

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Applications of)
)
EchoStar Communications Corporation)
General Motors Corporation)
Hughes Electronics Corporation)
)
For a Transfer of Control)

CS Docket No. 01-348

PETITION TO DENY

Brunson Communications Inc. ("Brunson"), licensee of UHF television broadcast station WGTW, Burlington, New Jersey, by counsel, hereby petitions the Commission to deny the applications of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, and their subsidiaries and affiliates, for a transfer of control of licenses and other authorizations.

On December 3, 2001, EchoStar Communications Corporation ("EchoStar"), General Motors Corporation and Hughes Electronics Corporation, and their subsidiaries and affiliates filed applications to transfer control of entities holding various FCC licenses and authorizations¹ to a new corporate entity. The new entity would be formed in order to remove DirecTV, the sole competitor to EchoStar's DISH Network DBS service, from the satellite television (DBS) market. EchoStar's DISH Network would remain in operation and would remain the sole provider in the United States of DBS services. The monopoly power thus granted to EchoStar would cause DBS consumers to pay higher prices and suffer a deterioration in service. The transfers of control are not in the public interest.

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¹ A list of the various licenses and authorizations is contained in an attachment to the Commission's Public Notice, DA 01-3005 regarding this matter.

1. Brunson is a Party in Interest

Brunson is a “party in interest,” as that term is used in Section 309 of the Communications Act of 1934, as amended (47 U.S.C. §309) and has standing to submit this petition. The following facts concerning EchoStar’s activities as they relate to Brunson’s business demonstrate that Brunson has standing.

EchoStar uses direct broadcast satellite technology to broadcast on a multitude of channels to customers across the nation. Those include many thousands of customers in the Philadelphia Designated Market Area, which is the fourth largest in the United States.

WGTW is a full-service commercial television station licensed to Burlington, New Jersey. WGTW transmits an omnidirectional signal with an effective radiated power of 2340 kW from the *de facto* antenna farm located in the Roxborough section of Philadelphia. That antenna farm is common to all of the television stations in the Philadelphia/Burlington area; the closest transmitter site for any other station serving part of the market (WUVP-TV) is 49 km away.

If Brunson’s competing television stations have access to DBS customers, but Brunson does not, Brunson will suffer competitive harm. Access to fewer viewers directly correlates to less in advertising revenues because interest by advertisers in purchasing time on WGTW is related directly to the number of viewers available.

2. EchoStar is in Violation of its Duties Under FCC Rules Designed to Promote Competition.

EchoStar is obligated pursuant to the Satellite Home Viewer Improvements Act of 1999 (SHIVA), Section 308 of the Communications Act of 1934, as amended, codified at Section 76.66 of the Rules, to carry the signals of all local television stations if it carries any local television

station. This statute and rules were promulgated to assure continued competition among local television stations by assuring that all local television stations were similarly treated by EchoStar.

EchoStar has not fulfilled its must carry obligation regarding WGTW. EchoStar carries ten television stations on its Philadelphia local-into-local DBS service. Of these stations, eight are located at the Philadelphia antenna farm. EchoStar has separated its carriage of the Philadelphia DMA stations into two classes: one class is carried on the primary EchoStar satellite located at 110° W longitude; the other class is carried on a satellite located at 129° W longitude. Only the stations carried on the 110° satellite can be received by the vast majority of EchoStar's customers. Customers who wish to receive all of the Philadelphia local-into-local stations must install a second DBS receive antenna and attendant signal processing apparatus. WGTW is the only one of the commercial television stations located at the Philadelphia antenna farm that is not carried by EchoStar on the 110° satellite. WGTW suffers competitive harm because EchoStar customers cannot view WGTW without going to the trouble of having a second DBS antenna installed. EchoStar has not impeded viewing of the other Philadelphia-area commercial television stations in this fashion.

WGTW is carried, along with the other Philadelphia stations entitled to carriage, on the DirecTV satellite that provides local-into-local service in Philadelphia. No additional equipment is necessary for DirecTV customers to view the signal of WGTW. Among the negative effects of a grant of the transfer applications is the possibility that WGTW may lose current its ability to serve its local viewers via the single DirecTV satellite. If EchoStar decides to use the channel capacity gained through this transaction for the most lucrative purposes, WGTW's viewers who now subscribe to the DirecTV DBS system may be forced to install a second satellite antenna, as EchoStar has forced its own subscribers to do.

In the manner of the patricide who seeks a court's mercy because he has become an orphan, EchoStar seeks to use the must-carry difficulties experienced by Brunson and other broadcasters as leverage to force the Commission to grant the transfer applications. Whether EchoStar's current lack of cooperation is manipulative or not, at a minimum EchoStar is withholding equal carriage on its CONUS satellites until the Commission grants the transfer applications. Thus, it appears that EchoStar is using the pending transfer as an excuse to avoid fulfilling its must carry obligations. Most recently, EchoStar's Charles Ergen stated, "...[I]f and when EchoStar's pending merger with Hughes Electronics is approved, EchoStar will have enough capacity to carry all qualified local stations on the central satellites and will move all local station signals to those central satellites."²

According to EchoStar, "New EchoStar will more efficiently use spectrum to offer more local-into-local programming, provide a competitive alternative to cable television, offer more broadband services, provide better service to rural and outlying areas at nationally standardized prices, and offer more niche, educational and high-definition television programming."³ Such intentions, if sincere, would be laudable, but EchoStar has hitherto shown little inclination to do any of these things. Rather than making niche programming available, it has characterized some programming as "obscure" and has relegated it to carriage on satellites that are not available to the vast majority of its customers.

Assuming that EchoStar will act as a monopolist once it has been granted a monopoly, the effect of the proposed transfers on Brunson would be catastrophic: specifically, Brunson's ability

² EchoStar Satellite Corporation, *Opposition to Petition for Modification or Clarification*, CS Docket No. 00-96 (January 23, 2002), at 2, emphasis added.

³ FCC Public Notice, CD Docket No. 00-348, at 2.

to carry its signal to the ever-increasing number of area residents who own DBS equipment will be severely compromised.

At present, the WGTW signal is available to all of the DirecTV subscribers who purchase local-into-local service in the Philadelphia DMA. EchoStar, in contrast, has shown no genuine interest in local-into-local programming to date. It strains credulity to accept that EchoStar, after the proposed transfers, will suddenly show such interest and provide its viewers with unfettered access to all local stations. WGTW will be left with only two modes of getting its programming to its viewers: over the air reception and cable carriage. EchoStar will effectively foreclose the DBS option for smaller broadcasters such as Brunson.

The FCC should consider EchoStar's actions in unlawfully refusing to respect its must carry obligations in the context of the transfer applications. At a minimum, the Commission should not reward such conduct with monopoly status. Section 338(d) of the Communications Act of 1934, as amended by the Satellite Home Viewers Improvement Act of 1999, provides:

No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station's local market on any particular channel number or to provide the signals in any particular order, except that the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market *on contiguous channels* and provide access to such station's signals at a nondiscriminatory price and *in a nondiscriminatory manner* on any navigational device, on-screen program guide, or menu.⁴

The Commission has already held that "Section 338(d)'s nondiscrimination provision bars satellite carriers from discriminating against some broadcast stations by requiring subscribers to

⁴ 47. U.S.C. 338(d). (Emphasis supplied.)

purchase additional receiving equipment in order to access some, but not all, local signals.”⁵ The analysis does not end with a financial comparison. If nondiscrimination were merely a matter of price, there would have been no need for Congress to add the further clause “and in a non-discriminatory manner.”

Elsewhere EchoStar has claimed that it is not charging its customers for the additional receive equipment that is required in order to receive the signal of WGTW and stations similarly situated. Thus, no “purchase” of additional equipment is necessary. However, it is plain that EchoStar’s manner of carriage of WGTW unlawfully discriminates against Brunson and other disfavored broadcasters, regardless of the price paid by EchoStar’s customers to receive them. These stations are only available if customers go to the trouble of specifically requesting equipment necessary to receive the station’s signal. Thus, customers must take affirmative steps to have the signal of WGTW available, before they even know what programming is offered by WGTW. The “carry one, carry all” provisions of local-into-local were meant to put all local broadcasters on an equal footing *vis-a-vis* local viewers:

The proposed provisions are intended to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources. The Supreme Court has found both to be substantial interests, unrelated to the suppression of free expression. Providing the proposed license on a market-by-market basis furthers both goals by preventing satellite carriers from choosing to carry only certain stations and [thereby] effectively preventing many other local broadcasters from reaching potential viewers in their service areas. The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates

⁵ *Implementation of the Satellite Home Viewer Improvement Act of 1999, Order on Reconsideration*, FCC 01-249 (September 5, 2001), para 40 (“*Recon. Order*”).

and few other signals. Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage.⁶

Preservation of free local television and promoting widespread dissemination of information from a multiplicity of sources is not possible if a customer must first be aware of the availability of additional local channels, then go to the trouble of specifically requesting the equipment from EchoStar, and then wait until the equipment can be installed. This is certainly not “carriage” as of the statutory deadline of January 1, 2002 in the sense intended by Congress.

EchoStar’s selection of the stations to be placed on its secondary satellites is no accident. EchoStar has placed its choice of local network affiliates on its primary satellites located at 119° and 110° West longitude, both of which can be accessed via EchoStar’s DISH 500 receive antenna. Other stations, such as WGTW, are placed on satellites that require specialized receive equipment. EchoStar thus discriminates against WGTW by refusing to make WGTW’s programming readily available. EchoStar provided no notice to Brunson that WGTW would be exiled to this satellite Siberia.

EchoStar is not treating its two slates of local channels equally. Its own employees have effectively admitted that WGTW and the other neglected channels are left out of the picture unless the customer takes the initiative. According to an EchoStar spokesman, “if the customers want those more obscure local channels, we will provide them the second dish and the installation at no charge.”⁷

⁶ *Joint Explanatory Statement of the Committee of Conference on H.R. 1554*, 106th Cong., 145 Cong. Rec. H11795 (daily ed. Nov. 9, 1999).

⁷ Marc Lumpkin, EchoStar, as quoted in “DBS to Keep \$5.99 Local-TV Prices,” *Multichannel News*, December 24, 2001.

One of the definitions for obscure includes “in an inconspicuous position; hidden.”⁸ Clearly, EchoStar’s strategy is to make what it perceives as the “more obscure” local channels even more “obscure.” EchoStar’s placement of WGTW on a secondary satellite, together with the inability of the vast majority of its customers to view this satellite, effectively renders the compulsory carriage provisions of the Communications Act and the FCC regulations thereunder meaningless. The primary synonym for “obscure” is “dark.”⁹ “Dark” is an apt description of a television station that has lost viewers because it has been abused by bottleneck monopolists such as EchoStar.

This issue was addressed squarely by the Commission in its *Reconsideration Order*, in response to a petition filed by a group of public television station licensees:

The legislative drafting change, at most, indicated that Congress did not want to prohibit satellite carriers from requiring additional dishes generally, but the change does not imply that Congress wanted to allow satellite carriers to require additional dishes if such a requirement created discriminatory effects. We believe that *a limited prohibition on requiring subscribers to obtain a separate dish to receive some local signals when other local signals are available without the separate dish is necessary to give full effect to local station carriage requirements. Otherwise, as Public Television Stations argue, satellite carriers could structure local station packages and separate dish requirements to discourage consumers from subscribing to certain local stations, including local noncommercial stations.*¹⁰

Unfortunately, EchoStar has proceeded exactly as predicted by the public television petitioners: it has packaged the local Philadelphia stations in a discriminatory fashion. EchoStar’s plan has the purpose and effect of discouraging consumers from obtaining the signals of certain local stations, including two noncommercial educational stations as well as WGTW. These actions disrespect the FCC regulations, the intent of Congress, the rights of WGTW and the public stations,

⁸ Webster’s New World Dictionary, 1982.

⁹ *Id.*

¹⁰ *Recon. Order*, note 5, *supra*, at 41 (emphasis supplied).

and even the interests of EchoStar's own customers. They give no confidence that EchoStar will suddenly become more responsible when armed with monopoly power. It is not particularly in EchoStar's interest for smaller television operators even to exist, and by the exercise of monopoly power, EchoStar may eventually possess the means of destroying these stations.

EchoStar has fought against any must carry obligation with great vigor, in Congress, at the Commission, and in the courts. EchoStar hoped that it would be allowed to continue to "cherry pick" the stations it carries. By so doing, EchoStar could discriminate in favor of those large corporations and networks with whom it could cut advantageous deals, and against independent broadcasters. EchoStar did not make adequate arrangements to carry WGTW or other small broadcasters by the statutory deadline for carrying local stations. The public interest, as expressed by Congress, required that EchoStar carry all local TV stations if it carried one local TV station. Its failure to respect that requirement disqualifies it from the extraordinary degree of trust that would be implied in a grant of the transfer applications.

3. The Proposed Transfers Would Create a Monopoly.

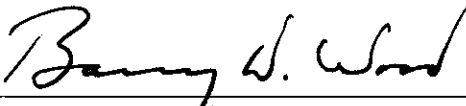
In reality, it is the fundamental premise of American antitrust policy that no party should be trusted with a monopoly if there is any way to maintain competition. Even the most public-spirited operator will, if given a monopoly, eventually be tempted to charge monopoly rates and otherwise abuse that position. Here, there is no danger that DirecTV will go out of business if it is not acquired by EchoStar in the contemplated merger. Two competing satellite operators can co-exist, to the benefit of the consumer. Their own advertising efforts bear the hallmarks of that competitive spirit, which has unquestionably served to bring prices down.

EchoStar would seek to avoid the consequences of that analysis by contending that the market in which it competes is broader than the market for DBS service. To a certain extent any number of media compete for the consumer's time and attention. However, just because some may choose to read newspapers rather than subscribe to DBS in order to watch a news channel does not mean that the acquisition by one entity of all newspapers nationwide would not violate the antitrust laws. There is no doubt but that the DBS operators collectively have provided some degree of competition to cable TV, which at one time was nearly a pure monopoly on the local level. Nevertheless, that does not mean that the DBS industry itself should be turned into a monopoly. The incentive for both DBS and cable to act in an anti-competitive fashion is only enhanced if on the DBS side of that battle there is only one entity to deal with.

For the foregoing reasons, the Commission should deny the transfer applications.

Respectfully submitted,

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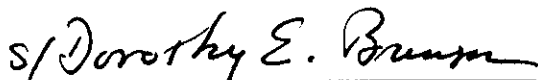
Dated: February 4, 2002

**DECLARATION OF DOROTHY E. BRUNSON
IN SUPPORT OF PETITION TO DENY**

1. I am the President and sole owner of Brunson Communications, Inc., licensee of television station WGTW, Channel 48, Burlington, New Jersey.
2. I have personal knowledge of the station's operations.
3. I have read and am familiar with the Petition to Deny against EchoStar Communications Corporation, *et al.*, to which this Declaration is attached.
4. The facts stated in the Petition to Deny and this Declaration are true and correct to the best of my personal knowledge, except those which are supported by other sources or of which official notice may be taken.

I hereby declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Dated February 4, 2001



Dorothy E. Brunson

CERTIFICATE OF SERVICE

I, Kerstin Koops Budlong, hereby certify that on this date I caused the foregoing "Petition to Deny" to be served by U.S. first class mail, postage prepaid, on the following:

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Dated: February 4, 2002

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