscribers should be provisioned with equipment capable of providing the broadest practicable range of content security, thereby maximizing subscribers' opportunities to receive high-value content pursuant to arms' length negotiations between content providers and MVPDs. By contrast, device manufacturers appear to be petitioning government to place limitations on the functionality of their devices in order to limit consumer options. This cannot be good public policy. For that reason, we cannot support any regulation issued by the Federal Communications Commission that would impose business models, copyright protection rules and other technical standards on MVPDs that are unnecessary to establish a standard for cable-ready digital televisions and which can be implemented through private licensing agreements. We believe that imposing such rules on the entire MVPD market will stifle innovation and limit the rollout of new services and hinder the satellite industry's ability to compete with the entrenched cable monopolies.

MR. RUPERT MURDOCH'S RESPONSE TO QUESTIONS SUBMITTED BY
REPRESENTATIVE ROBERT C. SCOTT

DirecTV does not keep as part of its business records the ethnicity of the programmer's ownership. Thus, we are unable to determine how many African-American owned channels are currently on Direct. In regards to diversity of the programming itself, DirecTV's customers currently have access to 11 public interest channels, 45 Spanish-language channels, six Chinese-language channels, BET and Black STARZ. News Corporation is committed to bring to Hughes and DirecTV its deep and proven commitment to equal opportunity and diversity. Specifically, the diversity initiatives we will implement include:

- A commitment to carry more programming on DirecTV targeted at culturally, ethnically and linguistically diverse audiences;
- An extensive training program for minority entrepreneurs seeking to develop program channels for carriage by multichannel video systems;
- A program for actively hiring and promoting minorities for management positions;
- An extensive internship programming for high school and college students;
- Improved procurement practices that ensure outreach and opportunities for minority vendors; and
- Upgraded internal and external communications, including the Hughes web site, to assist implementation of the above initiatives.



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May 30, 2003

BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Consolidated Application General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Docket No. 03-124

Dear Ms. Dortch:

On May 2, 2003, General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited ("News Corp.") filed the above-captioned consolidated Application seeking authority from the Commission to transfer control of licenses in connection with News Corp.'s acquisition of an interest in Hughes and related transactions. In that Application, the parties discuss the status of retransmission consent agreements between the 35 broadcast television stations that are owned and operated by News Corp.'s Fox Television Stations, Inc. ("FTS") subsidiary (the "O&Os") and the multichannel video programming distributors ("MVPDs") in those O&O markets. See Application at p. 63. After further inquiry, it has been determined that certain clarifications and updates are necessary to fully reflect the status of the retransmission consent agreements and negotiations, particularly with respect to certain small cable operators. Accordingly, News Corp. hereby submits the following updated information.

FTS has granted retransmission consent (on at least a temporary basis) to every cable operator in every market where News Corp. has an O&O station. Specifically, FTS has entered into retransmission consent agreements with the eleven largest MVPDs in its O&O markets (consisting of the nine largest cable operators in those markets, DIRECTV and EchoStar), representing approximately 33.5 million subscribers or about 93% of all

HARRIS, WILTSHIRE & GRANNIS LLP

Marlene H. Dortch
May 30, 2003
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subscribers in FTS owned station markets. These agreements expire on various dates between August 31, 2003 and May 31, 2009.

Approximately 450 smaller cable operators' retransmission consent agreements with FTS expired on December 31, 2002. These operators represent approximately 2.4 million subscribers in FTS owned station markets.

- o As of May 29, 2003, FTS has granted retransmission consent to approximately two-thirds of those operators without seeking carriage of any Fox Cable Networks programming service or other consideration.
- o The remaining approximately one-third of those operators were asked to carry Fox Cable Networks programming in exchange for retransmission consent. Every operator in this group has either executed a written retransmission consent agreement with FTS or has been granted retransmission consent pending negotiation and execution of final cable carriage and retransmission consent agreements. Specifically, as of May 29, 2003, approximately 45% of the operators in this group have either fully executed long form retransmission consent agreements or have been granted retransmission consent without requiring execution of a long form agreement. The balance of the outstanding proposed long form retransmission consent agreements with this group of operators are being negotiated or are awaiting execution.

News Corp. will continue to update the Commission on the status of any ongoing retransmission consent negotiations as developments warrant.

Please associate this letter with the above-captioned Application.

Respectfully submitted,



William M. Wiltshire
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1200 Eighteenth Street, N.W.
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202-730-1300

Counsel for The News Corporation Limited

HARRIS, WILTSHIRE & GRANNIS LLP

Marlene H. Dortch
May 30, 2003
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cc: Kenneth Ferree
Barbara Esbin
Marcia Glauberman
Douglas Webbink
James Bird
JoAnn Lucanik
Simon Wilkie
Neil Dellar
Tracy Waldon
Qualex International

