Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF INTELSAT GLOBAL SERVICE CORPORATION

Intelsat Global Service Corporation ("Intelsat") hereby comments on the consolidated application in the above-captioned docket, which seeks approval of the Federal Communications Commission ("FCC" or "Commission") for the transfer of control of Commission licenses in connection with the proposed sale of Hughes Electronics Corporation ("Hughes") to The News Corporation Limited ("News Corp."). Intelsat takes no position on the application itself and limits its comments in this proceeding to one issue: the analytical framework for determining technological interchangeability in establishing the relevant product market that should be used for evaluating the potential competitive impact of the proposed sale. Intelsat urges the FCC to follow both its own prior findings and relevant antitrust precedent by defining the product market in a manner that does not impose artificial distinctions based on the use of particular transmission facilities.

The Commission long has considered similar services provided over different transmission facilities to be part of the same product market. For example, in a 1983 decision in which the Commission classified certain domestic telecommunications carriers as "non-dominant" and therefore subject to streamlined Title II regulation, the agency concluded that different "telecommunications transmission media"—including "wire pairs, coaxial cable, terrestrial microwave, fiber optics, [and] satellite transponders and earth stations"—generally can "be adjusted readily to provide virtually any [interexchange telecommunication] service efficiently."[1] The agency further found that consumers typically viewed such services as "reasonably interchangeable" and were increasingly purchasing "bandwidth capacity" rather than a "service for a specific type of transmission or a service provided by a specific transmission medium."[2] Based on these findings, the FCC determined that "different transmission media [do not] demarcate different product markets."[3]

The Commission has made analogous findings with respect to international telecommunications services. In its 1998 decision partially reclassifying COMSAT Corporation as a non-dominant common carrier, the FCC confirmed its prior finding that "cable and satellite are fungible technologies utilized in the transmission of international switched voice service."[4]

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[1] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order*, 95 F.C.C.2d 554, 565 (1983).

[2] *Id.* at 564.

[3] *Id.* The FCC further noted that "[w]hile there may be some limits to supply substitutability for certain services, there are sufficient demand or supply linkages to justify treating [interexchange telecommunications services] as being in a single product market." *Id.* at 565. These findings have been applied in subsequent Commission decisions. *See, e.g., Application of MCI Communications Corporation and Southern Pacific Telecommunications Corporation for Consent to Transfer Control of Qwest Communications, Inc.*, 10 FCC Rcd. 1072, 1075 (1994).

[4] *COMSAT Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd. 14083, 14103 (1998).

Accordingly, the agency determined that "the product market definition for switched voice service should include the transmission of this service using both technologies."[5]

Similarly, the FCC more than six years ago recognized that the different technologies used to deliver multichannel video programming services should be evaluated within one product market analysis. In a *Notice of Proposed Rulemaking* regarding the implementation of rules to govern the reassignment of DBS channels, the Commission stated that there was no need to divide multichannel video programming services into different product markets, even though consumers at that time may not have viewed the various programming delivery technologies available to them as "perfect substitutes."[6] Specifically, the agency found that "the attributes of these technologies are similar enough, from a consumer's perspective, that separate product markets for each of the technologies is not warranted."[7]

These Commission determinations are consistent with the analysis employed by the antitrust enforcement agencies, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). Under the DOJ's and FTC's Horizontal Merger Guidelines ("Guidelines"),[8] the proper antitrust analysis is forward looking. The analysis is not limited solely to suppliers of products and services that exist at the present time, but also includes the

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5 *Id.*

6 *Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking*, 11 FCC Rcd. 1297, 1311 n.61 (1995).

7 *Id.* Since that time, the agency repeatedly has noted its "assumption" that various transmission technologies should be considered part of a "broadly defined MVPD market." *See, e.g., Policies and Rules for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking*, 13 FCC Rcd. 6907, 6940-41 (1998). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, CS Docket No. 01-129, at ¶ 116 (rel. January 14, 2002).

8 U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* (Rev. 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

product and service landscape as it is anticipated to be in the next year or so.[9] In defining the product market, the Guidelines concentrate on the products and services demanded by customers, attempt to assess the cross-elasticity of demand among various products and services and arrive at a group of options that provide the consumer with the service or product they desire.[10] In the case of telecommunications, the service typically desired is the delivery of a particular signal (data, video, telephone, etc.) to a given location or locations. The particular technological means of delivery is generally irrelevant.[11]

The agencies' enforcement actions confirm this indifference to delivery technology and highlight the proper focus on the actual underlying product or service being demanded. For example, in its 1998 complaint against Primestar Inc. to block certain asset transfers, the DOJ viewed DBS and cable delivery of video programming to be completely interchangeable.[12] Similarly, in the 1998 Consent Agreement with Time Warner, Inc. concerning its acquisition of Turner Broadcasting System, Inc., the FTC defined "Multichannel Video Programming Distributor" or "MVPD" as:

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9 *See, e.g.*, Guidelines §§ 1.32 (defining "uncommitted entrants" in the market as those likely to supply the market "within one year"); 1.41 (calculating market share based upon current sales in relevant market "together with that which likely would be devoted to the relevant market in response to a 'small but significant and nontransitory' price increase"); 3.0-3.2 (considering timeliness of entry to be those "committed entry alternatives that can be achieved within two years from initial planning to significant market impact").

10 *See* Guidelines § 1.11.

11 Thus, under the Guidelines, where signals can be delivered by various transmission means (fixed wireless technology, cables, satellites, telephone lines, etc.) and customers can shift among them in response to price fluctuations, all transmission means must be included in the same product market. The Guidelines also confirm, consistent with their forward-looking nature, that future price trends must also be analyzed in order to gain a realistic assessment of the competitive environment. *See* Guidelines § 1.11 ("the [agencies] may use likely future prices, absent the merger, when changes in prevailing prices can be predicted with reasonable reliability"). In doing so, the predicted near-term availability of all delivery technologies must be taken into account.

12 "High-power DBS service . . . threatens cable in the near future." *Complaint, United States v. Primestar, Inc.*, *available at* www.usdoj.gov/atr/cases/f1700/1757.htm at 5. *See also id.* at 19 (quoting cable officials' responses to DBS competition).

> a person providing multiple channels of video programming to subscribers in the United States for which a fee is charged, by any of various methods including, but not limited to, cable, satellite master antenna television, multichannel multipoint distribution, direct-to-home satellite (C-band, Ku-band, direct broadcast satellite), ultra high-frequency microwave systems (sometimes called LMDS), open video systems, or the facilities of common carrier telephone companies or their affiliates, as well as buying groups or purchasing agents of all such persons.[13]

Under the decree, Time Warner was prohibited from using its programming interests to "disadvantage new entrants into the distribution of cable programs such as Direct Broadcast Services, wireless systems, and systems created by phone companies."[14]

In accordance with this long line of guiding FCC and antitrust precedent, Intelsat urges the Commission to continue to recognize the interchangeability of space and terrestrial transmission facilities when defining the appropriate product market for the proposed sale of Hughes to News Corp.

Respectfully submitted,

INTELSAT GLOBAL SERVICE CORPORATION

By: /s/

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[13] *Time Warner, Inc.*, 123 F.T.C. 171, 185 (1997).

[14] *Analysis of Proposed Consent Order to Aid Public Comment* in *Time Warner, Inc.*, No. 961-00004, 61 Fed. Reg. 50,301, 50,311 (FTC 1996). *Accord United States v. Primestar Partners, L.P.*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994).