

**Remarks By Kevin J. Martin**  
**Commissioner**  
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**To The Carmel Group's**  
**Satellite Entertainment 2002: TV and Radio From Space**  
**Monterey, California**  
**April 25, 2002**

Thank you, Jimmy, for inviting me to join you at this conference. I've enjoyed being here these last two days to hear about exciting opportunities and challenges for the satellite entertainment industry and I am honored to have the opportunity to speak to you today.

Some of you may have read about my concerns with EchoStar's two-dish policy. I'd like to mention that, as a gesture of good will, I've asked the waiter to give Charlie Ergen two dishes for lunch.

I thought today I'd share some thoughts on a few issues we're grappling with at the FCC that might be of most interest to you and your industry. They are: spectrum sharing, Northpoint, the EchoStar-DIRECTV merger, program access, and must carry.

First, though, I'd like to say a few words about what an exciting time this is for the satellite industry. You have a long history of creating and using cutting-edge technology to introduce innovative new services—including the ubiquitous deployment of *digital* video programming long before your competitors. And it is that history that has resulted in DBS's success—from less than 600,000 subscribers in 1994 to more than 20 million today.

Now you are rolling out national satellite radio and two-way satellite services, such as broadband Internet access and interactive television. These technologies offer significant benefits for consumers, providing them with exciting new entertainment options and potentially changing the way they communicate and learn. These services also create new revenue streams and productivity gains, which could provide a boost to the economy, as well.

Satellite digital audio radio services have taken off this year. Analysts expect almost 1 and a half million subscribers to sign up by next year, and almost *five* million subscriptions by the end of the following year, 2004. That is a rate of growth most entertainment services only dream of. SDARS have far exceeded

expectations, and it's no wonder. Satellite radio is truly revolutionary, injecting new energy into an industry has seen little change in 40 years. One hundred stations, many commercial-free, with the high quality you'd expect from digital technology, and with more variety than most consumers ever imagined getting from their radio. Now that's exciting. And the last thing we at the FCC should do is put up unnecessary roadblocks to consumers' ability to access these services from wherever they are.

We currently are drafting permanent service rules for this technology (which operates now pursuant to special temporary authority), and a few issues do remain. Most notably, we need to establish power levels for the terrestrial repeaters that enable the service to be truly nationwide without inhibiting the deployment of services in adjacent bands. We are working with the interested parties and expect to reach a reasonable compromise in the near future.

Two-way satellite services may not have the rollout "splash" that satellite radio has enjoyed, but the services truly are the future of home entertainment. Much has been said about the promise of broadband and interactive television, with the multitude of new revenue streams that these services could produce. And I agree with Leo Hindery's remarks yesterday morning that video on demand and digital video recorders may be the most exciting of the new services on the horizon.

But most of that talk about the promise of broadband capabilities – particularly at the FCC – has focused on cable and DSL. True, these technologies have led the broadband migration, but we should not forget about satellite. Satellite broadband could be a high-speed on-ramp for almost every American household. Its ubiquitous nature means that distance and geography no longer determine which Americans can join the digital revolution.

Indeed, in many, particularly rural, areas, satellite technology is uniquely capable of providing consumers with an economical option for broadband and interactive services. And where cable and DSL *are* deployed, two-way satellite services provide the facilities-based competition so essential to promoting competitive pricing, service quality, and the incentive to innovate. These two-way services also enable DBS providers to offer service bundles, with the accompanying pricing flexibility and increased revenues.

The potential benefits of satellite broadband are clear—which is why some analysts have estimated that satellite broadband could reach 5 million subscribers by 2005. Now, I recognize that some in the industry are less optimistic. I've heard claims that both the technological problems (both latency and strained capacity)

and the economic problems (finding a competitive price point) are insurmountable – at least in the near term. But I have faith in the industry. I think you will find a way.

And importantly, we at the FCC should not stand *in* your way. As you continue to make rapid advances in satellite technology, the FCC should facilitate your ability to implement it. That includes minimizing the regulatory burden to the extent consistent with the Communications Act and designing innovative spectrum sharing methods that allow more providers to operate in a given band without compromising the integrity of existing services. And that leads me to my next topic, spectrum sharing.

## **I. Spectrum Sharing**

As one of 5 children, it was impressed upon me early on that – like it or not – sometimes we simply have to share. This fundamental life lesson, more so than ever before, is particularly relevant to spectrum.

As more and more players vie to use the same frequencies, it is becoming increasingly difficult to find unencumbered spectrum. As a result, industry has been forced to respond with creative ways to enhance spectral efficiency. These more recent technological changes allow spectrum sharing to be taken to new levels.

Take, for example, satellite and terrestrial sharing scenarios, which I will discuss in more detail in a few moments. Advances in software-defined radios permit increases in efficiency by allowing quick modification to transmit and receive on any frequency and in any desired transmission format. DoD's "XG" program – which focuses on Next Generation communications devices to support military deployment - seeks to produce even further advances in spectrum assignment technology through dynamic use of frequency, time and space.

We are also seeing incredible innovations in the unlicensed spectrum arena – the "wild west" of the spectrum landscape and arguably the epitome of adaptation in the face of forced sharing. Bluetooth and 802.11 applications will allow users to set up flexible short-range wireless networks. Sophisticated ultrawideband technology – promising to deliver data at faster speeds and lower power – can potentially co-exist with spectrum users in any frequency.

These examples illustrate how industry is adapting to make more and better use of the spectrum currently available, and harness spectrum once considered unusable.

The Commission must adapt as well. To the extent that technology is outpacing regulation, we should at the very least ensure that the Commission does not act in a way to discourage or stand in the way of innovation.

But I also think we should proactively seize opportunities to encourage, and even insist on, more efficient use of current spectrum, particularly through sharing. A basic focus on sharing can guide the Commission in helping to respond to the growing demand for spectrum.

Indeed, the Commission should move toward policies that make sharing easier, and even desirable. For example, a robust secondary market for spectrum and flexible allocations (that are technology and service-neutral) can create strong incentives for making use of excess capacity. Allowing priority access permits flexibility for a higher valued use some of the time, without having to dedicate specific frequencies to those uses all of the time.

In summary, our spectrum management objective should be to create incentives for the efficient utilization of spectrum at every given point in time, by both established users and new entrants. I am optimistic that future technological developments will provide the Commission with more and more opportunities to insist on sharing. Ultimately, the amount of available spectrum and our ability to use it is perhaps limited only by technology. Today, however, we must act rationally to make the best choices within the spectrum constraints that face us now, and that will lead to the marketplace developments we would like to see tomorrow.

Consistent with that philosophy, I note that the Commission adopted an Order a week ago today that provides an excellent example of a flexible, innovative and efficient spectrum sharing method. The Order establishes service rules for non-geostationary satellite systems (NGSOs) to operate in the shared Ku-band frequencies, providing advanced services that could include data, video, and telephony services.

The Order allows each of the seven applicants to use the entire band of allocated spectrum a majority of the time by segmenting the band only when an in-line interference event occurs—and then, only if the parties involved in the interference event have not negotiated another means of addressing the interference. This method thus allows licensees maximal flexibility to design their systems. The Commission avoids picking winners and losers, relying instead on competition to determine success. I am optimistic that this Order will spur exciting new services

while maintaining the integrity of the services provided by existing licensees—including, of course, DBS providers.

## **II. Northpoint**

As the Commission tries to emphasize sharing, however, it must continue to respect the rights of existing licensees to be free from harmful interference. As most of you probably know, the Commission recently adopted another item that will allow for spectrum sharing—the applications by Northpoint and other potential MVDDS licensees to provide terrestrial service in the 12 GHz band. Unfortunately, I am less confident that this item will respect the rights of existing licensees. For this reason, I dissented from the spectrum sharing / interference sections of that item.

I strongly support facilitating the deployment of new technologies and services. Northpoint approached the Commission with a plan to share the 12GHz band with DBS providers to provide a terrestrial service that would compete in the delivery of multichannel video programming. In theory, this service would both make more efficient use of spectrum and create another competitor against cable.

But as I've said, spectrum sharing is “good” only when it protects the rights of existing licensees and their customers, as well. The Commission has spent a considerable amount of time determining what the service rules should be for this new MVDDS technology.

After several years and several thousand pages of debate, the Majority of the Commission adopted a licensing scheme for MVDDS. Under their approach, the Majority determined that a 10% increase in unavailability or service outage for DBS subscribers was an appropriate burden to place on DBS customers. The Majority tried to apply this 10% limit by developing an interference measure called an “EPFD” limit—a technical parameter with which the MVDDS licensee must comply in order to keep interference to DBS to a 10% increase in signal outage. I think this amount of additional outage time is too high and I would have preferred a lower limit. But what is particularly troubling about the Majority's licensing approach is that it undermined even this 10% limit.

First, the interference test completely excluded signals sent from several DBS orbital slots. Second, the tests were conducted in only 32 television markets—so whole regions and entire states were excluded. Third, the Majority averaged these

interference limits with neighboring cities to create an interference measure for each of 4 regions of the country.

This complex methodology significantly distorts the service outage DBS customers actually will experience in several ways. First, if you live in one of the 32 markets that were tested, the actual interference you receive could be higher than 10% because your city may have been above the “average” for your region. So even if MVDDS licensees comply with the regional interference limit, the increase in your actual outage time could be significantly higher than 10%.

Second, if you live in one of those markets and receive service from one of the excluded DBS orbital slots, the actual interference you receive could be higher than 10% because the Commission didn’t even test what interference limits would be appropriate for your DBS transmitter. So the interference limit that the MVDDS licensee must comply with in your region could result in significantly more than 10% more signal outage.

Third, if live outside those 32 markets, there is no indication of how much interference you may suffer as DBS customer. What is particularly disturbing about this approach is that the amount of DBS signal outage resulting from MVDDS signals varies greatly due to weather and terrain, yet the regional interference limit was reached without regard to such variations in many instances. For instance, in calculating the interference limit for the Northwest region, no tests were conducted to measure interference to DBS service in Montana, Idaho, North Dakota, Alaska, or Hawaii, states with climates and terrain dramatically different from each other, and certainly different from Seattle and Sacramento, two of the cities on which the regional interference limit was based.

Fourth, the Majority further undermined the purported limit on interference by restricting the limit’s application to *one year*. After the first year of MVDDS service, there is *no limit* to the amount of interference that a MVDDS licensee may cause to a DBS customer. Fifth, the rule does not apply to existing DBS customers if they move locations. So if a DBS customer moves across the street, he loses his right to suffer no more than a 10% increase in signal outage. Indeed, there is *no limit* on the amount of interference this customer could suffer.

Finally, this interference limit does not apply to new customers *at all*. That’s right: the majority’s licensing approach tells the providers of the only service that has ever provided a viable alternative to cable that any future customers could be subject to limitless interference from a competing service.

What is even more odd about this approach is that it is inconsistent with the expert report by Mitre, which assumed the interference standard adopted would apply in each service area and to new customers, as well.

This morning Charlie Ergen noted that, in addition to the interference levels allowed, the other key element of the Order would be the mitigation techniques allowed – and who would pay for them. Again, I believe the Majority places too much of a burden on DBS providers. Specifically, in the Joint Statement by two members of the Majority, they claim that the “outage increases are also easily avoidable at most consumer receiver sites through a variety of mitigation techniques that are available to DBS providers.” Thus, it is the DBS consumers who will bear the burden of mitigation techniques, and the DBS providers who will have to pay for it.

In summary, while enabling a new service to launch and new competition to develop is exciting, allowing its launch by forcing some existing DBS customers, and *all new* DBS customers, to suffer potentially limitless service outage strikes me as placing the burden of deploying a new service on the backs of DBS consumers—and on an industry that has proven to be the only significant competitor to the cable industry that we have ever seen. The lack of clarity with regard to what is or is not harmful interference adds only further complication and confusion. I cannot, and did not, support this approach. Fundamental fairness, lawful decision making, and good policymaking all dictate in favor of establishing appropriate interference limits in each service area that MVDDS licensees must meet with respect to all DBS subscribers.

### **III. FCC Review of EchoStar-DIRECTV Merger**

There’s been a lot of discussion at this conference about whether DOJ and the FCC will approve the EchoStar/DIRECTV merger, and if they do, what concessions might be extracted from the parties, and what the impact would be on the satellite and related industries. We are still collecting a record on the merger, and I certainly haven’t decided yet whether I think the merger would be in the public interest. I sense it would be a glaring absence, however, if I spoke about pending regulatory issues affecting DBS and didn’t mention our review of this merger.

I thought it might be useful to you, yet not compromise the FCC’s process or provide the appearance that I have prejudged any issue, if I were to spend a few minutes just highlighting what I view as some of the critical issues.

First, how do you define the product market? Is it satellite-delivered video programming or DBS, *digital* multichannel video programming, *all* multichannel video programming, or *all* video programming (that is, including broadcast)? This issue is critical, because it determines the number of parties that would remain post-merger to compete with the combined entity. The more narrowly you define the market, the more difficult it is for the Commission to approve the merger. This is because a more narrowly defined market results in more geographic markets in which the number of competitors decreases from two to one. And a merger to a monopoly is hard to approve.

I would note that whatever we decide, we must be cognizant that the D.C. Circuit told us to take into account cable/DBS competition when it remanded our ownership rule limiting how big a cable operator could get.

Another important issue is the extent to which a national pricing plan would remedy the harm that could result from the creation of a monopoly in many rural and other underserved areas. On one hand, these consumers could benefit significantly from the price competition that keeps subscription fees low in urban areas. On the other, a better price wouldn't address consumers' concerns about service quality and customer support. Some also have argued that the merged entity might actually raise rates in urban areas rather than lower them where it doesn't face competition. Another detail we would need to iron out is how this policy would be enforced—I, for one, am generally hesitant to enter the rate regulation business.

A third issue is how to weigh the potential benefits—particularly the provision of two-way broadband Internet access and the commitment to carry local broadcast signals in all 210 U.S. DMAs. Without question, an increase in the deployment of facilities-based broadband and local-into-local would be great for consumers as well as competition in those (and vertically related) markets. But in the merger context, we look at such benefits in two ways. First, the Commission credits an act as a “benefit” of a merger only if it wouldn't occur “but for” the merger. Second, we must determine whether the benefit actually “offsets” the potential competitive harms. This latter issue is particularly interesting when the expected benefit is actually unrelated to the expected competitive harms.

To focus on broadband for a second, would the parties stop providing two-way broadband to consumers if this merger doesn't go through? Is it true that an economically viable business plan for the provision of satellite broadband service can be achieved only through this merger—that is, through the additional capacity that would be obtained by one entity controlling all the CONUS slots and



eliminating duplicative programming? This is as much a technical (*e.g.*, capacity) issue as a business one. As I noted earlier, analysts have predicted that by 2005, there will be 5 million satellite broadband subscribers.

Regarding local broadcasting, they say they would not rollout local-into-local in all DMAs (which would account for approximately 1600 channels) absent this merger or some other cooperative arrangement. And access to their local channels certainly would greatly benefit many of the same consumers who would suffer the most loss of competition by this merger. I am still deciding, however, how much weight to place on this issue.

Finally, the Commission must find that EchoStar has good character as a statutory precondition to finding that the transfer of licenses to EchoStar is in the public interest. When the transferee is a current licensee, as is the case with EchoStar, the Commission will look at how the licensee has complied with the statute and our rules.

#### **IV. Program Access**

The program access rules have been among the most successful rules in the media regulatory framework. I think you all would agree that these rules have been instrumental to the growth of DBS. As many of you probably know, Congress provided that one aspect of these rules—the prohibition against exclusive deals between cable operators and cable-owned satellite programming—would expire on October 5 of this year unless the Commission makes a specific determination that retaining this rule is “necessary to preserve and protect competition and diversity in the distribution of video programming.”

Last October, we initiated a rulemaking to investigate this issue. By our October deadline (and hopefully well before), I expect that the Commission will close this proceeding. As we debate what action to take, one issue is at the forefront of my mind. That is whether we can demonstrate “necessity.” The D.C. Circuit has been reviewing our decisions with increasing scrutiny, demanding both adherence to statute and consistent, reasoned decisionmaking. Specifically, the Court recently interpreted the statutory requirement to prove a rule is “necessary” as being quite a high burden. Thus, if the Commission determines that the exclusivity rule should be retained, we will need to articulate a complete and coherent analysis based on evidence demonstrating that the rule is, indeed, necessary in today’s marketplace.

I believe this can be done. I also believe the exclusivity rule has been instrumental to promoting a vibrant MVPD market and enabling DBS to entice customers away from the competition. But I am cognizant that our burden of proof will be a high one.

## V. Must Carry

Finally, I'd like to say a word about must carry. The "carry one, carry all" provision enacted in SHVIA is *the law*. DBS providers get to choose whether to carry any local broadcast signals, but if they do carry any, they must carry all local signals on contiguous channels, at a nondiscriminatory price, and in a nondiscriminatory manner on the EPG.

I believe that there are circumstances under which a two-dish policy could meet these statutory requirements. But I am very concerned about the burden that is being placed on consumers to obtain special equipment to see some local stations. Indeed, as two of four Commissioners (including me) have stated, we believe that a discriminatory two-dish policy does not become legal if the provider merely provides subscribers better notice about the need to get that extra equipment.

But I also believe that the local carriage requirements ultimately will prove good for business, too. DBS providers may not like the must carry provisions, but consumers do. It is the carriage of local broadcast signals that will enable DBS to compete fully with cable. In fact, prior to SHVIA, some DBS subscribers retained a subscription to basic cable in order to receive these local stations.

Moreover, as a panelist noted yesterday, where DIRECTV has rolled out local-into-local, it has seen *an increase* in subscription rates. Simply put, carrying local signals is good for consumers and good for business.

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I hope these thoughts have provided you with a bit of insight into what is going on at the FCC. I'm now happy to take any questions you might have.