

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

_____)	
<i>In the Matter of</i>)	
)	
EchoStar Communications Corporation,)	
General Motors Corporation,)	CS Docket No. 01-348
and Hughes Electronics Corporation)	
)	
For Authority to Transfer Control)	
_____)	

**COMMENTS OF CONSUMERS UNION,
THE CONSUMER FEDERATION OF AMERICA,
AND THE MEDIA ACCESS PROJECT**

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COMMENTS

A. Introduction

Due to the highly concentrated nature of the multi-channel video program distribution (MVPD) market, and the particular public interest harms that may result from the combination of the first and second largest satellite video distributors in the U.S., commenters Consumers Union,¹ the Consumer Federation of America,² and the Media Access Project³ believe that the merger of EchoStar and DirecTV, absent conditions, is not in the public interest, and the Commission should deny the application for transfer of control within its public interest authority.

However, the Commission should, by imposing the conditions described below, ensure that the potential anti-competitive harms of this merger are minimized while maximizing the likelihood that EchoStar and DirecTV would expand competition for high-speed Internet services and become a meaningful price competitor to the cable television industry.

This merger should only be approved with the following conditions:

- The Commission should condition this merger on an enforceable guarantee from EchoStar that they will offer the same terms at the point of sale in rural markets that

¹Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* (with approximately 4.5 million paid circulation) regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

² The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

³ Media Access Project is a twenty-four year old nonprofit, public interest law firm that represents the interests of the public to speak and to receive information via the electronic media of today and tomorrow.

they do in adjacent markets with competitive options. Our fear is that once one of two MVPD options for rural subscribers is eliminated, the remaining company will be free to eliminate equipment subsidies and raise prices for service above levels in urban markets where the satellite company must still compete with cable.

- In the alternative, absent a guarantee of non-discriminatory pricing, terms, and conditions, the Commission should consider a structural solution—divestiture of orbital slots, satellites, or transponder capacity—to meet the needs of the rural subscribers that will suffer loss of competition.
- The Commission should expeditiously license a new Multi-channel Video and Data Distribution Service (MVDDS), and that license should be completed before the merger is approved. We recognize that this is not on its face directly implicated in this proceeding, but given that the primary opposition to licensing such a service has come from the satellite community, and given that prompt licensing of an MVDDS competitor would add an important new voice in the MVPD marketplace—a voice that could compete for both satellite and cable subscribers—by approving a MVDDS license application, the Commission could avoid a zero-sum game in this instance. Furthermore, since DirecTV never purchased any spectrum through auction and since the majority of EchoStar’s spectrum was not purchased at auction, we believe it is inappropriate to auction this license, as this will result in unreasonably delayed entry of an essential new competitor.
- The Commission should provide a mechanism that will ensure the combined entity lives up to its obligation for a public-interest capacity set-aside. The Commission should increase the size of the set-aside on EchoStar’s systems from four percent to seven, to offset the loss of diversity resulting from having only one programmer choosing who gets on the set aside. In addition, the Commission should reverse course and require that a body distinct from the DBS operators select programming to appear on EchoStar’s set-aside.
- Finally, the Commission should require the combined EchoStar/DirecTV to provide open access for competitive Internet Service providers in its broadband service offering. Such access should be at least equivalent to that provided by the Federal Trade Commission in the merger of AOL and Time Warner.

B. The Multi-channel Video Program Distribution (MVPD) Marketplace is Highly Concentrated and Any Additional Concentration Raises Large Competitive Concerns.

Concentration in the MVPD marketplace has continued unabated for the last several decades. Although statutory provisions designed to foster competition, such as program access, have helped to ameliorate some abuses, the increased national concen-

tration allows cable MSOs to engage in a variety of anticompetitive behaviors. As concentration increases, so does ability to do harm.

Any additional concentration, such as that proposed in the EchoStar/DirecTV merger, presents a problem of anticompetitive behavior. The potential abuses in this transaction are heightened for many rural consumers since they often do not have a cable option, in addition to a satellite offering. This argument is explained in more detail below.

In 1997, the Federal Trade Commission (FTC) concluded that the cable television programming market was highly concentrated.⁴ It further concluded that entry into the programming market is “difficult,” taking “more than two years to develop [a service] to a point where it has a substantial subscriber base and competes with ... ‘marquee’ ... service[s]” *Id.* ¶34.

In 1998, the Department of Justice filed a complaint to prevent the sale of MCI and News Corp.’s U.S. DBS interests to Primestar. *Complaint of United States, United States v. Primestar*, Docket No. Civil No.: 1:98CV01193 (JLG) (filed May 12, 1998).⁵ The complaint details how the cable industry colluded to deny carriage of News Corp.’s cable programming until News Corp agreed to abandon its plans for facilities-based competition against cable via its DBS assets and agreed to sell them to Primestar, a joint venture of cable MSOs.

In 1999, as part of the order now on remand, the Commission found “credible evidence” that cable programmers continued to use their market power to force programmers to deny programming to rivals, in direct violation of Section 613(f)(2)(A)-

⁴ *Time Warner Inc., Turner Broad. Sys. Inc., Telecommunications Inc., and Liberty Media Corp.*, FTC Docket No. C_3709, Complaint, ¶30, 1997 WL 65377 (Feb. 3, 1997).

(2)(B). *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 – Horizontal Ownership Limits, Third Report and Order*, 14

FCC 19098, 19122 (1999) (“1999 Cable Ownership Order”). The Commission found:

WCA and Ameritech proffer credible evidence that indicates MSOs have used their market power to cause unaffiliated programmers to refuse to sell their programming to other MVPDs...Ameritech and WCA state that, because of the MSOs’ monopsony pressure, unaffiliated cable networks such as Fox News, MSNBC, Game Show Network, Eye on People, Home & Garden Television and TV Land act like vertically integrated programmers and refuse to sell their products to alternative MVPDs.

Id. and n.128.

Given this existing high level of concentration, and ability to leverage market power to harm competition, a merged EchoStar/DirecTV, the third and eighth largest MVPDs in the market, raises substantial concern that the combined company could exercise market power to the detriment of MVPD customers through inflated prices or reduced quality of service.

C. Satellite and Cable Occupy Distinct Product Spaces and Therefore the Merger Presents Particular Competitive Concerns for Rural Subscribers But May Have Some Offsetting Pro-Competitive Benefits.

1. Satellite Does Not Compete With Basic Cable Service Because Satellite Subscribers Consist Primarily of Those Who Cannot Get Cable and Mega-Consumers of Video Programming

Despite claims by the Commission and cable providers, satellite is not a substitute for basic cable service. Since cable operators avoid competing with each other head-to-head, alternative distribution media have been viewed by policy makers as the vehicle to break the cable monopoly. For almost two decades since the initial deregulation of cable, consumers have been told that some new technology is just around the bend. But the

⁵ Available at <http://www.usdoj.gov/atr/cases/indx41.htm>.

notion of satellite as an all-purpose competitor and price disciplining force for cable is a promise as yet unfulfilled.

Satellite was the highly-touted savior of cable's monopoly power abuse in the 1990s, but did not curtail pricing abuse or diminish cable's market power. Rates for cable service are up 36% since the passage of the 1996 Telecommunications Act.⁶ Instead of disciplining cable, satellite competition is predominately restricted to two niches – a rural niche and a mega-service niche.

Fully 40 percent of satellite subscribers cannot get cable—we call this the “rural niche,”⁷ since most of those subscribers live in rural areas not wired for cable. The remaining satellite subscribers tend to buy a high-volume, high-cost product that competes only with a small subset of mega-service cable customers. In contrast, in the heart of the cable market – 42 million “lunch bucket” cable subscribers – competition is muted. While it may be true that satellite is available as a distribution mechanism for its market niches, in the largest part of the market, satellite lacks the force to compel cable to rein in its prices.

2. Satellite and Cable Occupy Distinct Product Spaces as Evidenced by the Fact That Satellite Does Not Price Discipline Cable Service.

The cable industry and the Federal Communications Commission claim that satellite services are a widely available alternative to monopoly cable franchises, and serve as disciplining forces at the point of sale and at the national level in the market for programming.

⁶ Source: Bureau of Labor and Statistics.

⁷ See Comments of CFA, et al., *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, et al.* CS Docket No. 98-82 (hereafter, “CFA Comments”).

At the point of sale, as a distributor of programming to the public, it is argued that if cable operators raise their prices too high or let their quality slip (by favoring their own programming or scrimping on programming expenses to increase profits) people will switch to satellite.

At the national level, as a buyer of programming, satellite is said to provide access to eyeballs. It is claimed that as an independent buyer of programs it becomes part of the open field necessary to allow programmers who are not owned or affiliated with cable operators to reach a large enough audience to succeed.

However, if cable lacks significant multichannel competition, it will not be pressed to deliver quality products and program producers will not have an effective alternative distribution mechanism to reach the public. We have demonstrated in more detail elsewhere⁸ that satellite services do not play nearly as competitive a role in core segments of the multichannel transmission and program distribution markets as the industry claims. For the “lunch bucket” cable subscriber, satellite is not an effective alternative for cable.

Moreover, satellite’s ability to discipline cable in upscale markets is diminishing. As digital cable and cable modem services expand, satellite’s advantage in the high-end niche programming market will be eroded unless satellite can offer a more robust and price competitive broadband offering than is currently available to satellite subscribers.

During the second period of cable regulation, from 1992-1995, cable rate increases were diminished and the satellite TV industry came into existence. Cable added approximately 7 million subscribers between the end of 1992 and 1995, boosting

⁸ *Id.*

the total to about 62 million. Its penetration rate grew at a slightly higher rate than at any time after the first period of cable deregulation, from 1984-1992.

During 1992-1995, satellite systems also grew from about 1 million to 4 million subscribers. Apparently, the growth of satellite did not discipline the cable TV industry. Since the passage of the 1996 Telecommunications Act, with expanded basic rates in rural systems immediately deregulated and other regulations phased out, cable TV returned to its historic pricing pattern, unrestrained by the pressures of satellite competition. In real terms, cable rate increases were larger with the presence of an expanding satellite sector than without it.

Even in the midst of the furor over delivery of local stations by satellite, the largest satellite provider eschewed price competition for the basic package.

Congress has been moving at an unusual speed to pass a bill that would give DBS providers the right to beam local network signals to local subscribers ...

“It’s not a cure-all,” said Hartenstein, who has run DirectTV since its inception in 1990. For one thing, Hartenstein’s business plan is not based on beaming local network signals to his customer base, soon expected to top 9 million. Instead, he is suggesting that subscribers buy new antennas to supplement their coverage. DirecTV is working with retailers to have the specialized antennas available at reduced prices. He calls this program “Distant/Terrestrial,” meaning he sends you all the cable and movie channels you could dream of (for which he can charge), and you pick up the free network feeds with an extra antenna.

The segmentation of the market has become more and more apparent once the right to retransmit local broadcast stations was granted.

“What is going to happen is every few months there is going to be a new development,” [Thomas Egan, a cable and satellite analyst with PaineWebber in New York] said. “I think what will happen is they will try to compete less on price and try to compete more on services.”

Mr. Egan said expected cable companies to focus their energy on high-speed Internet and new digital services, while satellite companies would be focusing on increased programming.⁹

The vast majority of cable customers are victimized by cable pricing because the high-cost, high-capacity DBS offering exceeds their means or their needs. A recent study by the FCC did not find a significant price disciplining effect of satellite on cable.¹⁰ Cable makes much more money by increasing prices for basic cable than competing in the DBS niche. The revenue gained by increasing cable prices to existing subscribers since the Telecom Act of 1996 exceeds the revenue lost to all DBS-only subscribers by almost 2-to-1 and all DBS-only subscribers in areas where cable is available by 3-to-1. Cable revenues added from new subscribers, at the higher prices, just about equaled cable revenues lost to new DBS-only subscribers in areas where cable is available at the old prices.¹¹

The addition of high-priced digital cable and cable modem Internet services strengthens cable's advantage over satellite.¹² These high-end services allow cable opera-

⁹ Clausing, Jeri, "Satellite TV is Poised for New Growth," *New York Times*, November 26, 1999, p. C-6.

¹⁰ Federal Communications Commission, *Pricing Analysis*, February 2001. The study did find a weak subscriber effect. Even though satellite is not cross elastic on price, larger satellite subscribership does have a small effect in taking subscribers away from cable. There is also evidence that satellite is much more effective where cable quality is weak. Neither of these observations is inconsistent with our argument that satellite is not sufficiently competitive to discipline cable pricing.

¹¹ The pricing strategy was apparent to some industry observers, as a Cisco publication noted (Abe, George, *Residential Broadband* (Cisco Press, Macmillan Technical Publishing, 1997), p. 217.

Cable MSO management apparently agrees it is necessary to get more from each subscriber. Since the passage of the Telecom Act of 96, cable operators have taken the opportunity to raise subscription rates more than twice as fast as the consumer price index, clearly not a strategy for getting new households.

¹² Boersma, Matthew, "The Battle for Better Bandwidth – Should Cable Networks be Open?," *ZDNet*, July 11, 1999.

tors to attack the high-end niche that satellite occupies. Cable will be able to leapfrog satellite at the high-end of the market, particularly when it is bundled with high-speed Internet access.

3. Satellite Does Not Compete With Cable Because of Different Pricing Characteristics, Especially Higher Up-Front Costs.

Direct Broadcast Satellite (DBS) fills a niche at the high end of the market.

DBS's large channel capacity and high front-end costs dictate the offering: large bundles of high priced channels, long-term contracts, and substantial costs to the consumer for equipment. DBS is pursuing the smaller group of customers who seek these large packages and are able to bear the up-front costs of a satellite dish and installation.

4. Because Satellite is Often the Only MVPD Option for Rural Subscribers, This Merger Presents a Particular Competitive Concern for Those Subscribers.

The greatest potential harm of this transaction is in going from two competitors to one in rural, "unwired" areas. This merger presents the threat of monopolistic pricing for customers who have no alternative to satellite.

Demand for MVPD services is extremely inelastic, and likely even less elastic for rural subscribers who are more isolated from other forms of entertainment. When a satellite operator becomes the only competitor in a particular area, there is greatly reduced pressure for the operator to offer the same equipment subsidies as offered in urban areas where the competition against cable is cutthroat.

It has long been recognized that satellite subscribership is much higher in rural areas. Simply put, satellite penetrated first and foremost in areas where cable was not available. For example, in filings at the FCC, DirecTV states that its subscriber base was

half urban and half rural.¹³ In the recent past, however, it claims that about two-thirds of new subscribers have been from urban areas. Given that over three-quarters of the U.S. population lives in urban areas, satellite subscribers are still disproportionately rural.

In other words, this analysis shows that for a substantial part of the satellite base, head-to-head competition with cable is muted. For approximately 40% of the satellite subscribers, cable simply cannot compete.

This merger presents the prospect of rural subscribers having competition in their video marketplace contract from two providers to a single satellite company. This presents a substantial problem of monopoly abuse of these customers. Since those subscribers constitute approximately 40% of the DBS marketplace, this is a significant concern. These rural consumers are likely to face increased prices, reduced equipment subsidies, and are less likely to receive their local broadcast stations from a satellite monopoly.

5. This Merger May Potentially Provide Efficiencies That Will Allow it to be a Stronger Competitor to Cable.

a. The Merged Entity May Be Able to Provide More Local Programming.

One of the primary obstacles for satellite to become a robust competitor for cable's core subscribers has been a lack of local programming. Local broadcast television programming is still some of the most popular programming on television; even accounting for the loss of market share to cable channels that has occurred over the last several decades, prime-time viewership of the broadcast networks still matches the viewership of *all cable channels taken together*. Satellite customers must often supplement their satellite service with a television antenna and a signal splitter to receive

¹³ Seventh Annual Report, para 66.

local broadcast channels. However, the quality of over the air reception does not often match either the quality of satellite or cable reception. The only option to this technologically awkward solution is for satellite subscribers to purchase basic cable service to receive local channels—and surprisingly, a large number of subscribers do actually purchase both services.¹⁴

This is borne out in the Consumers Union survey, where satellite subscribers who also take cable have a lower cable bill than other cable subscribers, indicating they are likely taking cable as a broadcast complement. They are almost three times as likely to report that their cable bill is less than \$30 per month (46 percent to 17 percent), suggesting they take the basic tier which gives them the local channels they cannot get with satellite. They also report watching many fewer channels than other satellite subscribers and cable subscribers.

The Satellite Home Viewer Improvement Act (SHVIA) opened the door to offering local broadcast channels over satellite in the largest broadcast markets in the country. However, given that the satellite companies are now subject to an additional must carry requirement it is unlikely that as separate companies they would have the capacity necessary to offer local broadcast service in all small to medium size markets. While it may be true that it is technically possible for these companies to offer all local channels today, this does not appear to be an economically feasible proposition.

The combination of EchoStar and DirecTV would add substantial satellite capacity and would avoid the redundancy of two competitors having to offer the same local signals in the same markets. As a result, these two competitors will be able to offer

¹⁴ In the Consumers Union survey, approximately 11 percent of the respondents in the Consumers Union survey take both cable and satellite service.

substantially more local programming as a combined entity than either of them would be able to do alone.

We therefore believe that it would be appropriate for the Commission to condition the merger on a commitment to provide all local broadcast channels in all markets where technically feasible. This would move EchoStar/DirecTV into direct competition with local cable companies nationwide for the lowest-price offering of the most popular television programming.

b. The Merged Entity May be Able to Provide a More Robust Broadband Service Offering.

The merging entities claim that this merger, if consummated, will give them greater efficiencies for a stronger broadband service offering. While we cannot evaluate the accuracy of those statements, if the combined EchoStar/DirecTV is able to lower the cost of high-speed Internet services for rural subscribers and offer open access to their broadband platform as we describe below, consumers will benefit enormously.

D. The Commission Should Adopt Safeguards for Capacity Set Aside to Ensure EchoStar Complies with its Statutory Obligations under Section 25(b) of the 1992 Cable Act.

Section 25(b) of the 1992 Cable Act requires DBS operators to set-aside four to seven percent of their capacity for noncommercial, educational and informational programming and prescribes a cap on the cost that operators may charge non-commercial programmers to appear on the set-aside. 47 U.S.C. §335(b); 47 C.F.R. § 100.5(c). The presence of multiple DBS operators has aided the Commission's ability to implement and enforce this statute and its rules. As a result of this merger, the Commission will lose its ability to benchmark the performance of the two remaining significant DBS operators. In

addition, the importance of ensuring compliance increases because the public will lose the benefit of multiple corporate entities making decisions about which programmers will be placed on the non-commercial educational set-aside.

The Commission should condition any approval of the merger on adoption of the following safeguards. First, the Commission should increase the size of the set-aside on EchoStar's systems from four percent to seven, to offset the loss of diversity that will result from having only one company choosing who gets on the set-aside. Second, the Commission should reverse course and require that a body distinct from the DBS operators select programming to appear on EchoStar's set-aside. In addition, the Commission should impose additional reporting and enforcement obligations if it approves the EchoStar/DirecTV merger. Although the need for these obligations would be evident regardless of this merger's structure, the need for such obligations is even more apparent because EchoStar is the acquiring party: EchoStar has been the most recalcitrant DBS operator with respect to its Section 25(b) obligations.

1. Non-Commercial Programmers are at the Mercy of DBS Operators

When the Commission implemented Section 25(b), it decided that DBS operators should select which programmers should appear on the set-aside. *DBS Public Interest Order*, 13 FCC Rcd 23254, ¶¶93-114 (1998). This selection simplified the process of populating the set-aside, but put non-commercial programmers at the mercy of DBS operators. In order to be selected, non-commercial programmers must be on good terms with DBS operators. This means if a non-commercial programmer disagrees with an operator about contract terms or the appropriate legal limits, non-commercial programmer risks being eliminated from the set-aside altogether. In fact, as described in

detail below, we believe that at least one non-commercial programmer was a victim of retribution because that programmer was willing to file a complaint at the Commission to force an operator to comply with the law and the Commission's rules.

2. The Loss of DirecTV as a Separate Operator Will Impair the Commission's Ability to Enforce Its Rules Regarding the DBS Non-commercial Set-Aside.

Without DirecTV's separate provision of noncommercial educational set-aside capacity, the FCC will lose the ability to compare the performance of two companies' performance. In addition, non-commercial programmers will lose the ability to compare the offers of each company to determine whether the DBS operators are complying with the law. Commission merger review precedent recognizes this loss as a significant harm that deserves remedy by the imposition of conditions. DBS operators are virtually the only providers of satellite-delivered non-commercial set-aside programming.¹⁵ Without action by the Commission, the already weak negotiating position of non-commercial programmers will be reduced even further, endangering enforcement of the 1992 Cable Act.

The Commission's public interest review includes as its third prong, the ability of the Commission to enforce its rules and the law after the merger. *SBC/Ameritech Order*, 14 FCC Rcd 14712, 14737, ¶ 48 (1999). The FCC has recognized that the presence of several market participants enables regulators and others to benchmark the performance of multiple companies against each other. *SBC/Ameritech Order*, 14 FCC Rcd at 14770-95, ¶¶ 125-185. The Commission recognized that this benchmarking is preferable because it is less intrusive than other types of regulation. *Id.* In the context of the

¹⁵ While there are other "large dish" satellite programming providers, these providers are not a significant

SBC/Ameritech merger, the Commission also explicitly recognized that market participants can use the varying proposals and policies of monopoly providers to negotiate agreements with them. *Id.* at ¶¶ 140-43.

Because DBS operators are virtually sole providers of satellite delivered non-commercial set-aside programming capacity, non-commercial programmers are in the identical position to CLECs negotiating with ILECs that the Commission considered in the *SBC/Ameritech Order*. There the Commission recognized the serious losses to competition and private negotiation because of the merger and imposed conditions to ameliorate that harm. Similarly, the Commission faces the same situation in the EchoStar/DirecTV merger that it did in *SBC/Ameritech*. The Commission will lose the ability to compare the performance and behavior of the two major DBS operators. The presence of other satellite operators also subject to Section 25(b) will not ameliorate this problem. As the Commission found in the *SBC/Ameritech Order*, the presence of smaller competitors with different structures and market presence does not substitute for similarly situated competitors. *SBC/Ameritech Order* at 14786, ¶159.

3. The Loss of DirecTV Will Reduce Competition in Program Selection and Thus Will Harm the Public and Weaken the Impact of Section 25(b).

Not only will the loss of DirecTV as an independent entity reduce the ability of non-commercial programmers and the Commission to implement Section 25(b), but the loss of DirecTV as a decision-maker will also reduce the diversity of programming on the set-aside by consolidating the selection process under one roof. The goal of the 1992 Cable Act and Section 25(b) is to promote the diversity of speech on video distribution media. 1992 Cable Act, §2(b)(1). Under the framework adopted by the Commission,

source of set-aside programming.

diversity is partially promoted by allowing each satellite operator to select the programming that will appear on its set-aside. If the number of DBS operators is cut in half as a result of this merger, so will the number of companies making decisions about the noncommercial programming the public will see.

4. EchoStar Has a Poor Track Record With Respect to Section 25(b).

While the need for safeguards is evident without respect to the particular parties at issue, the fact that EchoStar will be the dominant party after the merger adds impetus to the need for safeguards to implement Section 25(b). EchoStar has demonstrated repeatedly an unwillingness to comply with the Commission's rules and the law. The Commission has intervened several times to force EchoStar to comply and has fined EchoStar for non-compliance.

First, EchoStar concluded that it would place all of the noncommercial programming on its satellite located at 61.5 degrees. A non-commercial programmer, ADEC, filed a complaint against EchoStar. The Commission concluded that EchoStar's plan was not in compliance with the Commission's decision and the law, and directed EchoStar to locate the programming where all of its subscribers could obtain it free of charge and without purchasing additional equipment. *ADEC Complaint Order*, 14 FCC Rcd. 19976 (1999).

ADEC also challenged EchoStar's method of calculating the cost of appearing on the set-aside. The statute placed limits on the expense that could be charged to non-commercial programmers. Section 25(b) directed the Commission to determine an appropriate rate. The statute states that the price cannot exceed 50 percent of the direct costs of making the channel available and that the Commission should take into account

the non-profit character of the programmer to whom the channel is being provided. The Commission adopted suitable and appropriate cost rules. *DBS Public Interest Order* at ¶¶126-34; 47 C.F.R. §100.5(c)(5). The Commission deferred its decision about appropriate costs to allow ADEC to analyze EchoStar's cost information, which it has previously refused to disclose. *ADEC Complaint Order*, 14 FCC Rcd. 19976 (1999). Unfortunately, and perhaps not coincidentally, EchoStar did not ultimately grant ADEC space on its non-commercial set-aside. At EchoStar's request, the Commission thus dismissed ADEC's pricing complaint as moot. *ADEC Complaint Dismissal Order*, 15 FCC Rcd. 13,638 (Int'l. Bur. 2000).

Finally, EchoStar flagrantly ignored the impending deadline to implement Section 25, despite having over one year's notice of the precise deadline and eight years since Section 25(b) was initially adopted. EchoStar not only sought a last-minute waiver of its obligation to make up for its failure to take its regulatory obligations seriously, but blamed the impending Y2K preparations for this failure. As Media Access Project explained at the time, Section 25(b) had existed since 1992, long before "Y2K" was a commonly understood term. Media Access Project *ex parte* letter, File No. SAT-WAV-19991210-00116 (filed Dec. 17, 1999). Most important, in a strongly-worded order, the Commission found EchoStar did not have good cause to miss the deadline and denied most of its request. The Commission granted EchoStar a very limited amount of time to comply with the rules, *EchoStar Waiver Request Order*, 15 FCC Rcd. 1814 (1999), and fined EchoStar for the days that EchoStar was out of compliance. *EchoStar Notice of Apparent Liability*, 15 FCC Rcd. 5557 (Enf. Bur. 2000).

5. Conditions Regarding the Public Interest Set Aside Could Ameliorate These Harms.

As the precedent of the *SBC/Ameritech Order* demonstrates, the Commission has an obligation to ameliorate the harms to the public interest caused by the merger of EchoStar and DirecTV. Several options would ameliorate the harms. The most effective solution to these difficulties would be to appoint a separate body to select programming to appear on EchoStar's set-aside and to negotiate prices, as originally considered in the *DBS Public Interest Order*. Such a body should be independent from EchoStar and would select programmers based on appropriate criteria. In the alternative, to address the vulnerability of non-commercial programmers and the inability of the Commission to benchmark behavior, the Commission should require EchoStar to submit and/or describe the contract terms it develops between it and non-commercial programmers. For example, EchoStar could submit a summary of each contract that includes the length of contract, price terms, orbital slot, and any other terms that allow EchoStar to terminate the carriage contract. This information is material that EchoStar certainly keeps in its current records, so it would not require additional administrative effort. A summary report would conserve Commission resources in reviewing the material. EchoStar should also submit detailed pricing data so that the Commission can determine whether they violate the law and the Commission's rules.

If the Commission leaves EchoStar in a position to select programmers for the set-aside, the Commission should create a confidential feedback or complaint system for non-commercial programmers. This system could be based on the Commission's current *ex parte* rules allowing for confidential submissions when a party fears reprisal. 47

C.F.R. §1.1204(a)(9). This would allow the Commission to, at a minimum, monitor compliance without endangering the carriage of worthy non-commercial programmers.

E. Despite the Potential Harms of This Merger, the Commission Would Better Meet its Public Interest Obligations by Conditioning, Rather Than Blocking This Merger.

Unless the Commission imposes conditions on this merger to mitigate the public interest harms of the transaction, it should be denied.

1. Because of the Alleged Efficiencies of the Merger, It May Create a Stronger Competitor to Cable.

Insofar as this merger will allow the combined entity the ability to offer local broadcast channels everywhere, including small rural markets without a cable option for local broadcast, it will create a much stronger competitor to cable. In addition, the cost savings/efficiencies of the merger could lead to more price competition with cable. Because of these potential positive benefits, we urge the Commission to approve the transaction with conditions.

2. The Commission Could Avoid a Zero-Sum Game and the Loss of Rural Competition By Expediently Licensing a New Multi-Channel Video and Data Distribution Service (MVDDS) Competitor.

The loss of competition that will result from this merger could be offset were the Commission to expediently license a new Multi-channel Video and Data Distribution Service (MVDDS). We recognize that the MVDDS docket is not directly implicated in this proceeding. But given that the primary opposition to licensing such a service has come from the satellite community, and given that prompt licensing of an MVDDS competitor would add an important new voice in the MVPD marketplace—a voice that could compete for both satellite and cable subscribers—by approving a MVDDS license

application the Commission could avoid a zero-sum game in this instance.¹⁶ The public could benefit from the expansion of popular local broadcast channels on satellite, more price competition for cable services and high-speed Internet services, plus the competitive benefit of a new MVPD player.

Our concern is that the Commission has let the incumbent DBS providers unreasonably delay this proceeding and thwart the entry of new competition. DirecTV and EchoStar have been encouraging the Commission to auction this spectrum; we believe that an auction will increase price and delay entry, and are not the best way to promote competition in this band. DirecTV has never purchased any spectrum in an auction and the majority of EchoStar's spectrum was also acquired without an auction.

While it would be preferable to go from three to four competitors in urban markets (through MVDDS entry), and from two to three competitors in rural areas, even holding the number of competitors constant by approving a MVDDS license would provide one avenue for resolving the most significant problems involving increased concentration presented by this merger.

3. The Merging Companies Should Bear the Burden of Guaranteeing That They Will Not Engage in Monopolistic Pricing in Those Rural Markets Where There Will No Longer Be Satellite to Satellite Competition.

Even if the Commission is to license a new MVDDS competitor, the market will still remain highly concentrated and it is uncertain whether a new licensee can enter the market fast enough, including meeting their burden to disprove interference problems.

Additional protection beyond MVDDS licensing is necessary. The Commission should

¹⁶ The argument regarding the public interest benefit of licensing a new MVDDS competitor is spelled out fully elsewhere. See *Comments of Consumers Union, et al., In the Matter of Amendment of Part 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-band Frequency Range*, ET Docket No 98-206.

condition this merger on an enforceable guarantee from EchoStar that they will offer the same terms at the point of sale in rural markets that they do in adjacent markets with competitive options. Again, our fear is that once one of two MVPD options for rural subscribers is eliminated, the remaining company will be free to eliminate equipment subsidies and raise prices for service above levels in urban markets where the satellite company must still compete with cable.

If EchoStar can demonstrate to the Commission that it will have non-discriminatory pricing—the same rates, terms and conditions in rural areas as in adjacent competitive markets, including the same equipment subsidies, promotions and service options—for rural subscribers without competition as for subscribers in adjacent competitive markets, the most significant potential harm of this merger could be mitigated.

4. The Commission Should Consider the Possibility That There May Be a Structural Condition, e.g. Divestiture of Satellite Capacity to Serve Rural Subscribers Who Will Suffer a Loss of Competition.

We urge the Commission to consider whether there is a structural condition that could decrease the harms of this transaction. By requiring Echostar/DirecTV to divest adequate satellite capacity to meet the viewing needs of the portion of the population that does not have competitive options, the potential harms of additional concentration in the MVPD marketplace could be offset. Although we are not in the technical position to determine whether this is the best course of action, as an alternative to the prices, terms and conditions requirement discussed above.

5. The Commission Should Ensure That the Merged Entity Will Provide Open Access to Unaffiliated Internet Service Providers, to the Extent Technologically Feasible.

Given the high levels of concentration in the broadband market,¹⁷ we believe that the combined company should be required to offer open access to the same extent as AOL Time Warner. Unfortunately, those who were confident that open access would win the day in the marketplace have so far been wrong.

To the extent technically feasible, the combined satellite entity should offer open access comparable to what is spelled out in AOL Time Warner's consent decree.¹⁸ This carries additional importance since for many satellite subscribers, satellite broadband is the only option they have available (since they have no cable wire and DSL is only available within about a three mile radius of a phone company's central office—well out of the reach of most rural subscribers). Eliminating one of two competitive options for rural subscribers makes it even more critical that the Commission ensure openness on the satellite broadband platform. We recognize that there may be technological constraints on a full implementation of open access, but with a commitment from EchoStar to work as rapidly as possible towards an open system, rural subscribers could benefit enormously from this transaction.

F. Conclusion

Despite the enormous dangers of the high concentration that would result from the EchoStar/DirecTV merger, the conditions that we propose would minimize or substantially eliminate the most significant consumer concerns. By licensing a new MVDDS service and ensuring that the efficiencies of this merger pass through to consumers in the form of more local broadcast programming and an open broadband

¹⁷ See Agreement Containing Consent Orders, *In the Matter of America Online, Inc. and Time Warner*, FTC File NO. 001 0105 (finding that the broadband market “is highly concentrated and the proposed merger, if consummated, will substantially increase that concentration.”)

Internet service offering, consumers would receive the benefit of a new voice and the potential of a price competitor to cable television monopolies. On balance, approval of this merger with the conditions described above would best serve the public interest.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Murray". The signature is fluid and cursive, with a long, sweeping tail on the "y".

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¹⁸ Id.