

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,

Plaintiff,

v.

ECHOSTAR COMMUNICATIONS CORP., et al.,

Defendants.

Case No. 1:02CV02138 (ESH)

DECLARATION OF ROBERT SILVER

1. I am a member of the firm of Boies, Schiller & Flexner LLP, which represents EchoStar Communications Corporation ("EchoStar") in the above-captioned matter.

2. I submit this declaration in support of Defendants' emergency motion for trial on an expedited basis in this matter.

3. On October 28, 2001, General Motors Corporation ("GM") and its subsidiary Hughes Electronics Corporation ("Hughes"), together with EchoStar, announced the signing of definitive agreements that provided for the spin-off of Hughes from GM and the merger of Hughes with EchoStar. Subsequently, on November 15, 2001, Charles Ergen and James DeFranco each filed a Premerger Notification form with the Premerger Notification office of the Federal Trade Commission, collectively including thirty-eight (38) 4(c) documents totaling approximately 1,000 pages.

4. Prior to December 17, 2001, EchoStar voluntarily produced to the United States Department of Justice, Antitrust Division ("the Division") the following documents

containing information requested by the Division: (1) a list of competitors in the 36 DMAs where EchoStar provides local channels; (2) a schedule of current DISH Network hardware and programming packages, promotions and prices; and (3) a list of EchoStar's top twenty-five (25) commercial customers. Moreover, throughout the Hart-Scott-Rodino ("HSR") process, EchoStar voluntarily produced documents on various topics at the request of the Division, as well as materials provided to the FCC in connection with its review of the merger.

5. On December 17, 2001, pursuant to Section 7A(e)1 of the Clayton Act, 15 U.S.C. § 18a, and Section 803.20 of the Premerger Notification Rules and Regulations, 16 C.F.R. § 803.20, The United States Department of Justice, Antitrust Division (the "Division"), served on Charles W. Ergen, Chairman and Chief Executive Officer of EchoStar, a Request for Additional Information and Documentary Material ("Second Request").

6. In response to the document requests contained within the Second Request, EchoStar has produced to the Division approximately 1.17 million pages of responsive documents from the files of over thirty individual EchoStar employees, comprising approximately 850 boxes containing over 160,000 documents.

7. In response to the interrogatories contained within the Second Request, EchoStar has provided to the Division two sets of interrogatory responses. The first responses, provided on April 8, 2002, are sixty-six (66) pages in length; the second responses, provided on June 4, 2002, are one hundred and sixteen (116) pages in length.

8. Also in response to the interrogatories contained within the Second Request and follow up requests of the Division, EchoStar has provided to the Division over one hundred (100) exhibits, a number of which were provided in electronic form due to their size. An index

to these exhibits, which describes each exhibit and notes its date of production, is attached hereto as Exhibit 1.

9. Beginning on December 4, 2001, and extending through June 4, 2002, the Division conducted interviews of seven (7) EchoStar representatives: Executive Vice President Jim DeFranco; Senior Vice Presidents Mark Jackson, Michael Schwimmer, Ira Bahr and Edward Allwein; and Directors Mary Davidson and David Bair.

10. Beginning on July 3, 2002, and extending through October 2, 2002, the Division took depositions of the following current and former EchoStar personnel: Vice President Tom Stingley, former Vice President Mary Ferguson, Vice President Michael Kelly, Executive Vice President Soraya Cartwright, Executive Vice President Jim DeFranco, Senior Vice President Michael Schwimmer (two days), Treasurer Jason Kiser (two days), Chief Operating Officer Michael Dugan, and Chief Executive Officer and Chairman of the Board Charles Ergen (two days).

11. It is my understanding that Hughes and DIRECTV have provided the Division with documents, interrogatory responses and exhibits similar in number and extent to those provided by EchoStar; that the Division has interviewed a number of Hughes and DIRECTV personnel; and that the Division has taken the depositions of eight (8) current Hughes or DIRECTV personnel.

12. Beginning on May 3, 2002, Defendants made seven (7) in-person presentations to the Division concerning issues relevant to its consideration of the merger. These presentations were by EchoStar, Hughes and GM personnel, who were made available to the Division to answer questions as part of the presentations. The presentations and principal participants were as follows:

- a. "Overview / The Non-Merger World," presented on May 2, 2002 by EchoStar Chairman and Chief Executive Officer Charles Ergen, General Motors Vice Chairman and Chief Financial Officer John M. Devine, Hughes President and Chief Executive Officer Jack A. Shaw, DIRECTV Chief Executive Officer and Chairman of the Board Eddy Hartenstein, and EchoStar Treasurer Jason Kiser;
- b. "Spectrum," presented on May 14, 2002 by EchoStar Chief Operating Officer Michael Dugan, EchoStar Senior Vice President Michael Schwimmer, EchoStar Vice Presidents David Bair and Rex Povenmire, and DIRECTV Executive Vice Presidents Larry Chapman and David Baylor;
- c. "Transition," presented on June 7, 2002 by EchoStar Chief Operating Officer Michael Dugan, EchoStar Senior Vice President David Kummer, EchoStar Vice President Rex Povenmire, and DIRECTV Executive Vice Presidents Larry Chapman and David Baylor;
- d. "Broadband," presented on June 11, 2002 by EchoStar Senior Vice President Mark Jackson, Hughes Network Systems Chairman and Chief Executive Officer Pradman Kaul and Senior Vice President and General Manager Michael Cook;
- e. "Synergies," presented on June 24, 2002 by EchoStar Chief Financial Officer Michael McDonnell, EchoStar Treasurer Jason Kiser, and EchoStar Senior Vice President Michael Schwimmer, at which DIRECTV Senior Vice President Stephanie Campbell, Senior Vice President &

Acting C.F.O. Michael Palkovic and Vice President for Finance Brent

Pace attended and answered questions;

- f. "Wrap-Up and Joint Operating Agreement," presented on July 10, 2002 by EchoStar Chairman and Chief Executive Officer Charles Ergen, DIRECTV Chief Executive Officer and Chairman of the Board Eddy Hartenstein, and DIRECTV Executive Vice President Larry Chapman; and
- g. "Competitive Effects, Efficiencies and Proposed Remedy," presented on October 28, 2002 by EchoStar Chairman and Chief Executive Officer Charles Ergen, DIRECTV Chief Executive Officer and Chairman of the Board Eddy Hartenstein and Economist Robert Willig.

13. Defendants have made a number of voluntary submissions to the Division, including but not limited to the following: (1) "Satellite Technology Overview," a 77 slide power point presentation submitted on May 12, 2002; (2) "Synergies Models (Top Level and Detail) and Transition Model with Annotated Interrogatory 14" a 126 page document submitted on July 19, 2002; (3) "Local-into-Local Service: Economic Submission," three multi-page models and 21 pages of explanatory text submitted on August 6, 2002; (4) "Post-Merger Capacity Utilization Submission," a 119 page document including exhibits submitted on August 8, 2002; (5) "Local-into-Local Service: Technical Submission," a 10 page document submitted on September 18, 2002; (6) "The Impracticality of Moving Programming to 8PSK Modulation," a 12 page document submitted on September 25, 2002; (7) "2001 License Fees Paid by EchoStar to Showtime," a 7 page document submitted on October 10, 2002; (8) "Competition in the MVPD Market," a 41 page document submitted on October 21, 2002; (9) "Efficiencies," a 70

page document submitted on October 21, 2002; (10) "Proposed Remedy," a 27 page document submitted on October 21, 2002; and (11) "Consolidated Exhibits to the October 21, 2002 Submissions" (twenty five volumes of exhibits), submitted on October 21, 2002.

14. Defendants' economists have met with representatives of the Division in person or by teleconference on at least the following nine separate occasions:

Defendants' economists made a presentation to the Division's economists and answered questions on June 25, 2002;

Defendants' economists had a conference call with the Division's economists on August 30, 2002 (On the call, the Division's economists asked the Defendants' economists 40 detailed questions about their analysis. The Defendants' economists answered all of the questions in writing or verbally.);

Defendants' economists made a presentation to the Division's economists and answered questions on September 19, 2002;

Defendants' economists answered questions from the Division's economists via conference call on September 27, 2002;

Defendants' economists answered questions from the Division's economists via conference call on October 3, 2002;

Defendants' economists met with the Division's economists on October 4, 2002;

Defendants' economists made a presentation to the Division's economists and answered questions on October 17, 2002;

Defendants' economists had a conference call with the Division's economists on October 24, 2002; and

Defendants' economists made a presentation to the Division's economists and answered questions on October 28, 2002;

15. The primary purpose of all of the in-person discussions and conference calls between Defendants' economists and representatives of the Division was to allow Defendants' economists to present their conclusions, address concerns expressed by the plaintiffs, and answer questions. Plaintiffs' representatives had a full opportunity to question the defendants'

economists about their conclusions, methodology, data and any other subject of interest to them, and on a number of occasions requested and received follow-up analysis by the Defendants' economists. The Plaintiffs' representatives never provided any written analysis to the Defendants.

16. Defendants' economists have made (or submitted) at least six (6) principal presentations to the Division: (1) "Analysis of the EchoStar-Hughes Merger: Competitive Effects and National Pricing," presented by Defendants' economists on June 25, 2002; (2) "Notes on EchoStar-DIRECTV Merger Simulation Analysis Methodology," submitted by Defendants' economists on July 2, 2002; (3) "Further Analysis of the Diversion Ratio Between EchoStar and DIRECTV," presented by Defendants' economists on Sept. 13, 2002; (4) "Extensions to EchoStar-DIRECTV Merger Simulation Analysis," presented by Defendants' economists on October 17, 2002; (5) "Estimating the Nest Parameter in the EchoStar-DIRECTV Merger Simulation Analysis," presented by Defendants' economists on October 17, 2002; and (6) "Economic Analysis of the EchoStar-Hughes Merger," presented by Defendants' economists on October 28, 2002.

17. As backup for the above presentations, Defendants' economists have provided DOJ with at least eight additional written submissions, which include the following written materials: (1) "Supplemental Technical Appendix to the Presentation on the Competitive Effects of the EchoStar-DIRECTV Merger," submitted by Defendants' economists on July 25, 2002; (2) "The EchoStar-Hughes Merger Simulation: Technical Notes," a detailed 52-page explanation of the Defendants' economists methodology and results, submitted on August 19, 2002; (3) "Responses to a Subset of Questions from the August 30th Phone Call," submitted by Defendants' economists on September 9, 2002; (4) "Report on Further Analysis of the Diversion

Ratio Between EchoStar and DIRECTV,” submitted by Defendants’ economists on Sept. 16, 2002; (5) “Responses to a Subset of Questions from the August 30th Phone Call, Part II” submitted by Defendants’ economists on October 2, 2002; (6) “Analysis of Imprecision of EchoStar Cable Bill Promotions,” submitted by Defendants’ economists on October 21, 2002; (7) “Why the DOJ Use of the Churn Tracker Survey Is Unreliable,” submitted by Defendants’ economists on October 21, 2002; and (8) “Use of the Churn Tracker Survey vs. the Subscriber Database Match to Measure Diversion Ratios,” submitted by Defendants’ economists on October 21, 2002.

18. Defendants’ economists have provided Plaintiffs all of the data and technical information necessary to replicate their results, including any and all data and explanatory files the DOJ economists asked for. These files included at least two databases with more than one million observations, along with databases that allowed the DOJ to examine a variety of topics (from the impact of increased start-times on pay-per-view purchase habits to the impact of local-into-local service on cable pricing).

19. I understand that in addition to the information Defendants have provided to it, the Division has also issued *ex parte* Civil Investigative Demands for documents and/or deposition testimony from a large number of third parties.

20. Other than the complaint itself, the Plaintiffs have not provided Defendants with any written materials or discovery supporting the allegations in their complaint.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of November, 2002, at Armonk, New York.


Robert Silver

EXHIBIT 1

Schedule of Exhibits Provided by EchoStar to the Department of Justice,
Antitrust Division in Response to Second Request issued December 17, 2001

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- Exhibit 1(a)(i) (Schedule of Attorneys) (provided 4/8/02)
- Exhibit 1(a)(ii) (Schedule of Investment Banks) (provided 4/8/02)
- Exhibit 1(a)(iii) (Schedule of Consultants) (provided 4/8/02)
- Exhibit 1(a)(iv) (Schedule of Distributors) (provided 4/8/02)
- Exhibit 1(c)(i) (Schedule of Former Employees) (provided 4/8/02)
- Responses to Interrogatory 2(c) provided in Chart Form (provided 2/20/02):
- 1999 - 50 Top DBS Purchasers from EchoStar by Amount Purchased
 - 2000 - 50 Top DBS Purchasers from EchoStar by Amount Purchased
 - 2001 - 50 Top DBS Purchasers from EchoStar by Amount Purchased
 - 1999 - 50 Top DBS Purchasers from EchoStar by Quantity Purchased
 - 2000 - 50 Top DBS Purchasers from EchoStar by Quantity Purchased
 - 2001 - 50 Top DBS Purchasers from EchoStar by Quantity Purchased
 - 2000 - 50 Top StarBand Purchasers from EchoStar by Amount Purchased
 - 2001 - 50 Top StarBand Purchasers from EchoStar by Amount Purchased
 - 2000 - 50 Top StarBand Purchasers from EchoStar by Quantity Purchased
 - 2001 - 50 Top StarBand Purchasers from EchoStar by Quantity Purchased
- Exhibit 3(a)(i) (Television Households by DMA: actuals 1998-2000; forecast 2001) (provided 4/8/02; 9/12/02)
- Exhibit 3(a)(ii) (Television Households by State: actuals 1998-2000; forecast 2001) (provided 4/8/02; 9/12/02)
- Exhibit 3(a)(iii) (Forecast of Television Households Available 2002-2003, in millions) (provided 4/8/02)
- Exhibit 3(b)(i) (MVPD Subscribers by State) (provided 4/8/02)
- Exhibit 3(b)(i)(a) (Year-to-Date Subscribers by State: July 2002) [transmitted to DOJ in electronic format] (provided 9/12/02)
- Exhibit 3(b)(ii) (MVPD Subscribers by DMA) (provided 4/8/02 and 6/17/02)

- Exhibit 3(b)(ii)(a) (Year-to-Date Subscribers by DMA: July 2002) [transmitted to DOJ in electronic format] (provided 9/12/02)
- Exhibit 3(b)(iii) (MVPD Subscribers by Zip Code) [transmitted to DOJ in electronic format] (initially provided 4/8/02; corrected version provided 4/22/02)
- Exhibit 3(b)(iii)(a)(Year-to-Date Subscribers by Zip Code: July 2002) [transmitted to DOJ in electronic format] (provided 9/12/02)
- Exhibit 3(b)(iv) (Programming Services Summaries 2002-2003) (provided 4/8/02)
- Exhibit 3(c)(i) (MVPD Penetration by State) (provided 4/8/02)
- Exhibit 3(c)(i)(a) (Penetration by State at Year End 1998-2001, and at July 2002) [transmitted to DOJ in electronic format] (provided 9/12/02)
- Exhibit 3(c)(ii) (MVPD Penetration by DMA) (provided 4/8/02)
- Exhibit 3(c)(ii)(a) (Penetration by State at Year End 1998-2001, and at July 2002) [transmitted to DOJ in electronic format] (provided 9/12/02)
- Exhibit 3(d)(i) (Programming Summary for 1st Quarter 2002, January) (provided 4/8/02)
- Exhibit 3(d)(ii) (Programming Summaries for 1998-2001) (provided 4/8/02)
- Exhibit 3(d)(iii) (Programming Summaries for January 1998- June 2002) (provided 9/26/02)
- Exhibit 3(f)(i) (DISH Network Local Markets Launch Date Summary) (initially provided 4/8/02; corrected version provided 6/4/02)
- Exhibit 3(f)(ii) (Locals Launched as of March 14, 2002) (provided 4/8/02)
- Exhibit 3(f)(iii) (Possible Future Launching of Local Stations) (provided 4/8/02)
- Exhibit 3(f)(iv) (Local Stations Launched from March 1996 through July 2, 2002) (provided 9/26/02)
- Exhibit 3(i)(i) (Programming Services Summaries 1998-2001) (provided 4/8/02)
- Exhibit 3(i)(ii) (MVPD Subscribers to Programming Tiers and Premium Packages as of June 7, 2002, Arranged by Zip Code) [transmitted to DOJ in electronic format] (provided 6/17/02)

- Exhibit 3(i)(iii) (DISH Network Subscriber Counts by Month by Zip Code for Basic Programming Packages and Premium Services, January 1998 - June 2002) [transmitted to DOJ in electronic format] (provided 7/30/02)
- Exhibit 3(j)(i) (Subscribers by Zip Code to Broadcast Network Distant Local Channels as of May 31, 2002) [transmitted to DOJ in electronic format] (provided 6/6/02)
- Exhibit 3(j)(ii) (Subscribers by Zip Code to Local-into-Local Channels as of May 31, 2002) [transmitted to DOJ in electronic format] (provided 6/6/02)
- Exhibit 3(j)(iii) (DISH Network Subscriber Counts by Month by Zip Code for Local Programming Channels and Distant Networks, January 1998 - May 2002) [transmitted to DOJ in electronic format] (provided 7/30/02)
- Exhibit 3(o)(i) (DISH Network Lease Materials) (provided 4/8/02)
- Exhibit 3(p)(i) (Schedule of Retailer/Distributor Payment Categories) (provided 4/8/02)
- Exhibit 3(p)(ii) (Payments to Retailers 1998) (provided 4/8/02)
- Exhibit 3(p)(iii) (Payments to Retailers 1999) (provided 4/8/02)
- Exhibit 3(p)(iv) (Payments to Retailers 2000) (provided 4/8/02)
- Exhibit 3(p)(v) (Payments to Retailers 2001) (provided 4/8/02)
- Exhibit 3(p)(vi) (Expected Payments to Retailers 2002) (provided 4/8/02)
- Exhibit 3(p)(vii) (Cooperative Advertising Payments by State) (provided 4/8/02)
- Exhibit 3(p)(viii) (Cooperative Advertising Payments by DMA) (provided 4/8/02)
- Exhibit 3(p)(ix) (Cooperative Advertising Payments by Zip Code) [transmitted to DOJ in electronic format] (provided 4/8/02)
- Exhibit 3(p)(x) (Commission Payments by State) Exhibit 3(p)(xi) (Commission Payments by DMA) (provided 4/8/02)
- Exhibit 3(p)(xii) (Commission Payments by Zip Code) [transmitted to DOJ in electronic format] (provided 4/8/02)

- Exhibit 3(p)(xiii) (Residual Payments by State) (provided 4/8/02)
- Exhibit 3(p)(xiv) (Residual Payments by DMA) (provided 4/8/02)
- Exhibit 3(p)(xv) (Residual Payments by Zip Code) [transmitted in electronic format] (provided 4/8/02)
- Exhibit 3(q)(i) (EchoStar Communications Corporation Consolidated Statements of Operations for 1998-2001) (provided 4/8/02)
- Exhibit 3(q)(i)(a) (EchoStar Communications Corporation Consolidated Statements of Operations - Detail for the Seven Months ending July 2002) (provided 8/28/02)
- Exhibit 3(q)(ii) (EchoStar Communications Corporation 2002 Budget) (provided 4/8/02)
- Exhibit 3(q)(iii) (Subscriber Revenue by State 1998-2001) (provided 4/8/02)
- Exhibit 3(q)(iii)(a) (Year-to-Date Subscriber Revenue by State: July 2002) [transmitted to DOJ in electronic format] (provided 9/12/02)
- Exhibit 3(r)(i) (Monthly Churn by State 1998-2001) (provided 4/8/02)
- Exhibit 3(r)(i)(a) (Year-to-Date Churn by State: July 2002) [transmitted to DOJ in electronic format] (provided 9/12/02)
- Exhibit 3(r)(ii) (Monthly Churn by DMA 1998-2001) (provided 4/8/02)
- Exhibit 3(r)(ii)(a) (Year-to-Date Churn by DMA: July 2002) [transmitted to DOJ in electronic format] (provided 9/12/02)
- Exhibit 3(r)(iii) (Monthly Churn by Zip Code 1998-2001) [transmitted to DOJ in electronic format due to size] (provided 4/8/02)
- Exhibit 3(r)(iii)(a) (Year-to-Date Churn by Zip Code: July 2002) [transmitted to DOJ in electronic format] (provided 9/12/02)
- Exhibit 3(r)(iv) (Subscriber Disconnects and Restarts by Zip Code 1998-2001) [transmitted to DOJ in electronic format] (provided 5/31/02)
- Exhibit 4(b)(i) (Programming License Fee Summaries for 1998-2001) (provided 6/4/02)
- Exhibit 4(b)(ii) (Premium Channel Summaries 1998-2001) (provided 6/4/02)

- Exhibit 4(b)(iii) (Summaries of Programming Costs 2002-2003) (provided 4/8/02)
- Exhibit 4(c)(i) (Schedule of Actual and Expected Variable Cost) (provided 4/8/02)
- Exhibit 4(d)(i) (Schedule of Actual and Expected Subscriber Acquisition Cost) (provided 4/8/02)
- Exhibit 4(e)(i) (Schedule of Actual and Expected Maintenance Cost) (provided 4/8/02)
- Exhibit 4(f)(i) (Local Stations License Fee Summary 2000-2003) (provided 4/8/02)
- Exhibit 4(f)(ii) (Local to Local Cost Analysis Summary as of 12/31/01) (provided 4/8/02)
- Exhibit 4(f)(iii) (Local to Local Cost Analysis Summary as of 2/28/02) (provided 4/8/02)
- Exhibit 4(f)(iv) (Satellite and Uplink Costs Summary) (provided 4/8/02)
- Exhibit 4(g)(i) (Schedule of Actual and Expected Advertising/Marketing Costs) (provided 4/8/02)
- Exhibit 4(g)(ii) (Advertising Costs by DMA: January 2001 - February 2002) (provided 4/8/02)
- Exhibit 4(h)(i) (Cable/DBS Penetration by State) (provided 4/8/02)
- Exhibit 4(h)(ii) (List of Competitors by DMA) (provided 4/8/02)
- Exhibit 4(h)(iii) (Information on Major Competitors) (provided 4/8/02)
- Exhibit 4(h)(iv) (1998-2000 National Penetration Rate for Top 15 MSOs and DBS Companies) (provided 4/8/02)
- Exhibit 4(h)(v) (Top MVPD Companies) (provided 4/8/02)
- Exhibit 5 (Schedule of Relevant Databases) (provided 4/8/02)
- Exhibit 6(i) (DISH Network Promotions 1998-2001) (provided 6/4/02)
- Exhibit 6(ii) (Programmer Subsidized Promotions) (provided 6/4/02)

- Exhibit 6(iii) (License Fee Waivers/Reimbursals by Programmers 1998-2001) (provided 6/4/02)
- Exhibit 6(iv) ("Winback Save Matrix - Riverfront Winback Agents Only") (provided 6/4/02)
- Exhibit 6(v) ("RF Winback Price Increase Save Matrix") (provided 6/4/02)
- Exhibit 6(vi) (DISH Network Promotion and Basic Programming Package Pricing Information, January 2001 - June 2002) [transmitted to DOJ in electronic format] (provided 7/30/02)
- Exhibit 6(vii) (DISH Network New Subscriber Counts by Promotion and Basic Programming Package by Zip Code by Month, January 2001 - June 2002) [transmitted to DOJ in electronic format] (provided 7/30/02)
- Exhibit 8(i) (Schedule of DBS Authorizations) (provided 4/8/02)
- Exhibit 8(ii) (Schedule of Ku-Band FSS Authorizations) (provided 4/8/02)
- Exhibit 8(iii) (Schedule of Ka-Band FSS Authorizations) (provided 4/8/02)
- Exhibit 9(a)(i) (Schedule of Satellites) (provided 4/8/02)
- Exhibit 9(h)(i) (Schedule of Channels Transmitted by Satellites) (provided 4/8/02)
- Exhibit 9(k)(i) (Schedule of DMAs Served by Satellites) (provided 4/8/02)
- Exhibit 9(k)(ii) (DMA/Zip Code Table) [transmitted to DOJ in electronic format] (provided 4/8/02)
- Exhibit 10 (Satellites Used or Available for Broadband Internet Services) (provided 4/8/02)
- Exhibit 14(i) (Schedule of Efficiencies Personnel) (provided 6/4/02)
- Exhibit 18(a)(i) (Schedule of Corporate Information) (provided 4/8/02)
- Exhibit 18(c)(i) (EchoStar Offices and Facilities) (provided 4/8/02)