

February 4, 2002
Via Electronic Filing

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

RE: CS Docket 01-348

Chairman Powell,

The merger currently being considered between EchoStar Communications and Hughes Network Services may be one of the most important decisions to face the Commission in recent years. This is unlike any other because nearly all previous mergers concerned companies with terrestrial facilities which while having deep consumer impact, had no bearing on use of spectrum whatsoever. Copper and fiber are a renewable commodity, unlike the DBS spectrum under discussion here. After reviewing most of the previously filed comments on this matter, I am concerned to see that the majority are against the merger. Not based on facts, but for reasons of emotion. A decision affecting the efficient use of spectrum should always consider the facts, and the best usage of a limited resource.

DEFINING THE RURAL MARKET

There seems to be deep concern as to the lack of competition in the rural marketplace. It is my contention that this market is not significant enough to warrant this level of concern. Often the facts become diluted in the myth and legend of lobbyists and activists. The facts in this case indicate that the most rural markets will be least impacted by the proposed merger.

According to the Nielsen Company's data for the 2001-2002 TV season, there are 105.5 Million TV Households in the United States ¹. Currently the DBS companies are duplicating service in the top 43 markets, representing 63% of TVHH. The combined "New EchoStar" has already committed to serving at least the top 100 DMA's, bringing this number to 85.4% of TVHH. The remaining 110 DMA's in total represent only 14.6% of the US TV households. In fact, by the time you get to DMA 166, it contains less than one tenth of one percent of the total US TV Households. Admittedly, while these markets are very small, we certainly do not want to disenfranchise them.

¹ Nielsen Media Research Local Universe Estimates for the 2001-2002 Broadcast Season available at www.nielsenmedia.com/dmas.html

The availability of cable also needs to be considered. Many claims are being made that as many as 30% of the TVHH in some rural states may not have a choice for their MVPD if this merger is permitted. Again the facts do not back this up.

According to the NCTA,² 96.7% of all TVHH are passed by cable. Their same data indicates that 69.9% of those homes subscribe to at least basic cable services. It appears that others filing comments may be basing their opinions on the actual subscription rate, rather than the availability of cable in these areas. The 26.8% of homes passed that do not subscribe to cable services have already made a choice. They have chosen DBS, C-band or OTA as their source for TV reception, and must be factored into the equation as served households.

When we discuss those that will be left without choice under the proposed merger it is only the remaining 3.3% of TVHH that need to be considered. Mostly, these are homes in remote locations that are “off the grid” for most amenities like public water and natural gas. The fact that they are unpassed by cable is not discriminatory, but a function of their choice to live in a rural environment.

Another consideration when defining the rural market is that of DBS penetration. There are currently 40 states where DBS serves at least 15% of TVHH³. That goes up as high as 41.27% for the state of Vermont. Of the 34 States which have representatives participating in the Rural Caucus response to this action, only New York and Pennsylvania have less than 15% DBS penetration.

IMPACT OF THE “LOCAL TV ACT”

This public outcry for the needs of the rural viewer seems to be forgetting that in the year 2000, Congress addressed the issue of Rural TV with the “Rural Local Broadcast Signal Act”, (LOCAL TV Act), a \$1.25 Billion loan guarantee program with the sole intent of bolstering local broadcast television services to rural and underserved areas. According to Mr. Bob Phillips, the president and CEO of the National Rural Telecommunications Cooperative (NRTC)⁴, “Consumers in rural America can rejoice today. The loan guarantee program will make it possible for the work to begin on providing rural Americans with the same level of access to local television programming—and perhaps high speed internet service—as those who live in big cities.” Surely a bill as monumental as this should be considered when determining what exactly will constitute an underserved market.

The original intent of SHVA⁵, and the recently approved SHIVA⁶ was to assure the American consumer has a choice of MVPD. While marketplace competition and ultimately natural

2 National Cable & Telecommunications Association—Industry Statistics as of November 2001 available at www.ncta.com

3 Source: SkyTrends-SkyMap, 2001

4 National Rural Telecommunications Cooperative - NRTC CEO Calls Loan Guarantee Program a Major Victory For Rural Consumers - December 21, 2000

5 Satellite Home Viewer Act of 1988, amended 1994

6 Satellite Home Viewer Improvement Act of 1999 November 29, 1999

selection took place, it was not the intent of SHIVA to foster competition within the DBS marketplace, rather that DBS could effectively compete in the MVPD arena. The strongly entrenched cable companies have been deploying digital technology at a rapid pace in response to inroads made by DBS. Since 1970 the number of cable systems operating in the US has gone from 2490 to 10,400 today ⁷. The number of subscribers on these systems now receiving Digital Service has increased more than 9 fold in just 4 short years, serving over 13.7 Million TVHH, more than either EchoStar or GMH serve currently.

CABLE INCUMBENCY

Statistics indicate that the incumbent cable concerns are not only holding their own, but growing rapidly. The combined subscriber growth of both EchoStar and GMH for the year 2001 was just under 3 Million net additions. When compared to the 4 Million new subscribers won by Digital Cable interests during the same period ⁷, it is easy to see that DBS is far from the prevalent technology.

While cable claims that DBS has controlled prices and that competition exists in the MVDP marketplace, the facts speak for themselves. In recent years we have seen cable rates increase many times that of inflation, while the DBS companies have held rates with no more than a \$1 increase to basic service. With programming cost continuing to accelerate, DBS needs leverage to negotiate. Leverage that will be provided through the combined subscriber count of the merged company. Contrary to concerns of a “monopoly” that will raise prices at will, the merged DBS company will be vigilant in its pursuit of controlled costs. Only with competitive pricing can DBS hope to remain viable against the cable monolith.

The recent negotiations with Disney/ABC Family is a perfect example of EchoStar’s unwillingness to accept increases as routine and simply pass them on to subscribers. While the outcome of this negotiation remains undecided at this time, EchoStar has a long history of providing consumers with high value subscription services, and holding prices stable for as long as possible.

CONCERNS of the NRTC

In a recent handout by the NRTC entitled “Rural Concerns with EchoStar/DirecTV Merger” ⁸ they make the claim that “national pricing will not work”. In fact the DBS companies have had nothing but a national pricing policy. At no time has either DBS company offered differential rate structures to their subscribers. Rural customers have had the advantage of both competitive pricing and robust offerings made possible by the urban competition faced by DBS. There is no valid reason to believe that a merger will reduce these advantages, in fact the

⁷ National Cable & Telecommunications Association—Industry Statistics as of November 2001 available at www.ncta.com

⁸ Source: National Rural Telecommunications Cooperative—handout entitled “Rural Concerns with EchoStar/DirecTV Merger”

channel lineup of the merged company is more likely to become even more varied, a direct function of the increased bandwidth.

The NRTC's claim that "rural Americans...could still end up subsidizing urban subscribers"⁸ is another claim without fact. It is the very nature of satellite communications that it cost no more to deliver a signal to a rural DBS subscriber than an urban one. If anything, the rural subscriber will continue to have the advantage of lower installation and equipment costs implemented for the urban markets with higher subscriber density.

The NRTC is also quick to discount other MVPD sources such as C-band, MMDS and SMATV as "inadequate substitutes for DBS". This is another example of "statistics of convenience". Currently there are millions of TVHH who receive MVPD from these technologies. They have been proven as both viable and reliable during many years of serving consumers. The commission only need to review it's pending applications for MMDS service to realize the viability of this service both for today and for the future.

CONCLUSION

From it's inception the Commission has always placed spectrum efficiency at the forefront of it's decisions. While we must also address the needs of the consumers, we can not ignore the fact that currently 97% of the basic, premium and PPV channels serving CONUS DBS market are duplicated. This valuable spectrum should be used to expand local coverage, increase the availability of HDTV, expand offerings to general and specialized audiences, and expand the application of interactivity to the consumers.

The merger of these two companies will prepare DBS for the difficult task of providing consumers with a choice of MVPD, while attempting to control the costs of cable TV as well as that of programming itself. Every year brings with it a new set of demands that change the MVPD marketplace, and what is required to compete.

While announcing SHIVA on November 29, 1999, former Chairman Kennard said in part⁹, "We will aggressively implement the new Satellite Home Viewer Act so that consumers have viable alternatives to cable." The former Chairman went on to say " Since Congress eliminated the FCC's ability to regulate cable rates, competition remains our best hope of combating rate increases. This law is designed to keep cable rates in check by making satellite a real choice for consumers."

⁸ Source: National Rural Telecommunications Cooperative—handout entitled "Rural Concerns with EchoStar/DirectTV Merger"

⁹ Statement of FCC Chairman William E. Kennard On New Satellite Home Viewer Act (SHVA) November 29, 1999

Recently, DBS Spectrum and technology was stretched to the limit to comply with the Must Carry requirements of SHIVA. These new bandwidth demands have limited the ability of DBS to effectively compete against cable, and has limited whatever competition there will be to the 43 local markets currently served with local broadcast signals. The combined bandwidth of the “New EchoStar” will assure the intent of SHIVA is carried to the majority of Americans with renewed vigor.

One thing that stands out to me is while there is all this concern with respect to rural TVHH, no one is addressing the 17.5 Million TVHH that are in multi-family properties of 3 or more units ¹⁰. While a small percentage is afforded protection under the OTARD Rule ¹¹, the majority of these viewers are restricted from DBS access and are limited to a single provider of MVPD. Their numbers represent 16.6% of the total TVHH, nearly 3 times larger than the number of rural viewers similarly restricted from cable.

The commission should approve this merger on the merits of spectrum efficiency and overall benefit to the majority of the American TV viewers, while ignoring the outcry of special interest groups seeking to restrict this merger for less than 4% of TVHH.

Thank you for reviewing my comments.

Respectfully

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10 U.S. Census Bureau, Census-2000

11 Over The Air Reception Devices Rule—First passed October 14, 1996, Amended January 22, 1999, further amended October 25, 2000, enacted may 25, 2001