IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Department of Justice Antitrust Division 1401 H Street, N.W., Suite 8000 Washington, DC 20530,	)	
Plaintiff,	)	Civil No.:
v.	)	Filed:
PRIMESTAR, INC., 8085 S. Chester, Suite 300 Englewood, CO 80112,	)	
TELE-COMMUNICATIONS INC., 5619 DTC Parkway Englewood, CO 80111-3017,	)	
TCI SATELLITE ENTERTAINMENT, INC., 8085 S. Chester, Suite 300 Englewood, CO 80111,	)	
TIME WARNER ENTERTAINMENT COMPANY, L.P., 75 Rockefeller Plaza New York, NY 10019,	)	
MEDIAONE GROUP, 188 Inverness Drive Englewood, CO 80122,	)	
COMCAST CORPORATION, 1500 Market Street Philadelphia, PA 19102,	)	
COX COMMUNICATIONS, INC., 1400 Lake Hearn Drive, NE Atlanta, GA 30319-1464,	)	

GE AMERICAN)
COMMUNICATIONS, INC.,)
Four Research Way)
Princeton, NJ 08540-6684,)
)
NEWHOUSE BROADCASTING)
CORPORATION,)
5015 Campuswood Drive)
East Syracuse, NY 13057,)
)
THE NEWS CORPORATION)
LIMITED,)
1211 Avenue of the Americas)
New York, NY 10036,)
)
MCI COMMUNICATIONS)
CORPORATION,)
1801 Pennsylvania Avenue, NW)
Washington, D.C. 20006,)
)
and)
)
KEITH RUPERT MURDOCH,)
1211 Avenue of the Americas)
New York, NY 10036,)
)
Defendants.)
_____________________________________)

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the acquisition by the largest cable companies in the United States of control of the only remaining high-power orbital satellite slot capable of distributing a nationwide package of video programming competitive with that offered by cable. Completion of this acquisition would effectively foreclose the use of this scarce and valuable asset to challenge defendants' monopoly power. In the hands of a competitor whose sole economic interest would be to use this asset profitably, the satellite slot could be a vehicle for a product offering that is higher in quality and lower in cost than currently available offerings. The defendants recognize the magnitude of this competitive threat and seek to "nip it in the bud," to protect their dominance and monopoly profits for years to come.

I. NATURE OF THE ACTION

1. The United States seeks to prevent the proposed acquisition of satellite assets of defendants MCI Communications Corp. ("MCI"), The News Corporation Limited ("News Corp."), and K. Rupert Murdoch ("Murdoch") (collectively "News Corp./MCI") by defendant cable system operators acting through the vehicle of Primestar, Inc. ("Primestar") pursuant to an Asset Acquisition Agreement entered into by defendants on June 11, 1997. By placing News Corp./MCI's satellite assets in the hands of Primestar, which is controlled by five of the largest cable companies in the United States, the proposed acquisition would "substantially lessen competition" and "tend to create a monopoly" in markets for the delivery of multichannel video programming services.

2. Television viewers in the United States today are accustomed to choosing among myriad program offerings. Approximately 76%, or over 73 million, of all the television households in the United States currently pay for some form of multichannel video programming distribution ("MVPD") service. By far the dominant providers of MVPD services are the local cable companies, which collectively account for 87% of all MVPD services sold in the United States. In many local MVPD markets, the franchised cable operator's share of MVPD services exceeds 90%.

3. Cable firms are in large part unregulated monopolists. Responding to Congress's

instructions, the Federal Communications Commission ("FCC") reports annually on the status of competition in MVPD markets. In each report, the Commission reaffirms the conclusion that is apparent to American consumers: cable firms continue to dominate the MVPD marketplace. In its 1997 Competition Report, the FCC stated that "local markets for the delivery of video programming generally remain highly concentrated and are still characterized by some barriers to both entry and expansion by competing distributors."

4. For several years, industry observers and policymakers have anticipated new entry into video markets, principally by local exchange telephone companies. These expectations were heightened by the passage of the Telecommunications Act of 1996, which was intended to facilitate telephone company entry into video markets. Nonetheless, as the FCC has recently concluded, such firms "have yet to become a significant competitive presence."

5. Direct broadcast satellite ("DBS") has emerged as the first real challenge to cable's dominance and the best hope for consumers who seek alternatives to their local cable company. DBS transmits video signals from an orbiting satellite directly to a dish antenna located at the customer's residence. The customer either rents or buys the dish and pays the DBS firm a monthly fee for the programming. In the majority of local MVPD markets, DBS is the only significant competition for the cable incumbent. DBS now stands as the most successful cable alternative; indeed, increasing numbers of DBS subscribers are former cable subscribers. High-power DBS service, beamed from a single point that can reach the entire continental United States, is the DBS service that threatens cable in the near future, due to its superior technology and economies of scale. With the introduction of the first high-power service in 1994, DBS has begun to take a significant number of customers away from cable.

6. Competition from high-power DBS, however, is constrained by severe limitations on the availability of orbital locations from which a DBS satellite can operate. International treaties allocate for U.S. use only three high-power DBS orbital positions ("slots") capable of serving the entire continental United States. This action concerns the proposed acquisition of the last of these three slots, the only one not currently being used to provide high-power DBS service, by a corporation controlled by five of the largest cable companies in the nation.

7. The five cable companies that control Primestar serve approximately 60% of all cable subscribers in the United States. Those cable companies have no economic incentive to use this valuable DBS satellite capacity to steal their own cable subscribers and thus cannot be expected to do so. Rather, their strategy is to keep this scarce asset out of the hands of any firm that would compete vigorously against their cable operations.

8. If permitted, the proposed asset acquisition would result in a lessening of competition and an enhancement of monopoly power in local MVPD markets in much of the United States, and would therefore harm a broad sector of the American public. Moreover, the transaction constitutes an agreement that would unreasonably restrain trade and would allow Primestar's cable owners to maintain their market power in local markets throughout the country, thereby depriving millions of American consumers of the benefits of competition, including lower prices, higher quality, greater choice, and increased innovation.

II. JURISDICTION AND VENUE

9. This action is filed by the United States under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25 and Section 4 of the Sherman Act, 15 U.S.C. § 4, to prevent and restrain the defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

10. Defendants are engaged in interstate commerce and in activities substantially affecting interstate commerce. The Court has jurisdiction over this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337.

11. MCI is a Delaware corporation with its corporate headquarters and principal place of business in the District of Columbia, and Primestar, Inc.; Time Warner, Inc.; Tele-Communications, Inc.; TCI Satellite Entertainment, Inc.; Comcast Corporation; Cox Communications, Inc.; MediaOne Group; GE American Communications, Inc.; and Newhouse Broadcasting Corporation, all transact business and are found within the District of Columbia. These defendants are subject to the jurisdiction of this Court pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22. News Corp., an Australian corporation, transacts business in the United States, either directly or through its wholly-owned subsidiaries. News Corp. has consented to plaintiff's assertion that this Court exercises personal jurisdiction. Keith Rupert Murdoch is a naturalized U.S. citizen and the controlling shareholder of News Corp. He has consented to plaintiff's assertion that this Court exercises personal jurisdiction.

12. Venue is proper in this District under 15 U.S.C. § 22 and 28 U.S.C. § 1391(b)(3), (c) & (d).

III. THE DEFENDANTS

13. Primestar Partners, L.P., was a partnership organized and existing under the laws of Delaware, with its principal office in Englewood, Colorado. It was formed in 1990 as a joint venture partnership involving five of the largest cable multiple system operators ("MSOs") in the nation: Time Warner, Inc.; Tele-Communications, Inc. ("TCI"); Comcast Corporation ("Comcast"); Cox Communications, Inc. ("Cox"); US West/MediaOne; and Primestar's satellite provider, GE American Communications, Inc. The Primestar cable partners collectively serve approximately 60% of the nation's cable households. In addition, Primestar operates the nation's second-largest satellite television service, which currently serves more than 1.8 million subscribers nationwide from a "medium-power" satellite.

14. Primestar, Inc., the successor to Primestar Partners, L.P., was formed pursuant to a restructuring agreement between the owners of Primestar Partners, L.P. This so-called "roll-up" transaction involved the individual Primestar partners contributing their ownership interests in the partnership and related assets (principally the existing subscribers to the medium-power DBS service) to Primestar, Inc., in exchange for shares of Primestar, Inc. The roll-up was consummated on or about March 6, 1998.

15. Primestar, Inc. is effectively controlled by its cable owners. These companies control the corporation through their ownership of Primestar stock, the articles of incorporation, the by-laws, and other ancillary agreements. These provisions allow the Primestar cable companies to control the board of directors, which in turn controls the business operations of Primestar, Inc.

16. TCI is a corporation organized and existing under the laws of the State of

Delaware, with its principal place of business in Englewood, Colorado. TCI serves 13,538,000 cable subscribers, making it the largest cable multiple system operator ("MSO") in the United States.

17. In late 1996, TCI transferred its satellite assets, including its interest in Primestar Partners, L.P., to a separate corporation known as TCI Satellite Entertainment, Inc. ("TSAT"). TSAT and TCI are under substantial common ownership and control by virtue of their overlapping officers, directors, and shareholders. For example, John Malone, the Chairman of the Board of TCI, holds that same position with TSAT, and many of the directors of TCI sit on the TSAT board. Malone also controls a majority of the voting power of both TCI and TSAT.

18. Time Warner Entertainment Company ("Time Warner Entertainment") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. Time Warner Cable, a subsidiary of Time Warner Entertainment, operates Time Warner Entertainment's cable systems, with its principal place of business in Stamford, Connecticut. Time Warner Cable serves 12,000,000 subscribers, making it the second largest cable MSO in the United States.

19. MediaOne Group, formerly US West/Media One, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Englewood, Colorado. MediaOne Group serves 4,910,000 subscribers, making it the third largest cable MSO in the United States.

20. Comcast is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Philadelphia, Pennsylvania. Comcast serves 4,400,000 cable subscribers, making it the fourth largest cable MSO in the United States.

21. Cox is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Atlanta, Georgia. Cox serves 3,345,771 cable subscribers, making it the sixth largest cable MSO in the United States.

22. Newhouse Broadcasting Company ("Newhouse") is a New York corporation with its corporate headquarters and principal place of business in East Syracuse, New York. New Vision Satellite, a partnership controlled by Newhouse, held an interest in Primestar Partners, L.P. Advance/Newhouse Partnership ("Advance/Newhouse") is a joint venture between Advance Communications Corporation and Newhouse. In 1994, Advance/Newhouse formed a partnership with Time Warner Entertainment whereby Advance/Newhouse contributed cable systems serving 1.4 million subscribers and Time Warner contributed cable systems serving 2.8 million subscribers. The resulting entity, the TWE-Advance/Newhouse Partnership is controlled and managed by Time Warner Entertainment. Newhouse has entered into a voting agreement with Time Warner Entertainment which obligates Newhouse to vote its shares in Primestar, Inc. as directed by Time Warner Entertainment.

23. GE American Communications, Inc., a global provider of satellite communications technology, is a subsidiary of GE Capital Services, Inc., a subsidiary of the General Electric Company. GE American Communications, Inc. is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in Princeton, New Jersey.

24. News Corp. is an Australian corporation with 1996 revenues of $9.9 billion, controlled by K. Rupert Murdoch, a naturalized U.S. citizen. News Corp. holds extensive media programming and distribution interests worldwide, from newspapers to major movie

studios to TV stations to satellite broadcasting companies. A substantial portion of News Corp.'s annual revenues come from the activities of its U.S. subsidiaries. Those subsidiaries include the 20th Century Fox movie and television studio, cable networks such as The Fox News Channel, Fox Sports Net, the fX Network, and The Family Channel, as well as 22 broadcast TV stations and the Fox Broadcast Network.

25. MCI is a Delaware corporation with its corporate headquarters and principal place of business in the District of Columbia. MCI is the second largest carrier of long-distance telecommunication services in the United States and the second largest carrier of international long-distance telecommunication services in the world, with 1996 revenues of $18.5 billion.

IV. THE TRANSACTION

26. Pursuant to the terms of an Asset Acquisition Agreement dated June 11, 1997, News Corp./MCI agreed to transfer the authorization to operate 28 satellite transponders at the 110° West Longitude ("W.L.") orbital slot along with two high-power DBS satellites currently under construction to Primestar, which is a vehicle through which its cable-affiliated owners acquire control over those assets. In exchange, News Corp./MCI would receive a 20% non-voting equity share in Primestar and a convertible note. The combined value of the note and the stock equals approximately $1.1 billion. The parties further agreed to negotiate arrangements to carry certain News Corp. programming on Primestar's high-power DBS service. Finally, News Corp./MCI agreed not to compete in the domestic DBS market for a period of ten years following the consummation of the deal.

V. FACTS COMMON TO EACH CAUSE OF ACTION

A. The DBS Industry Today

1. C-Band

27. DBS services are a subset of a broader category of satellite TV services known as direct-to-home ("DTH") satellite services. DTH services offer satellite-delivered programming comparable to the programming offered by a traditional cable television service. Beginning in the late 1970s, and well before the advent of DBS services, C-band frequency satellites delivered programming directly to households. C-band orbital locations are virtually unlimited, but the low-power signal requires enormous backyard receiving dishes measuring four to eight feet in diameter. C-band services have traditionally been marketed exclusively to rural areas. The size and cost of these dishes render the C-band business largely obsolete today. The industry consensus is that the C-band business will slowly disappear as existing customers replace their larger dishes with smaller, less expensive DBS equipment.

2. Medium-power DBS

28. The next satellite TV technology to emerge after C-band was medium-power DBS. Medium-power providers operate in a different Ku-band range than high-power DBS. The medium-power service currently offered by Primestar delivers approximately 140 channels to its 1.8 million subscribers. Because Primestar operates at medium- rather than high-power, the Primestar service requires satellite receiving dishes 27" to 39" in diameter. No other medium-power firm exists today, and no new entry into medium-power DBS is anticipated. Primestar has indicated that it eventually plans to abandon its medium-power business after migrating its existing subscribers to a high-power satellite-based Primestar service.

3. High-power DBS

29. The latest generation of DBS services operate in the high-power portion of the

Ku-band satellite frequency and deliver video programming directly to a pizza-sized (18" diameter) dish antenna installed at the subscriber's home. As with the older DTH services, to subscribe to a DBS service, a consumer must also acquire an integrated receiving device or set-top box that decodes the signal from the antenna and displays it on the customer's television set.

30. The Ku-band spectrum allocated for DBS service is limited by international treaties, and the FCC is responsible for assigning all U.S. satellite orbital positions and frequencies. Only three orbital slots have a signal footprint that allows a high-power DBS satellite to transmit programming to the entire continental United States (excluding Alaska). These three slots are referred to as full-CONUS slots; they are located at the 101° W.L. orbital position, at 110° W.L., and at 119° W.L. Thirty-two transponder frequencies are available at each orbital slot, and each frequency can carry multiple channels (e.g., HBO, ESPN).

31. The first high-power DBS slot, located at 101° W.L., is controlled by two firms, DirecTV, Inc. ("DirecTV") and United States Satellite Broadcasting, Inc. ("USSB"). DirecTV, Inc. is a subsidiary of Hughes Electronics Corporation, a division of General Motors. DirecTV is the leading DBS provider in the U.S., using 27 transponders to deliver 175 channels of digital programming to some 3.3 million subscribers. USSB operates the other five transponders on the DirecTV satellite and offers approximately 30 channels of programming. Both DirecTV and USSB utilize the "DSS®" consumer receiving system which includes antennas, set-top boxes and remote-control units compatible with both services. DirecTV and USSB offer complementary programming services, with USSB focusing its offering entirely on premium movie services like HBO, Showtime, Cinemax, and The Movie Channel. As a result, the vast majority of USSB's subscribers also subscribe to DirecTV.

32. A second slot, located at 119°, is controlled in part by Echostar Communications

Corporation ("Echostar") and in part by Tempo Satellite, Inc. ("Tempo"). Echostar controls 21 of the 32 transponder frequencies authorized at 119°, with which it provides approximately 120 channels of programming to just over 1 million subscribers. The remaining 11 frequencies at the 119° slot are licensed to Tempo, a wholly-owned subsidiary of TSAT. Although nominally licensed to Tempo, this 119° capacity is effectively controlled by Primestar pursuant to a 1990 option agreement between Tempo and Primestar Partners, L.P.

33. In March 1997, only months before its 119° license was due to expire, Tempo launched a satellite into the 119° slot, and Primestar announced its intention to begin offering a high-power DBS service by the fall of 1997. Once the instant transaction was announced, however, Primestar postponed these plans. At present, neither Tempo nor Primestar is making commercial use of the 119° capacity.

34. The third and last full-CONUS DBS slot, located at 110°, is the key asset involved in the instant transaction. The 110° slot has never been used to provide DBS service. The authorization to operate a satellite at 110° was purchased by MCI at an auction conducted by the FCC in January 1996. Pursuant to the instant transaction, five large cable system operators now seek to acquire control of that authorization through a purchase by Primestar, which states that it will use the 110° capacity to launch its own high-power DBS service.

B. The Advent of DBS and the Original Primestar Consent Decrees

35. The Primestar partnership was formed in February 1990. Although medium- or high-power DBS competition to cable had by then been anticipated for at least a decade, satellite television was not perceived as an immediate threat to cable. That perception began to

change in the late 1980s. In 1989, Hughes Electronics entered into discussions with Cablevision Systems Corp. (a large cable company unaffiliated with Primestar), the National Broadcasting Company (NBC) and Rupert Murdoch about the possibility of forming a venture to launch a high-power DBS service called “Sky Cable.” Shortly after the Sky Cable venture was announced, Primestar signed a long-term lease with GE Americom for the only available medium-power satellite. The Sky Cable venture ultimately failed to materialize.

36. From inception, Primestar and its cable MSO partners had no intention of launching a service that might compete aggressively with cable; their purpose was to block DBS entry by any other firm. This intent was effected by entering into agreements to restrict access to programming controlled by the individual Primestar partners to any would-be satellite competitors. The cable employees of one Primestar partner summarized their principal concern as follows: “Do our best to keep core services [basic cable programming] off Hughes DBS to minimize long-term competitive bypass threat.” In October 1988, the employees of another eventual Primestar partner, GE Americom, summarized the position of the cable partners:

> A number of facts became clear [in a meeting of GE, Newhouse and Cox]: (1) these MSOs strongly feel that TCI approval is required because these MSOs are afraid that an endorsement of DBS by them of us could incent TCI to partner with Hughes in high power and raid their territory; (2) the MSOs are information gathering and have no apparent will to act soon; (3) <u>the prospect of high power concerns them and its threat is the only reason they would act and then only for defensive reasons</u>; and (4) <u>the MSOs would like DBS never to happen</u> . . .. [Emphasis added.]

37. In November 1990, Primestar launched its medium-power service consisting of 10 analog channels in 20 predominantly rural markets. The service featured 3 pay-per-view channels and 7 broadcast superstations. During its first full year of operation, Primestar acquired fewer than 12,000 subscribers nationwide, falling well short of even the cable partners’

extremely conservative projections.

38. Shortly after formation of the Primestar partnership in 1990, the Department of Justice ("Department") commenced an investigation of Primestar and its cable partners. In 1994, the Department filed an action under Section 1 of the Sherman Act alleging that the Primestar partners had conspired to restrain competition by blocking other firms from entering the DBS business. The case was resolved by a consent decree whose principal provisions prevented the cable defendants from denying partner-controlled programming to non-Primestar affiliated companies seeking to enter the DBS business. Forty-five state attorneys general filed a separate action that was also resolved by a similar consent decree. The state decree expired in October 1997; the federal decree will expire in April 1999. See New York v. Primestar Partners, L.P., 1993-2 Trade Cas. (CCH) ¶ 70,403, 1993 WL 720677 (S.D.N.Y. 1993); United States v. Primestar Partners, L.P., 1994-1 Trade Cas. (CCH) ¶ 70,562, 1994 WL 196800 (S.D.N.Y. 1994).

39. In December 1993, DirecTV and USSB successfully launched the first domestic commercial high-power DBS satellite in preparation for introducing digital satellite television service. In March 1994, Primestar announced its conversion to digital, thereby offering more than 70 channels of programming. In June 1994, DirecTV and USSB began offering the nation's first high-power DBS service. DirecTV signed up nearly 1 million subscribers in its first year. From inception, DirecTV and USSB positioned their services to emphasize their numerous advantages over typical cable offerings, including superior and expanded programming choices as well as digital quality picture and audio. DirecTV now serves over 3.3 million subscribers.

40. In March 1996, Echostar began offering its DBS service, known as the "DISH

Network," using the 21 frequencies it controls at the 119° slot. Because it controls less than the full complement of transponders at 119°, Echostar can only offer approximately 120 channels of programming. Echostar has repeatedly sought authority from the FCC to use the 11 transponders controlled by Tempo, but Primestar or Tempo has opposed all such requests. Echostar positioned its initial product offering as a low-cost DBS alternative to cable television and in just over two years has attracted more than 1 million subscribers nationwide.

C. The History of the 110° Slot

41. The authority to operate a satellite at the 110° slot was originally granted to Advanced Communications Corp. ("Advanced") by the FCC in December 1984. Advanced applied for and received two extensions of time to meet the FCC's so-called "due diligence" deadlines for the construction and launch of a DBS satellite. Advanced never commenced construction of any DBS satellites, but negotiated an agreement with TCI whereby Advanced would transfer its authority to construct and operate a satellite at the 110° slot to TCI's Tempo affiliate in a private sale for approximately $45 million.

42. Numerous parties objected to Advanced's attempt to sell the 110° authorization to TCI. In a letter to the FCC opposing the proposed transfer, MCI stated that:

> The channels at 110° represent the only remaining block of frequencies that can be used to provide viable DBS service. If the FCC allows these to be transferred to Tempo/Primestar, it would be like hiring the wolf to guard the sheep. Ceding access to prime DBS spectrum to a consortium comprising the country's largest MSOs and the programming venture the cable industry has created to extend the reach of cable television to areas where wired cable is impractical will jeopardize the prospects that DBS will emerge as an independently viable competitor to cable television. Cable television will have fought off its latest challenger, and consumers will be forced to pay higher prices with fewer service options.

43. On October 30, 1995, the FCC revoked Advanced's 110° authorization for

failure to meet its due diligence obligations and in January 1996 the FCC auctioned the 28 frequencies at the 110° slot formerly held by Advanced. Three firms bid for the 110° slot: MCI, Echostar, and Tempo on behalf of Primestar. MCI acquired the 110° frequencies with a bid of $682.5 million. MCI announced that it would enter the DBS business rapidly and held discussions with numerous firms, including DirecTV, Primestar, and Echostar, regarding possible strategic alliances.

44. In April 1996, MCI and News Corp. announced that they had formed a joint venture for the purpose of entering the DBS business in the United States using the 110° slot. News Corp. already had extensive satellite experience in Europe and Asia. The joint venture between News Corp. and MCI, dubbed "ASkyB," planned to enter the market in late 1997 with a 200-channel offering.

45. In Spring 1996, TCI negotiated a deal with News Corp. on behalf of Primestar to jointly operate a high-power DBS service, but Time Warner vetoed the deal. John Malone testified that on that occasion and others provisions in the Primestar partnership agreement had the effect of preventing TCI from entering high-power DBS without the other Primestar partners. The partnership agreement thus served to keep the cable companies aligned, and prevented individual partners from independently entering the DBS business to compete against the other partners' cable businesses. As John Malone testified, "I think our partners were more worried about us [TCI] than they were about Direc[TV] or Echostar."

46. In February 1997, News Corp. announced that it would buy 50% of Echostar in a deal valued at $1 billion. News Corp./MCI planned to contribute to the venture more than $1 billion in assets, including $500 million cash, the 110° slot authorization, and numerous satellites, in exchange for 50% ownership of Echostar. The venture planned to introduce a

"Sky" branded DBS service delivering more than 500 channels of programming via two full-CONUS slots (110° and 119°) using over 50 satellite transponders. The deal provided Echostar with needed capital and full-CONUS slots, and gave News Corp. a vehicle for rapid market entry.

47. The ASkyB venture promised to provide local broadcast television signals via satellite to markets covering approximately 75% of the U.S. population. DBS firms currently lack the ability to provide local television signals to subscribers, placing DBS at a competitive disadvantage to cable companies, which do carry local signals. The ASkyB business plan was focused on surmounting this obstacle with an aggressive strategy aimed at overcoming the technological and regulatory barriers to providing local signals.

48. According to ASkyB projections released at the time of the announcement, ASkyB intended to take a sizeable share of the overall MVPD market and quickly become a major DBS player. ASkyB projected signing up more than 8 million subscribers by year-end 2001. Preston Padden, then President of News Corp.'s worldwide satellite operations, announced that ASkyB would break even in 1999 at three million subscribers. By 2002, ASkyB expected to be generating positive cash flow approaching $1 billion per year.

49. The announcement of the Echostar/ASkyB venture had an immediate and dramatic impact on the cable industry. Cable stocks experienced a rapid and significant drop in value, while Echostar stock rose. John Malone testified that the ASkyB announcement "had a chilling effect on the stock market for cable." The day after the venture was announced, the <u>Wall Street Journal</u> reported that "cable insiders had already dubbed the proposed ASkyB service 'Deathstar.'" Soon thereafter, Preston Padden, ASkyB's CEO, stated publicly that "the cable guys will be calling Dr. Kevorkian" once the ASkyB service commenced operations.

50. Reacting to the ASkyB announcement at the National Cable Television Association ("NCTA") meetings in March 1997, senior Time Warner executive Ted Turner proclaimed that "we're going to make it as tough [for Murdoch] as we possibly can. Kind of like the Russian Army did with the German army . . . either Murdoch is going to go hungry or we are." Likewise, NCTA President Decker Anstrom stated "this will be a market by market battle for customers."

51. ASkyB's plans for entering the market prompted the Primestar partners to assess their options for defending against this new competitive threat. Primestar renewed its efforts to arrive at a business plan for the operation of a high-power DBS service utilizing the Tempo 119° slot. A March 20, 1997 memo by John Malone referring to Primestar's proposed 119° business plan states "[t]ime to market is critical to gain market share, blunt ASkyB entry."

52. Sometime in late March 1997, Malone and Leo Hindery of TCI met with Murdoch. Hindery characterized the substance of those discussions by stating: "We concluded with both organizations saying, 'Let's talk. Let's not whale on each other.'"

53. On March 26, 1997, John Malone told <u>Satellite Business News</u> what he thought of the business plan Echostar and News Corp. had described publicly the previous month, including their strategy for delivery of local signals:

> I think it probably will turn out to make sense for some markets. I wouldn't be surprised to see them target a few markets, really drive hard in those markets, and Rupert [Murdoch, President of News Corp.] try to make a deal for distribution [of his program networks by] cable [systems] so he takes some of the pressure off. <u>There's some kind of peace in which Rupert gets what he wants, which is broader distribution of his programming networks in exchange for which he's not quite as aggressive [in DBS]</u> . . .You don't take Rupert lightly. It may actually be the kind of rallying cry Primestar and the cable operators need in order to really see the threat that is there. So Rupert may be doing us a huge favor by pointing out to us our vulnerabilities and rallying us . . . I suspect that

> the external threat of Rupert Murdoch to CNN may be about to cause them [Time Warner] to be a little more willing to reach the combinations with TCI and the rest of the industry and maybe have a united front in Primestar. [Emphasis added.]

54. In the months following the ASkyB venture announcement, Murdoch discovered that he was being blackballed because of his DBS plans. Many of the major cable MSOs refused even to discuss potential carriage arrangements pertaining to News Corp.'s fledgling programming services, in particular Murdoch's prized Fox News Channel. As Malone testified, "[m]ost of the large cable operators were giving [Murdoch] a slow no on carrying his channels."

55. Faced with this dilemma, Murdoch sought advice from Malone. Malone told Murdoch that his plan was "lunacy," to which Murdoch replied, "[w]ell, then, help me get out of it; help me find something else to do . . . what is plan B?"

56. Sometime that spring, News Corp. and Primestar began exploring a potential alliance through which News Corp./MCI would sell its DBS assets to Primestar. Most of these discussions were between Chase Carey, News Corp.'s Chief Operating Officer, and Leo Hindery, TCI's President, who was negotiating on Primestar's behalf. Hindery's role, according to Malone, was one of "a peacemaker . . .. He kept trying to convince everybody that there was more profit in peace than war." Of all the Primestar partners, Time Warner was the most vehemently opposed to any deal with News Corp. Malone personally was involved in several meetings with Time Warner and the other Primestar cable partners where he was "a proponent of, at least, exploring whether or not we could make peace [with Murdoch]."

57. At the time he was negotiating the proposed transaction with News Corp./MCI on behalf of Primestar, Hindery was not an officer or director of TSAT, but the President of TCI. Nonetheless, Hindery testified that "I felt because this company TSAT had once been part

of my company -- I felt I saw a fiduciary responsibility, but one I took very seriously, to the shareholders of TSAT, many of whom were common shareholders of TCI." Hindery believed that the proposed transaction worked to the mutual benefit of TCI and TSAT and that, by reaching the agreement with News Corp./MCI, he could "serve all masters well to the benefit of all." Hindery was recently elected Chairman of the Board of Directors of the NCTA.

58. On June 11, 1997, Primestar announced that it had reached a binding agreement to purchase ASkyB's high-power DBS slot at 110° and other satellite assets. In exchange, News Corp./MCI would receive a 20% non-voting equity share in Primestar and a convertible note, which if exercised would increase News Corp./MCI's equity ownership to 31.4%. Malone testified that this agreement in effect resolved the differences between Murdoch and the cable industry because "it just really says, Hey guys, I'm not Darth Vader anymore. If you carry my programming, you won't be subsidizing the enemy and, therefore, feel free to treat me as a friend, not as an enemy." Although the written agreement did not so specify, at about the time the agreement was reached, certain Primestar partners' cable systems began to widely carry Murdoch's program networks.

VI. RELEVANT MARKETS

59. The relevant product market affected by this transaction is the delivery of multiple channels of video programming directly to the home. The programming can be delivered via a number of distinct methods, including cable, satellite or wireless technologies. This product market is referred to by the FCC, as well as the industry generally, as multichannel video programming distribution, or MVPD.

60. The characteristics of an MVPD service are: (1) multiple channels, typically

anywhere between 35 and 175; (2) programming that includes a mixture of "basic" services (such as ESPN, CNN, USA, TNT), as well as premium services (such as HBO, Showtime, and Cinemax) that are not available "over-the-air;" and (3) a monthly subscription fee for programming.

61. Over the past decade, cable viewership has grown significantly, while viewership of broadcast TV stations has steadily declined. According to the FCC's 1997 Competition Report, the non-premium cable audience increased its television viewing hours from an average 11.5 share in the 1987-1988 broadcast year to an average 36.25 share in 1996-1997. The audience of the broadcast television stations declined from an average 87.7 share of television viewing hours to an average 66.5 share for the same time period.

62. MVPD providers are multi-product firms which typically offer a wide variety of "tiered" programming packages. For cable television, these tiers generally include: (1) "antenna" service which must be taken by all subscribers and includes all local over-the-air television signals and public, governmental, and education access channels; (2) "basic" or "expanded basic" which includes a package of additional "core" cable programming channels available for an additional monthly fee; and (3) "premium" or "pay" services which include networks available on a per-channel basis like HBO and Showtime.

63. Cable and DBS are both MVPD products. While the programming services are delivered via different technologies, consumers view the services as similar and to a large degree substitutable. Indeed, most new DBS subscribers in recent years are former cable subscribers who either stopped buying cable or downgraded their cable service once they purchased a DBS system. Cable and DBS compete by offering similar packages of basic and

premium channels for a monthly subscription fee. Subscribers who purchase MVPD services from either firm select from a number of programming packages that include basic channels as well as premium services. In the case of cable television, broadcast signals are bundled with the other expanded tiers of service, while DBS subscribers generally receive broadcast signals via another technology (e.g., antenna or cable). DBS firms are currently prohibited from offering network broadcast signals as part of a programming package to most consumers.

64. Standard over-the-air broadcast television does not include the wide variety of programming services that are available to MVPD subscribers, and thus most consumers do not consider broadcast television an acceptable substitute for cable, DBS, and other MVPD services.

65. Consumers purchasing MVPD services select from among those companies that can offer such services directly to the consumer's home. The set of MVPD providers able to offer service to individual consumers' residences will generally be the same throughout each local community, but will differ from one local community to another. For ease of analysis, therefore, it is useful to aggregate consumers who face the same competitive choices in MVPD providers, for example by specific zip codes or local cable franchise areas.

66. Cable system operators generally must obtain a cable franchise from local, municipal or state authorities in order to construct and operate a cable system in a specific area. Most MVPD customers who live in areas served by cable typically purchase MVPD services from the locally franchised cable firm serving their area. Indeed, the FCC's most recent cable competition report concluded that 87% of all MVPD subscribers nationwide purchase MVPD services from the incumbent local cable provider. Consumers cannot purchase MVPD services from a cable firm located outside their franchised territory because that firm does not have the

authority to run wires to the consumer's home. The vast majority of local markets served by cable have only one franchised operator.

67. In a few local markets, a second firm has been granted authority to construct its own cable system to compete with the incumbent cable provider. These firms are referred to as overbuilders because they literally build a second wireline cable system over the incumbent's franchise territory. To date, overbuilding has been limited to a small number of markets where an unusual combination of population density, demographics, topography, and other factors make an overbuild strategy feasible. In most markets, however, cable overbuilds are unlikely in the foreseeable future.

68. In a small number of local markets firms have constructed multichannel multipoint distribution service ("MMDS") systems that use microwave transmissions to deliver programming to subscribers' homes. These MMDS systems, also known as wireless cable, are severely limited by the need for a line-of-sight path between the transmitter and receiving antenna at the subscriber's residence. The requisite line-of-sight is obstructed in many areas by trees, buildings, mountains, etc., rendering MMDS unsuitable for many regions. Consequently, MMDS operators have had limited success and currently serve only 1.1 million subscribers nationwide.

69. In contrast to MMDS and overbuilders, DBS service is available to consumers anywhere in the continental U.S. For most people who live in cabled areas, DBS offers the only service that is an acceptable substitute to the cable system's service. The DBS segment of the MVPD market has experienced rapid growth since its inception in the mid-1990s, and currently has over 7 million subscribers nationwide.

VII. ANTICOMPETITIVE EFFECTS

70. High-power DBS represents the most serious competitive threat the cable industry has ever faced. With 7 million subscribers, DBS firms now serve more customers nationwide than all of the other non-cable MVPD technologies combined.

71. Leo Hindery, President of TCI, the country's largest cable system operator, recently testified before a Senate subcommittee that "more than any other non-cable MVPD, DBS has fundamentally changed the video distribution landscape and the competitive dynamics of the marketplace. It has altered the way that cable operators package and price their services and the way that we serve our customers."

72. Significant numbers of cable subscribers have switched to DBS and the Primestar cable partners have lost substantial revenues as a result. Studies by the Primestar partners demonstrate that DBS tends to steal cable's most profitable multi-pay customers. These customers, who tend to subscribe to more premium and pay-per-view services from their cable provider than the average cable customer, are the most likely candidates to switch to DBS. As an April 15, 1997, TCI memorandum states: "Cable industry surveys, and TCI proprietary research, consistently show that DBS defectors from cable were high-revenue, multi-pay customers."

73. A document entitled "Summary of DBS Risk Assessment Key Findings" prepared by US West/Media One, concluded that: "Those leaving us for DBS would be some of our most valued customers. Those at risk are multimedia customers and higher spenders. Those people most at risk to DBS are typically spending more with us today--43% report that they spend more than $40 a month on cable services."

74. The majority of cable subscribers who switch to DBS either cancel their cable

service entirely or reduce their level of service drastically. A 1997 survey conducted by the Consumer Electronics Manufacturers Association found that 64% of the new DBS subscribers surveyed dropped their cable service entirely after purchasing a dish, resulting in an estimated $1.4 billion annual loss to the cable industry nationwide. An internal TCI marketing study found that 85% of those cable subscribers purchasing a DBS system planned to downgrade or disconnect their cable service.

75. Cable subscribers who switch to DBS are extremely difficult to lure back to cable because of both the up-front investment a consumer must make to purchase a DBS system and the high level of satisfaction among digital satellite television subscribers.

76. The threat of DBS competition has had a significant effect on competition in the MVPD market. Cable operators have taken DBS competition into account in setting cable rates and in strategic decisions relating to upgrades or other measures to improve the quality of their service.

77. No new DBS entry or expansion by existing DBS firms is likely without use of the 110° slot. New entry using a partial-CONUS slot is unlikely because the high capital costs of DBS could only be spread across a smaller base of potential customers. New entry at medium-power is unlikely because of disadvantages associated with the larger dishes.

78. Moreover, because the 110° slot is located in the middle of the three U.S. high-power DBS slots, it can be used to send signals to DBS dishes already pointed to satellites in either the 101° or 119° positions. Thus, all current DBS subscribers in the country can receive signals from a satellite in the 110° slot without having to buy and install a second separate dish antenna. This characteristic gives the slot unique strategic appeal. For example, the 110°

capacity could be combined with the capacity of satellites from another slot to increase the overall channel capacity of an existing DBS provider (as planned by ASkyB and Echostar), or it could be used to wholesale local broadcast signals to DirecTV and Echostar subscribers. Control of this asset is thus critically important to Primestar's cable owners, both as a means of keeping subscribers intent on switching to DBS within the Primestar family, and perhaps more critically, as a means of denying the asset to any DBS service independent of cable interests that would use it to lure away the MSOs' cable subscribers.

79. Primestar would not use the 110° capacity to compete aggressively with cable, but rather to protect the Primestar owners' cable interests. Primestar would have little incentive to use the 110° slot to compete vigorously with cable because to do so would cannibalize the Primestar owners' existing cable subscribers. The Primestar partners feared that in the hands of a cable-independent firm the 110° assets could have been used to attract their cable customers; therefore, they wanted to ensure that the assets were never put to such use.

80. In addition, control of the 110° slot would enhance the Primestar owners' ability to sustain cable rate increases by allowing them to recapture (as Primestar DBS customers) a portion of those subscribers who leave cable in response to such a price hike. Because high-power DBS is a much more effective substitute to cable service than medium-power DBS, a high-power service would be a better hedge for the Primestar owners' cable businesses than its medium-power has been thus far.

81. Ownership of the 110° slot authorization is vital to the prospects for future competition in local MVPD markets nationwide. If Primestar is not permitted to acquire the slot then it will be deployed by an independent firm or group of firms with every incentive to compete directly with cable. Murdoch himself testified that should the instant acquisition be

blocked, “there would be a high level of interest [in the 110° slot] from Mr. Ergen [Echostar], the remaining satellite operators and possibly others with ambitions . . ..”

82. Use of the 110° capacity by any firm independent of cable interests will produce more MVPD competition than would result from control of the 110° slot by Primestar. An independent firm would have every incentive to price and position its DBS service so as to increase the number of subscribers switching from cable to DBS, maximizing its chances of winning a significant portion of the 60 million cable households in this country. An independent firm operating a high-power DBS service at the 110° slot will seek to compete with cable firms by luring away cable’s customers. Primestar, by contrast, would be content to attract only those customers that had already been convinced by its rivals to abandon cable.

83. For the same reasons, use of the 110° slot by either of the DBS firms already in the market, DirecTV or Echostar, would also result in increased competition in the MVPD market. DirecTV and Echostar would have every incentive to use the additional capacity to attract as many additional subscribers as possible, regardless of whether they come from cable. Acquisition of the 110° slot by these firms therefore would likely have a significant procompetitive effect in the MVPD market.

84. Absent this proposed transaction with Primestar, ASkyB would have entered the MVPD market with a high-power DBS service, either on a stand-alone basis or via a toehold acquisition of Echostar or joint venture with it.

85. Such entry would have occurred on a timely basis and would have significantly increased competition in the MVPD market. The MVPD market is highly concentrated and is characterized by high entry barriers. No other potential entrants as formidable as ASkyB exist; no other firms possess the requisite combination of assets, including the critical 110° slot, to

enter the market.

86. By now, ASkyB would be serving subscribers were it not for the transaction at issue. ASkyB had taken specific and concrete steps towards DBS entry. MCI had invested a substantial sum for the 110° degree slot ($682.5 million) and News Corp. had made substantial payments and other financial commitments pertaining to the anticipated construction and launch of four DBS satellites. ASkyB had developed detailed business plans for independent entry, and then had subsequently negotiated a mutually beneficial toehold acquisition with Echostar. ASkyB had invested substantial resources in detailed studies relating to the feasibility of the delivery of local signals via satellite, including the development and adaptation of spot-beam satellite technology. As ASkyB's former chief executive Preston Padden testified, "I don't know that we had a budget in the traditional sense of the term. We thought were in the process of building a very large business and we were on our way to doing that."

87. ASkyB had the ability to enter, either independently or by means of a toehold acquisition. News Corp.'s assets could have been buttressed by those of numerous prospective partners. News Corp. courted and was courted by a variety of potential investors, including several Regional Bell Operating Companies ("RBOCs"), Citibank, DirecTV, and Hyundai.

88. ASkyB also possessed unique DBS expertise acquired from operating DBS systems in foreign markets, including the "BSkyB" (United Kingdom) and "Star TV" (Asia) operations. Experience in these markets was significant because it gave News Corp. valuable management expertise and because ASkyB could take advantage of certain efficiencies of scale in programming and equipment stemming from its worldwide operations. Moreover, ASkyB had access to News Corp.'s extensive worldwide programming assets, including the 20th Century Fox Studio and numerous national programming services.

89. In addition to possessing the requisite assets, ASkyB had a strong incentive to enter the DBS business. Murdoch wanted a DBS platform as a means of ensuring distribution for his programming. The Primestar cable owners recognized this motivation and believed that ASkyB would enter for this very reason.

90. ASkyB's entry would have had considerable procompetitive significance. Since local MVPD markets have always been highly concentrated, new entry on a national scale would be likely to have a significant impact. Indeed, entry by each of the two existing cable-independent DBS firms, DirecTV/USSB and Echostar, has had a major impact on MVPD competition. Entry by ASkyB, especially in partnership with Echostar, would have substantially invigorated the market.

91. The ASkyB business plan included unique elements that would have differentiated ASkyB from the existing DBS providers and made it a closer substitute for cable. From its inception, the ASkyB plan was based on a cable model, i.e., provision of local signals, low up-front costs, and multiple set-top boxes in the home.

92. ASkyB business plans demonstrate that ASkyB itself was convinced that its entry would have been successful and profitable. ASkyB provided potential investors with "extremely conservative" projections that showed it would garner 8 million customers and a 38% share of DBS subscribers within five years of launch. One document provided to investors states that "subscriber projections for ASkyB are moderate compared to the overall market size. ASkyB intends to achieve a level of approximately 1 to 1.5 million net subscribers a year over the next ten years. This amounts to obtaining approximately 10.8 million subscribers by the end of fiscal year 2006. This level of subscribership is viewed as moderate by company management." ASkyB estimated that it would break even by the year 2000 with 3.2 million

subscribers.

93. The Primestar cable owners, as well as the rest of the cable industry, shared the view that ASkyB posed a significant competitive threat and that elimination of that threat would be to their benefit. On March 27, 1997, Dan O'Brien, Time Warner's representative on the Primestar Partners' Committee, stated "no doubt [ASkyB] will be a formidable competitor" and testified that he "expected [News] to have prices that were lower than everyone else's." An October 1997 memorandum written by a Wall Street DBS investment analyst explicitly identifies the elimination of ASkyB as a competitor as a key benefit of the Asset Acquisition Agreement to Primestar's cable owners. Moreover, John Malone himself testified that elimination of Murdoch as a DBS competitor was "one of the benefits" of the transaction.

FIRST CAUSE OF ACTION
(Violation of Section 7 of the Clayton Act By Each Defendant)

94. The United States hereby incorporates paragraphs 1 through 93.

95. The transaction constitutes the acquisition of a scarce and valuable asset by firms dominant in their respective relevant local MVPD markets through a company controlled by these MVPD firms. These firms, the original Primestar partner cable companies, exercise market power today in the MVPD markets in which they operate cable companies, and, if this transaction is not blocked, will continue to do so in the near future. The asset to be acquired would be a potent weapon in the hands of a true competitor to cable; it could and would be used to compete aggressively with the dominant cable firms. The asset is also a unique weapon; there exists no other means of feasibly entering the MVPD market in the near future. Through

this transaction, the Primestar cable owners collectively would gain control of this uniquely valuable asset and deny its use to any firm that could employ it to diminish their market power. Consequently, as a result of this transaction, competition in MVPD prices and service will be diminished and entry by innovative MVPD firms curtailed. If consummated, the transaction would therefore substantially lessen competition and tend to protect and maintain a series of local monopolies in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

96. As a result of the transaction, ASkyB's assets would be folded into Primestar's operations and ASkyB would become a Primestar investor, rather than entering de novo or through a toehold acquisition. The transaction would thus eliminate ASkyB, the most significant potential competitor likely to face the Primestar cable owners. If consummated, the transaction would violate Section 7 of the Clayton Act, 15 U.S.C. § 18.

SECOND CAUSE OF ACTION
(Monopolization in Violation of Section 2 of the Sherman Act By Defendants Primestar, Inc., TCI, TSAT, Time Warner, MediaOne, Comcast, Cox and Newhouse)

97. The United States hereby incorporates paragraphs 1 through 96.

98. The individual Primestar cable companies have monopoly power in the provision of multichannel video programming distribution services in each of the local geographic markets where one of them is the incumbent cable franchisee. The proposed acquisition of the 110° satellite slot from News Corp./MCI is exclusionary conduct because: (1) it would allow the dominant firms to control a key asset that could and would have been used to compete against them thereby preventing entry into the market or more effective competition by existing competitors, and (2) a substantial purpose of the acquisition was to avoid such competition. The transaction thus would preserve and enhance the monopoly power of the Primestar cable

owners and therefore, if consummated, would violate Section 2 of the Sherman Act, 15 U.S.C. § 2.

THIRD CAUSE OF ACTION
(Illegal Restraint of Trade Under Section 1 of the Sherman Act By Each Defendant)

99. The United States hereby incorporates paragraphs 1 through 98.

100. Pursuant to the Asset Acquisition Agreement, the Primestar cable owners, each of which enjoys monopoly power in each of its franchise areas, agree to acquire a key asset that could and would have been used to compete against them. The effects of the agreement are to eliminate a significant and formidable competitor and to foreclose any use of the asset by any firm that would challenge their market power. Thus, the Asset Acquisition Agreement would unreasonably restrain trade and violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

101. By collectively agreeing to acquire the 110° slot, each of the Primestar cable owners ensures that every other cable defendant will not use this key asset to compete against it. Moreover, by purchasing the asset collectively the individual Primestar cable owners share the costs of foreclosing its use in any of their individually controlled markets. Thus, the Asset Acquisition Agreement would unreasonably restrain trade and violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

PRAYER FOR RELIEF

The United States requests:

1. That the proposed acquisition be adjudged to violate Section 7 of the Clayton Act, as amended 15 U.S.C. §18, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1,2;

2. That the defendants be permanently enjoined and restrained from carrying out the Asset Acquisition Agreement, dated June 11, 1997, or from entering into or carrying out any agreement, understanding, or plan, the effect of which would be to transfer the DBS assets of News Corp./MCI to Primestar; or, in the alternative, that the Primestar cable owners be required to divest their ownership interests in Primestar, Inc.;

3. That the United States be awarded costs of this action; and

4. That plaintiff have such other relief as the Court may deem just and proper.

Respectfully submitted,

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