

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Application of)
EchoStar Communications Corporation,)
General Motors Corporation,)
Hughes Electronics Corporation,)
)
Transferors,) CS Docket No. 01-348
)
and)
)
EchoStar Communications Corporation,)
)
Transferee,)
)
For Authority to Transfer Control)

To: The Commission

**COMMENTS OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS AND
THE PUBLIC BROADCASTING SERVICE**

Public television’s mandate has always been to provide all Americans with access to its service. This goal of universal access has been repeatedly recognized by Congress and the Commission as a vital public policy aim.¹ Direct broadcast satellite (“DBS”) service, which is capable of reaching most households across the country without the expensive and time-consuming process of laying last mile cable or other infrastructure, is uniquely positioned to

¹ Congress created the public broadcasting system to provide noncommercial and educational programming throughout the nation. Recognizing the unique contribution noncommercial stations make to their local communities, Congress has long supported measures to ensure that all television viewers have access to their local noncommercial stations. *See, e.g., Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996); H.R. Rep. No. 102-628, at 69 (1992) (“The government has a compelling interest in ensuring that [public television] services remain fully accessible to the widest possible audience without regard for the technology used to deliver these educational and information services.”).

enhance that goal, as Congress recognized in enacting the Satellite Home Viewer Act,² the Satellite Home Viewer Improvement Act (“SHVIA”),³ and other legislation that promotes the widespread distribution of DBS services.⁴ Now, EchoStar and DirecTV (collectively, “Applicants”), the two largest and only significant providers of DBS service,⁵ have asked the Commission to consent to their proposal to merge.⁶ Consideration of the Application calls for the Commission to weigh the adverse effects of less competition (in essence, no competition) in the DBS market against the prospect of more service that would result from the additional capacity freed up by eliminating duplicative programming currently carried separately by both EchoStar and DirecTV. More service should mean, among other things, providing subscribers in more television markets with access to the signals of local stations, including local

² See Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477 (1994); Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, tit. II, 102 Stat. 3935, 3949-60 (1988).

³ See Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, App. I, tit. I, 113 Stat. 1501, 1501A-523 to 1501A-544 (1999).

⁴ See Launching Our Communities’ Access to Local Television Act of 2000, Pub. L. No. 106-553, tit. X, 114 Stat. 2762, 2762A-128 to 2762A-142 (providing loan guarantees to finance the delivery of local television broadcast signals to rural households by means including DBS).

⁵ According to a recent Commission report, “[t]here are currently four companies licensed . . . to provide DBS service: DirecTV, EchoStar (marketed as the DISH Network), Dominion Video Satellite, Inc. (marketed as Sky Angel) and R/L DBS Company.” *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, CS Docket No. 01-129, ¶ 55 (Jan. 14, 2002) (“Eighth Annual Report”). However, R/L DBS Company is not currently providing service, and “Dominion does not operate its own satellite, and offers only 19 video channels, as opposed to hundreds for DirecTV and EchoStar.” *Id.* ¶ 55 n.184.

⁶ See Consolidated Application for Authority to Transfer Control of EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control (Dec. 3, 2001) (“Application”). EchoStar Communications Corporation (“EchoStar”) provides DBS service through the DISH Network brand. DirecTV is owned by Hughes Electronics Corporation, a subsidiary of General Motors Corporation. According to the Application, EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation would transfer control of their DBS assets to a new company, EchoStar Communications Corporation (“New EchoStar”). See Application at 10, 12, 15.

noncommercial stations. However, if increased service is the public interest rationale that justifies the merger despite the creation of a monopoly in the DBS market,⁷ then the Commission should take steps to ensure that the prospect of more service will be realized. The Association of Public Television Stations (“APTS”)⁸ and the Public Broadcasting Service (“PBS,” and collectively “Public Television”)⁹ ask in these comments that the Commission not approve the merger without (1) making a reality of Applicants’ assurances of additional services that are pro-competitive and in the public interest and (2) requiring delivery of those services in a nondiscriminatory manner.

I. THE COMMISSION SHOULD HOLD NEW ECHOSTAR TO ITS STATED COMMITMENT TO INCREASING LOCAL-INTO-LOCAL SERVICE

Applicants state that the merger would increase efficiency because New EchoStar could eliminate duplication in the channel line-ups of EchoStar and DirecTV, allowing it to use the capacity for other purposes.¹⁰ In particular, they tout New EchoStar’s ability to use this

⁷ Applicants contend that the relevant product market is the broader market for multichannel video programming distribution rather than the market for DBS services. *See* Application at 37-40. But even in the multichannel video programming market, the merger would result in most locations in, at best, a change from a triopoly (cable + EchoStar + DirecTV) to a duopoly (cable + New EchoStar). This would leave consumers with only two choices of multichannel programming providers. Such a decrease is neither pro-competitive nor consistent with the public interest.

⁸ APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation’s 354 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members.

⁹ PBS is a nonprofit membership organization of the licensees of the nation’s public television stations. PBS distributes national public television programming and provides other program-related services to the nation’s public television stations.

¹⁰ *See* Application at 27 (“Combining the satellite and spectrum resources of [Applicants] will eliminate the duplicative use of the limited amount of available DBS spectrum to deliver the same programming, and allow DBS to compete more effectively against cable’s recent offerings.”). According to Applicants, this capacity would allow New EchoStar to provide a host (continued...)

newly-realized capacity to provide local service in more markets as a public interest benefit of the merger.¹¹ However, there is no statutory or regulatory requirement that obligates New EchoStar to use the capacity created by eliminating programming duplication to provide more local service. Thus, the decision of whether and how far to expand the availability of local-into-local would be entrusted solely to New EchoStar's discretion. Applicants cite New EchoStar's ability to more than double the number of markets where local service is available as a reason to approve the combination. The Commission should therefore hold them to their statements by making more widespread local service a condition of its consent to the merger. Applicants should not object since they have stated publicly and to the Commission that they plan to increase local service if the merger is approved.¹²

Specifically, Applicants have stated that New EchoStar would be able to offer local-into-local service in at least 100 markets, more than double the 42 that are currently served by one or both companies.¹³ In addition, subsequent to the announcement of the proposed merger, DirecTV has disclosed plans to add 10 more markets in 2002 to the 41 where it already provides local lineups, increasing even more the number of markets served by at least one carrier

of other services, including video on demand and high-speed Internet access, as well as more local service. *See id.* at 28-33.

¹¹ *See* Application at 28 (“New EchoStar will provide local broadcast programming to far more communities – 100 or more, including at least one city in each state, compared to the 36 and 41 metropolitan areas that [EchoStar] and DIRECTV each respectively serve now.”).

¹² *See* Application at 28 (“New EchoStar *will* provide local broadcast programming to far more communities.”) (emphasis added); Bruce Branch, *Ergen Ready for Regulators' Evaluating EchoStar-DirecTV Merger*, Communications Daily, Nov. 8, 2001, at 4 (reporting EchoStar CEO Charlie Ergen's statement that one of the biggest advantages of the merger would be New EchoStar's “ability to meet must-carry requirements with local-into-local service in 100 markets instead of 40”).

¹³ Application at 28 & n.57.

without taking into account the efficiencies of the merger.¹⁴ Therefore, Public Television urges the Commission to require New EchoStar to carry local stations in a total of 110 markets within 120 days of the date Applicants consummate the merger.¹⁵ This step would effectively ensure that “[t]he merger will dramatically expand the number of areas that can receive local broadcast station signals and will result in more vigorous competition to cable in these areas.”¹⁶ Under this circumstance, the transfer of control would expand consumer access to local noncommercial stations consistent with Congress’s mandate to this effect.

II. THE COMMISSION SHOULD REQUIRE NEW ECHOSTAR TO PLACE ALL LOCAL STATIONS ON ITS PRIMARY SATELLITES TO BE RECEIVED ON THE MAIN DISH

The Commission is currently conducting a proceeding on the legality of EchoStar’s practice of placing some local stations in a market on its primary satellites and other “less popular” stations, including many noncommercial stations, on wing satellites.¹⁷ A subscriber can only view stations on the wing satellite by having a second dish installed at his or her home. While the second dish is offered at no charge, subscribers must go to considerable

¹⁴ See *DIRECTV to Launch Local Channels in 10 New Markets This Year* (Jan. 8, 2002), available at <http://www.directv.com/DTVAPP/aboutus/headline.jsp?id=press_123>.

¹⁵ 120 days would give New EchoStar sufficient time to decide where it would like to expand service, to notify stations in those markets, and to arrange to carry stations that opt to exercise their carriage rights. The Commission’s rules require a satellite carrier to notify stations in a market where it intends to launch local-into-local service, in writing, at least 60 days before the commencement of service. See 47 C.F.R. § 76.66(d)(2)(i). A station then has 30 days from the date of receipt of the notice to submit an election request to the carrier, see 47 C.F.R. § 76.66(d)(2)(ii), and the carrier has must begin carrying the station by the later of 90 days from the date it receives the election request or upon commencing local-into-local service in the market. See 47 C.F.R. § 76.66(d)(2)(iii).

¹⁶ Application at 29.

¹⁷ See Public Notice of Cable Services Bureau Action: National Association of Broadcasters and Association of Local Television Stations Seek Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, CS Docket No. 00-96, DA 02-31 (Jan. 8, 2002).

time and effort to obtain it, and EchoStar is not adequately making known its availability.¹⁸ Furthermore, EchoStar is not including information about stations on the wing satellites in its electronic program guide (“EPG”), and the signal quality of stations relegated to the wing satellites is often noticeably worse than stations carried on the main satellites.¹⁹ As Public Television explained in comments and reply comments filed in that docket, which are incorporated herein by reference, these practices are inconsistent with the letter and spirit of SHVIA, which was intended to eliminate cherry picking and place all local broadcasters on equal footing, as well as with the Commission’s rules.²⁰ EchoStar’s arrangement discriminates against

¹⁸ Even if EchoStar were adequately promoting its second dish offer and making the device easily available to subscribers, Congress, the Commission, and the courts have long recognized that consumers generally cannot or will not switch between two pieces of equipment to receive programming. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(18), 106 Stat. 1460, 1462 (1992) (stating that “the ‘A/B’ input selector antenna system, is not an enduring or feasible method of distribution, and is not in the public interest”); H. Rep. No. 102-628, at 54 (1992) (providing survey results demonstrating that consumers are not willing to use A/B switches); S. Rep. No. 102-92, at 45 (1991) (explaining that consumers do not use A/B switches and concluding that “[t]he technical and economic complexities involved with an A/B switch make it an unworkable solution”); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 633 (1994) (“[[M]]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services.”) (internal quotations omitted).

¹⁹ *See* Reply Comments of Public Television in CS Docket No. 00-96 (Feb. 4, 2002) (“Public Television Reply Comments”). Excluding local stations from EchoStar’s EPG is a blatant violation of SHVIA, *see* 47 U.S.C. § 338(d) (requiring carriage of local stations “in a nondiscriminatory manner on any navigational device, on-screen programming guide, or menu”), as is discriminating among local stations with respect to picture quality. *See In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, Report and Order, 16 FCC Rcd 1918, 1969 (2000) (“[A] satellite carrier should treat all local television stations in the same manner with regard to picture quality.”).

²⁰ *See* Public Television Reply Comments; Comments of Public Television in CS Docket No. 00-96 (Jan. 23, 2002). NAB and ALTV likewise contend that EchoStar’s second dish arrangement violates SHVIA’s nondiscrimination provision. *See* Emergency Petition of National Association of Broadcasters and Association of Local Television Stations to Modify or Clarify Rule in CS Docket No. 00-96 (Jan. 4, 2002).

local noncommercial and other stations that are relegated to the second dish by making them less available to subscribers. Therefore, if the Commission approves the transfer of control, it should condition its consent upon New EchoStar's: (a) carrying all local stations on its primary satellites so they are received on the same dish, and (b) displaying all local broadcast stations on its EPG in a nondiscriminatory manner, within 30 days of the merger's consummation.

These conditions would impose no hardship on New EchoStar. First, adding programming choices to the EPG should not be problematic because EchoStar frequently changes its channel lineup.²¹ Second, DirecTV presently offers local-into-local service in more markets than EchoStar, and all the local stations it carries are receivable on the same dish.²² New EchoStar could therefore use DirecTV's capacity, including, if necessary, capacity DirecTV uses for national programming that EchoStar also carries, to offer local-into-local service accessible from a single dish. Alternatively, EchoStar could use capacity on two new spot beam satellites it will launch in the next few months. EchoStar itself has described its two dish arrangement as an "interim plan" made necessary by "the failure of Lockheed Martin and Loral Space and Communications to deliver EchoStar's spot-beam satellites on time."²³ EchoStar has

²¹ See, e.g., *DISH Network Satellite TV Adds Korea's Arirang TV to International Channel Lineup* (Oct. 15, 2001), available at <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=215582>; *VH1 Classic Channel Premieres on DISH Network* (July 18, 2001), available at <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=192040>.

²² See *More Than 200 Additional Local Channels Now Available to DIRECTV Customers in 41 Markets* (Dec. 27, 2001), available at <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=243419> ("No new equipment or additional antennae are required to receive the new local channel signals.")

²³ *Ergen Tries to Clear Air with NAB on New Local Plan*, Satellite Business News Fax Update (Jan. 4, 2002); see also *Opposition to Petition for Modification or Clarification of EchoStar in CS Docket No. 00-96*, at 1-2 (Jan. 23, 2002) ("EchoStar Opposition"); *EchoStar Statement on NAB Petition* (Jan. 7, 2002), available at <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=192040> (continued...)

indicated that it will take delivery of the new satellites by early in the second quarter of this year, well before the date by which the Commission would approve the merger.²⁴ Therefore, by the time the FCC were to approve the combination, EchoStar should, according to its own statements describing the second dish arrangement as an “interim solution,” already be offering all local stations on a single dish.²⁵

* * *

Among the factors the Commission considers in determining whether a proposed transfer of control serves the public interest is whether it would be inconsistent with the objectives of the Communications Act or other related statutes.²⁶ The FCC’s inquiry goes beyond traditional antitrust analysis, which focuses on whether a merger would reduce competition, to determine whether approval would frustrate implementation of the

ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=243419> (explaining that EchoStar implemented its second dish arrangement after “Lockheed Martin and Space Systems Loral failed to timely deliver” two new satellites); Letter From Charles W. Ergen, Chairman and Chief Executive Officer, EchoStar Communications Corporation, to Edward O. Fritts, National Association of Broadcasters 1-2 (Dec. 27, 2001) (“EchoStar has implemented an interim solution that will allow us to carry all qualified stations without having to drop local service in any of the markets where we currently provide such service.”) (“Ergen Letter”).

²⁴ See Ergen Letter at 1.

²⁵ Even if there were further delays in EchoStar’s launch of the new satellites or the new satellites still could not accommodate all local stations, New EchoStar could, as explained above, use DirecTV’s capacity to provide local-into-local service on the main satellites. Alternatively, New EchoStar could move some of its national programming to the wing satellites.

²⁶ See, e.g., *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6555 (2001) (“AOL/Time Warner Order”); *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9820-21 (2000) (“AT&T/MediaOne Order”); *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168 (1999) (“AT&T/TCI Order”).

Communications Act.²⁷ This includes furthering Congress's pro-competitive, national deregulatory policy framework, which is designed to open all communications markets to competition and to preserve and advance universal service. It also involves considering whether the merger would affect the quality and diversity of communications services or would result in the provision of new or additional services to consumers.²⁸ To serve these goals, the Commission may adopt conditions to remedy specific harms and to ensure that the merger would be in the public interest.²⁹ The imposition of conditions to protect the public interest is particularly appropriate in this case because the proposed transfer of control would reduce the number of competitive DBS providers serving the public from two to one. If the merger is approved, it will be because the Commission determined that the potential public interest benefits outweigh the unquestioned negatives of reducing the number of competitive DBS providers, so attaching conditions to assure that the promised benefits of more service to more people in more locations will be realized would support the Commission's rationale.

For the foregoing reasons, Public Television urges that if the Commission approves the proposed merger of EchoStar and DirecTV, it ensures that the combination would be in the public interest by: (1) giving true effect to Applicants' assertions that New EchoStar

²⁷ See *AT&T/MediaOne Order*, 15 FCC Rcd at 9821; *AT&T/TCI Order*, 14 FCC Rcd at 3168-69.

²⁸ See *AT&T/MediaOne Order*, 15 FCC Rcd at 9821-22.

²⁹ See Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part from *AOL/Time Warner Order*, 16 FCC Rcd at 6702; *AT&T/TCI Order*, 14 FCC Rcd at 3169. In the *AOL/Time Warner Order*, then-Commissioner Powell dissented from the instant messaging condition that the Commission imposed on AOL and Time Warner. The conditions supported by Public Television in this proceeding, however, are distinguishable from the instant messaging condition because here there is a clearly defined market; there are high barriers to entry resulting from limited capacity and the fact that it is expensive to acquire a satellite; and consumers are in a sense locked-in because they make substantial investments in DBS equipment and since EchoStar's and DirecTV's equipment is not compatible, changing DBS providers becomes an expensive proposition. See *AOL/Time Warner Order*, 16 FCC Rcd at 6703-09.

would expand local-into-local service; and (2) making sure that local stations are available to subscribers on an equal basis by requiring New EchoStar to carry them on its main satellites. Imposing these conditions would serve the dual goals of promoting competition in the video programming market and expanding access to local noncommercial, as well as commercial, service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Amy L. Levine, hereby certify that on this 4th day of February, 2002, I caused copies of the foregoing Comments of the Association of Public Television Stations and the Public Broadcasting Service to be served by electronic mail on:

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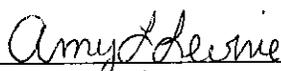
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