

EXHIBIT Y

Federal Communications Commission, Fourth Annual Report, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 97-141, 13 FCC Rcd. 1034 (rel. January 13, 1998), available on Westlaw (1998 WL 10229) and Lexis (1998 FCC LEXIS 140).

LEXSEE 13 fcc rcd 1034

In the Matter of Annual Assessment of the Status of
Competition in Markets for the Delivery of Video Programming

CS Docket No. 97-141

FEDERAL COMMUNICATIONS COMMISSION

13 FCC Rcd 1034; 1998 FCC LEXIS 140; 11 Comm. Reg. (P & F)
147

RELEASE-NUMBER: FCC 97-423

January 13, 1998 Released; Adopted December 31, 1997

ACTION: [**1] FOURTH ANNUAL REPORT

JUDGES:

By the Commission: Chairman Kennard and Commissioners Ness, Furtchgott-Roth
and Tristani issuing separate statements

OPINIONBY:
SALAS

OPINION:

[*1036] I. INTRODUCTION

1. This is the Commission's fourth annual report ("1997 Report") n1 to Congress submitted pursuant to Section 628(g) of the Communications Act of 1934, as amended ("Communications Act"). Section 628(g) requires the Commission to report annually to Congress on the status of competition in markets for the delivery of video programming. n2 Congress imposed this annual reporting requirement in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") n3 as a means of obtaining information on the competitive status of markets for the delivery of video programming. n4

-----Footnotes-----

n1 The Commission's first three reports appear at: Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming), CS Dkt. No. 94-48, First Report ("1994 Report"), 9 FCC Rcd 7442 (1994); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Dkt. No. 95-61, Second Annual Report ("1995 Report"), 11 FCC Rcd 2060 (1996); and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Dkt. No. 96-133, Third Annual Report ("1996 Report"), 12 FCC Rcd 4358 (1997). [**2]

n2 Communications Act of 1934, as amended, § 628(g), 47 U.S.C. § 548(g) FCC000000524 (1996) ("Communications Act").

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strive to make a competitive marketplace a reality for all consumers.

11. The following paragraphs contain a more detailed summary of the findings in this 1997 Report:

OVERVIEW OF VIDEO PROGRAMMING DISTRIBUTION MARKET:

* Geographic and Product Markets: For purposes of analysis, competition in the delivery of video programming involves local markets in which consumers can choose among particular multichannel or other video programming distribution services. The products that are sold in these markets consist of bundles of attributes -- antenna service, basic or optional tiers or packages of video programming channels, premium per-channel charge [**11] services, pay-per-view channels, and others. Providers of these services increasingly will participate in a broader telecommunications market that includes both video and nonvideo products as new communications services are added to their offerings. National, regional, and local markets are also involved in the video programming purchasing activities of these video providers.

* MVPD Market Overview: A total of 73.6 million households subscribed to multichannel video programming services as of June 1997, up 2.8% over the 71.6 million households subscribing to MVPDs in September 1996 reported in the 1996 Report. This subscriber growth accompanied a 2.9 percentage point increase in multichannel video programming's penetration of television households to 75.9% in June 1997. During this period, the number of cable subscribers continued to grow, reaching 64.2 million as of June 1997, up 1% over the 63.5 million cable subscribers in September 1996. Since the 1996 Report, cable's share of total MVPD subscribers, however, continued to decrease from 89% of all multichannel video subscribers as of September 1996 to 87% of all multichannel video subscribers as of June 1997. Conversely, noncable [**12] subscribers continued to grow, constituting 13% of all multichannel video subscribers as of June 1997, up from 11% last year. The total number of noncable MVPD subscribers grew from 8.1 million as of September 1996 to 9.5 million as of June 1997, an increase of almost 20% since the 1996 Report.

Local markets for the delivery of video programming generally remain highly concentrated and are still characterized by some barriers to both entry and expansion by competing distributors. DBS service is widely available and constitutes the most significant alternative to cable television. The digital technology employed by DBS provides high channel capacity and high picture quality. However, DBS service is different from cable service in a number of respects, including; (1) local broadcast signals are not available by satellite; (2) up front equipment and installation costs; and (3) the need to purchase additional equipment to receive service on additional television sets. Competitive overbuilding by franchised cable systems remains minimal, but is increasing and appears to improve service and/or pricing [*1040] where it exists. MVPDs using other distribution technologies have not posted subscribership [**13] increases comparable to DBS increases, but are in the process of testing digital technology that has the potential to improve significantly the competitiveness of their services.

MARKET PARTICIPANTS

* Cable Systems: Incumbent franchised cable systems remain the primary

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taking place. The Commission has adopted rules for implementation of digital television ("DTV") and broadcasters have continued testing DTV as they plan for the use of DTV spectrum. Under the Commission's rules for DTV, digital encoding and transmission technology will permit stations to broadcast: one or perhaps two High Definition Television ("HDTV") signals; multiple streams of Standard Definition Television ("SDTV") signals; or a combination of the two. The first DTV stations will begin broadcasting in the top ten markets by November 1998, with the digital transition currently scheduled to be completed [**23] by 2006.

[*1043] LOCAL, REGIONAL, AND NATIONAL HORIZONTAL MARKET DEVELOPMENTS

Multiple Dwelling Unit Buildings as a Separate Market: Video distribution competition within and for multiple dwelling unit buildings ("MDUs") appears to be developing as a distinct market separate from neighboring areas. Competitors for this market face different economics, technical applications, and regulatory issues.

Local Market Competition for Video Subscribers: Local markets for the delivery of video programming generally remain highly concentrated and continue to be characterized by some barriers to entry and expansion by potential competitors to incumbent cable systems. Competitive overbuilding by franchised cable operators remains minimal but is increasing (particularly by LECs) and appears, to varying degrees, to improve service and/or pricing where it exists. It remains difficult to determine whether or when competition from closely substitutable multichannel video programming services will affect currently non-competitive markets. DBS service is available in almost all areas and constitutes the most significant alternative to cable television. Its major advantage is its ability to offer service which [**24] is significantly different from cable service with respect to signal quality and programming options. Its major disadvantages, however, include its inability to provide local broadcast programming and the expense of its equipment and installation. In addition, its current advantage in channel capacity may be transitory once cable systems deploy digital distribution technology. MVPDs using other distribution technologies have not posted subscribership increases comparable to DBS subscribership increases, but are in the process of testing digital technology that has the potential to improve significantly the competitiveness of their services. Consequently, it remains difficult to predict the extent to which competition from MVPDs using non-cable delivery technologies will constrain cable systems' ability to exercise market power in the future.

Local Inservice Competition: Telephone Companies Offering Video and Cable Operators Offering Telephony: The 1996 Act repealed a statutory prohibition against an entity holding attributable interests in a cable system and a LEC with overlapping service areas. At the time of the 1996 Act's passage, members of the local telephone industry indicated [**25] that they would begin to compete in video delivery markets, and cable television operators indicated that they would begin providing local telephone exchange service. The expectation was that there would be a technological convergence that would permit use of the same facilities for provision of the two types of service. This technological convergence has yet to take place. Almost all of the video service being provided by LECs is being provided using conventional cable television technology or wireless cable operations that stand alone from the provider's telephone facilities. The provision of telephone service by cable firms over integrated facilities remains primarily at an experimental stage. The one area

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Federal Communications Commission, Third Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 96-496, 12 FCC Rcd. 4358 (rel. January 2, 1997), available on Westlaw (1997 WL 2451) and Lexis (1997 FCC LEXIS 151).

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In the Matter of Annual Assessment of the Status of
Competition in the Market for the Delivery of Video
Programming

[PART 1 OF 3]

CS Docket No. 96-133

FEDERAL COMMUNICATIONS COMMISSION

12 FCC Rcd 4358; 1997 FCC LEXIS 151; 5 Comm. Reg. (P & F)
1164

RELEASE-NUMBER: FCC 96-496

January 2, 1997 Released; Adopted December 26, 1996

ACTION: [**1] THIRD ANNUAL REPORT

JUDGES:

By the Commission

OPINION:

[PART 1 OF 3]

[*4360] I. INTRODUCTION

1. Section 628(g) of the Communications Act of 1934, as amended. ("Communications Act") requires the Commission to report annually to Congress on the status of competition in the market for the delivery of video programming. n1 Congress imposed this annual reporting requirement in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), n2 as one means of obtaining information on the competitive status of markets for the delivery of multichannel video programming delivery that would aid both Congress and the Commission in determining when there was competition sufficient to reduce or eliminate many of the regulatory restraints imposed on the cable industry by that legislation. n3 This is the Commission's third annual report ("1996 Report") to Congress submitted in compliance with this statutory requirement. n4 In this 1996 Report, we update our two prior reports and provide data and information that summarizes the status of competition in the market for the delivery of video programming. In the two prior reports we described the methodology and theory underlying our competitive analysis. We do not [**2] repeat that information in this report other than in an abbreviated fashion, and provide reference to the relevant discussion in prior reports. The information and analysis provided in this third report are based on publicly available data, filings in various Commission rulemaking proceedings, and information submitted by commenters in response to a Notice of Inquiry ("Notice") in this docket. n5

n1 Communications Act of 1934, as amended, § 628(g), 47 U.S.C. § 548(g) (1996) ("Communications Act").

n2 Pub. L. No. 102-385, 106 Stat. 1460 (1992)

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n7 Appendix H of the 1994 Report describes methods for assessing the status of competition in markets for the delivery of multichannel video programming. 1994 Report, 9 FCC Rcd at 7623, App. H. [**5]

B. Summary of Findings

4. In this 1996 Report, the Commission makes the following findings:

The 1996 Act embodies Congress' intent to promote a "pro-competitive national policy framework" and eventual deregulation of markets for the delivery of video programming. Several of the 1996 Act's provisions are intended to build on prior efforts, particularly the 1992 Cable Act, by removing additional barriers to competitive entry in these markets and establishing market conditions that promote the process of competitive rivalry. Many provisions of the 1996 Act, and the Commission's actions to implement them, have the potential for fostering increased competition. The Commission has adopted rules to implement the open video system provisions of the 1996 Act and has adopted rules to implement the 1996 Act provision which preempts certain local government and non-government restrictions on reception devices, including antennas and dishes for reception of over-the-air broadcast, wireless cable and DBS signals. The Commission has adopted similar rules with respect to certain home satellite dish services. A change in the definition of a cable system made by the 1996 Act now permits SMATV [**6] operators [*4362] to serve buildings regardless of ownership without being subject to regulation as cable operators, provided that public rights-of-way are not used in the process.

We find that incumbent franchised cable systems continue to be the primary distributors of multichannel video programming, although other MVPDs, particularly those using alternative technologies (e.g., DBS, wireless cable and SMATV systems), continue to increase their share of subscribers in many markets. Subscribership for distributors using technological alternatives to traditional cable service now accounts for 11% of total MVPD subscribership. Non-cable MVPD subscribership has been increasing an average of 22% per year since 1990, with cable subscribership currently down to 89% of all MVPD subscribers. Notwithstanding this decrease in cable systems' share of total MVPD subscribers, the actual number of cable subscribers continues to increase. In fact, since the 1995 Report, the number of cable subscribers increased by two million compared to the increase in combined subscribership for all other MVPDs of 2.3 million.

Local markets for the delivery of video programming generally remain highly concentrated, [**7] and structural conditions remain in place that could permit the exercise of market power by incumbent cable systems. Overall, our conclusion concerning competition in markets for the delivery of multichannel video programming remains unchanged from last year -- it remains difficult to determine to what extent these markets will be characterized over the long term by vigorous rivalry among multiple MVPDs offering closely substitutable services or, conversely, the extent to which many of these markets will remain dominated by one or two providers facing less vigorous rivalry from MVPDs offering highly-differentiated or niche programming services.

We find a growing but still very limited number of instances where incumbent cable system operators face competition from MVPDs offering services with very similar attributes (i.e., overbuilds/wired delivery). Where such competition exists, such as in Dover Township, New Jersey, the effects of competition are readily apparent. We also find a substantially increased presence of MVPDs deploying somewhat differentiated services, particularly DBS service providers.

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12 F. Rcd 4358, *4362; 1997 FCC LEJ '51, **8;
5 Comm. Reg. (P & F) 1164

Increased competition among DBS service providers has led to lower equipment [**8] prices and, possibly, increases in the number of cable subscribers choosing to drop or reduce cable services in favor of DBS services. Moreover, some cable system operators appear to be taking steps to improve their service offerings in response to the availability of DBS service. MVPDs using other distribution technologies, such as MMDS, have not posted comparable increases in subscribership, but are in the process of testing digital technology that has the potential to significantly improve the competitiveness of their services. Consequently, it remains difficult to predict the extent to which competition from MVPDs using non-cable delivery technologies will constrain cable systems' ability to exercise market power in the future.

. As a result of acquisitions and trades, cable multiple system operators ("MSOs") have continued to increase the extent to which their systems form regional clusters. The number of clusters of systems serving at least 100,000 subscribers increased from 97 to 137, and these clustered systems now account for service to approximately 50% of the nation's cable subscribers.

. [*4363] Nationally, concentration among the top cable MSOs has continued to increase, [**9] but still remains within the moderately concentrated range at 1326 (an Herfindahl-Hirschman Index ("HHI") between 1000 and 1800). If all MVPDs are included in the calculation, national concentration falls just above the threshold of the moderately concentrated range with an HHI of 1013. DBS providers DIRECTV and PRIMESTAR rank among the ten largest MVPDs in terms of nationwide subscribership with over 2.0 and 1.5 million subscribers, respectively.

. Vertical integration of national programming services between cable operators and programmers declined from last year's total of 51% to just 44% this year. We find, however, insufficient evidence to make any determination of the effect to date of these developments. The decline is due largely to the sale of Viacom's cable system assets. In addition, of the 16 programming services that were launched since the 1995 Report, 10 are not vertically integrated. Access to programming remains one of the most critical factors for the successful development of competitive MVPDs. Competing MVPDs have complained about the potential unavailability of programming distributed by means other than satellite or produced by programmers that are not vertically [**10] integrated with [ILLEGIBLE WORDS] To the extent that it appears that the denial of access to programming serves to deter entry of competitors in markets for the delivery of video programming, we will be concerned about these developments.

. Technological advances are occurring that will permit MVPDs to increase both quantity of service (i.e., an increased number of channels using the same amount of bandwidth or spectrum space) and types of offerings (e.g., interactive services). MVPDs continue to pursue new system architectures, upgraded facilities, use of increased bandwidth and deployment of digital technology.

. Our findings as to particular distribution mechanisms operating in markets for the delivery of video programming include the following:

. Cable Systems: The cable industry has continued to grow in terms of FCC000000531 subscriber penetration, average system channel capacity, the number of programming services available, revenues, audience ratings and expenditures on programming since the 1995 Report.

. DBS Service Providers: Subscribership to DBS services increased from 1.7

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12 FCC Rcd 4358, *4363; 1997 FCC LEX 51, **10;
5 Comm. Reg. (P & F) 1164

million homes last year to nearly 4 million homes at the end of October 1996. This increase is attributable [**11] in part to the development of competition from two new DBS services in the last year -- AlphaStar and EchoStar -- and price competition among providers that has significantly lowered the cost of receiving equipment.

. **Wireless Cable Systems:** Although wireless cable systems showed some growth in subscribership, the most significant development in 1996 was MMDS systems' preparation for the deployment of digital systems in 1997. This will increase the number of channels that MMDS systems can offer and permit them to be more competitive with incumbent cable systems. Throughout most of the year, LECs continued to expand their investment in the wireless industry, [*4364] but some have recently cut back on that investment. We also observe a continuation of the trend toward increased consolidation among wireless companies.

. **SMATV Systems:** SMATV subscribership increased 10.5% over the past year in systems that serve MDUs. Industry analysts attribute the growth, among other things, to technical improvements that increased operating efficiencies and to expanded product offerings, i.e., security features and diverse programming.

. **Broadcast TV:** Broadcast service continues to serve as both a transmission [**12] medium for many households, and a primary source of programming for most viewers regardless of distribution media. Regulatory changes and technological advances may, at some point in the future, permit the use of broadcast television and other existing and potential video technologies, such as low power television, for distribution of multichannel video programming.

. **LEC Entry:** The 1996 Act expands opportunities for LECs to enter markets for the delivery of multichannel video programming. Since adopting rules implementing the 1996 Act's open video system ("OVS") provision, we have certified the conversion of Bell Atlantic's Dover, New Jersey, video dialtone system to an OVS and authorized two additional OVS operators. In the last year, some LECs have continued to expand franchised cable operations, both within and outside their telephone service areas.

. **Utilities:** Section 103 of the 1996 Act removes regulatory barriers to entry in telecommunications and video markets for "registered" public utility holding companies. On September 12, 1996, the Commission adopted final rules to implement Section 103, and, to date, has granted all 18 applications filed thus far under the 1996 Act. [**13]

II. THE TELECOMMUNICATIONS ACT OF 1996

5. The Telecommunications Act of 1996, enacted February 8, 1996, marks a fundamental shift toward competition throughout the entire telecommunications marketplace. Congress specifically stated its intent to establish a "pro-competitive de-regulatory national policy framework" for the telecommunications industry. n8 Consistent with this philosophy, the 1996 Act contains several provisions that focus on removing barriers to competitive entry and on establishing market conditions that promote competitive firm rivalry. In addition to encouraging competition in the local telephone exchange market, the 1996 Act also encourages competition in the market for the delivery of multichannel video programming.

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n8 H. R. Rep. No. 104-458, 104th Cong. 2d Sess. 1 (1996) ("Conference Report").

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EXHIBIT AA

Federal Communications Commission, Second Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 95-61, 11 FCC Rcd. 2060 (rel. December 11, 1995), available on Westlaw (1995 WL 733714) and Lexis (1995 FCC LEXIS 7901).

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In the Matter of Annual Assessment of the Status of
Competition in the Market for the Delivery of Video
Programming

CS Docket No. 95-61

FEDERAL COMMUNICATIONS COMMISSION

11 FCC Rcd 2060; 1995 FCC LEXIS 7901; 1 Comm. Reg. (P & F)
530

RELEASE-NUMBER: FCC 95-491

December 11, 1995 Released; Adopted December 7, 1995

ACTION: [**1] SECOND ANNUAL REPORT

JUDGES:

By the Commission: Commissioner Barrett issuing a separate statement.

OPINION:

[*2062] I. INTRODUCTION

1. Section 628(g) of the Communications Act of 1934, as amended, directs the Commission to report annually to Congress on the status of competition in the market for the delivery of video programming. n1 This is the Commission's second report issued in compliance with this statutory requirement. n2 This second report ("1995 Report") is based on publicly available data, filings in various Commission rulemaking proceedings, and information submitted by commenters in response to a Notice of Inquiry ("NOI") in this docket. n3

n1 Communications Act of 1934 ("Communications Act") § 628(g), 47 U.S.C. § 548(g).

n2 The Commission released its first report pursuant to this statutory requirement on September 28, 1994. Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming), First Report, CS Docket No. 94-48, 9 FCC Rcd 7442 (1994).

n3 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, CS Docket No. 95-61, 10 FCC Rcd 7805 (1995). A list of these submitted comments and reply comments is set forth in Appendix A. [**2]

A. Scope of this Report

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2. The purpose of this 1995 Report is to provide data and information that summarizes the status of competition in the market for the delivery of video programming and that updates our Annual Assessment of the Status of Competition

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in the Market for the Delivery of Video Programming, First Report ("1994 Report"). n4 We begin this 1995 Report with an examination of the cable television industry, other existing multichannel video programming distribution technologies, and potential competitors to cable television (Section II). Among the alternative distribution technologies and providers discussed in this section are direct-to-home ("DTH") satellite services, including direct broadcast satellite ("DBS") services and home satellite dishes ("HSDs"), wireless cable systems using frequencies in the multichannel multipoint distribution service ("MMDS") or local multipoint distribution service ("LMDS"), local exchange telephone carriers ("LECs"), satellite master antenna television ("SMATV") systems, and broadcast television service. We also consider several other existing and potential distributors of video programming, such as electric utilities, and other [**3] distribution technologies, including video cassette recorders ("VCRs"), interactive video and data services ("IVDS"), and the Internet.

n4 1994 Report, 9 FCC Rcd at 7558 P 253.

3. Section III of this 1995 Report examines market structure and competition. We evaluate horizontal concentration in the cable television industry in Section III.A. In Section III.B, we evaluate vertical integration between cable television systems and programming services, and report on issues of access to programming. Finally, we address [*2063] technical advances in Section III.C.

4. Our assessment of the status of competition in the market for the delivery of video programming is presented in Section IV. In this section, we examine the extent of competition and evaluate market performance. We also report on existing and potential impediments to entry and competition, including strategic behavior that could deter entry and regulatory, legal, and other potential impediments.

B. Summary of Findings

5. We conclude that cable television systems remain the primary distributors of multichannel video programming services and continue to enjoy market power in local markets, although some progress has begun [**4] toward a competitive marketplace for the distribution of video programming. In the last year, DBS systems have attracted many subscribers to newly available services. MMDS and SMATV systems have also continued to increase in subscribership. Several LECs, however, have modified their plans for wire based video service, including video dialtone ("VDT") service, from the scale of entry reported last year. Some LECs are continuing their deployment of wire based facilities in selected markets, either through VDT or traditional cable systems. In other cases, LECs appear to be focusing their efforts on wireless entry through investment in MMDS facilities. In sum, while subscribership for distributors using alternative technologies has generally increased over the last year, overall subscribership for all distributors using alternative technologies is just 9% of total multichannel video programming distributor ("MVPD") subscribership, whereas cable systems account for 91% of the total. n5 Over the long term, it is difficult to predict the extent to which local markets will be characterized by vigorous rivalry among multiple distributors, or the extent to which distributors using alternative [**5] technologies may remain essentially "fringe" competitors, with relatively small market shares or offering services FCC000000536 largely differentiated from other services, at least from those multichannel



packages offered by cable systems. In addition, technological advances, particularly the conversion from analog to digital transmission, may affect the nature and cost of the services provided by cable operators and other MVPDs, and consequently, the extent of rivalry in markets for the delivery of video programming.

n5 Infra Appendix G, Table 1.

6. In this 1995 Report, the Commission makes the following findings:

7. Cable Industry Growth. Since the 1994 Report, subscriber penetration, average system channel capacity, the number of programming services available, revenues, expenditures on programming, and capital investment generally have increased for the cable industry. The number of homes passed by cable grew from approximately 90.6 million at the end of 1993 to approximately 91.6 million at the end of 1994, which is 96% of all television households in the United States. n6 The number of subscribers increased from 57.2 million to [*2064] 59.7 million between the end of 1993 and the end of 1994. [**6] Penetration (i.e., the number of subscribers as a percent of homes passed) rose 3.3% from the end of 1993 to a penetration of 65.2% at the end of 1994. n7 Channel capacity grew slightly, with 97% of all subscribers now receiving service from systems that can provide at least 30 channels. Cable systems with the capacity to offer more than 53 channels accounted for the biggest growth during 1994, with a 9.9% increase in the number of systems, and a 10.1% increase in the number of subscribers. n8 Total cable revenues, as well as revenues from regulated services, remained stable over the year. The industry's cash flow, a measure of earnings before interest, taxes, depreciation, and amortization, was \$ 9.94 billion in 1994, a 1.6% decline from the 1993 industry cash flow of \$ 10.1 billion. n9 Capital expenditures continue to increase, rising 28% to \$ 3.8 billion in 1994. n10

n6 Infra Appendix B, Table 1.

n7 Id.

n8 Id., Tables 3-4.

n9 Id., Table 6.

n10 Paul Kagan Assocs., Inc., The Cable TV Financial Databook 92 (1995) ("1995 Cable Financial Databook").

8. Horizontal Concentration. Since 1994, there has been an increase in the horizontal concentration of cable [**7] multiple system operators ("MSOs") nationwide. A number of cable MSO acquisitions and system trades have resulted in increased regional concentration, or "clustering," of cable system ownership. Based on recent reports of additional proposed transactions, it appears that this trend will continue as cable operators consolidate their holdings regionally. Although the cable industry tends to be moderately concentrated nationally, local markets for the distribution of multichannel video programming tend to be highly concentrated as measured by subscribership among all MVPDs. n11

n11 Infra sec. III.A.

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United States Department of Justice, Complaint, *United States v. Primestar, Inc.* (May 12, 1998), available on the U.S. Department of Justice web site <<http://www.usdoj.gov/atr/cases/fl700/1757.htm>>.

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Exhibit BB

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FOR PUBLIC INSPECTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice
Antitrust Division
1401 H Street, N.W., Suite 8000
Washington, DC 20530,

Plaintiff,

v.

PRIMESTAR, INC.,
8085 S. Chester, Suite 300
Englewood, CO 80112,

TELE-COMMUNICATIONS INC.,
5619 DTC Parkway
Englewood, CO 80111-3017,

Civil No.:

Filed:

FCC000000540

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TCI SATELLITE)
 ENTERTAINMENT, INC.,)
 8085 S. Chester, Suite 300)
 Englewood, CO 80111,)
)
 TIME WARNER ENTERTAINMENT)
 COMPANY, L.P.,)
 75 Rockefeller Plaza)
 New York, NY 10019,)
)
 MEDIAONE GROUP,)
 188 Inverness Drive)
 Englewood, CO 80122,)
)
 COMCAST CORPORATION,)
 1500 Market Street)
 Philadelphia, PA 19102,)
)
 COX COMMUNICATIONS, INC.,)
 1400 Lake Hearn Drive, NE)
 Atlanta, GA 30319-1464,)
)
 GE AMERICAN)
 COMMUNICATIONS, INC.,)
 Four Research Way)
 Princeton, NJ 08540-6684,)
)
 NEWHOUSE BROADCASTING)
 CORPORATION,)
 5015 Campuswood Drive)
 East Syracuse, NY 13057,)
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 THE NEWS CORPORATION)
 LIMITED,)
 1211 Avenue of the Americas)
 New York, NY 10036,)
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 MCI COMMUNICATIONS)
 CORPORATION,)
 1801 Pennsylvania Avenue, NW)
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)
 and)
)

FCC000000541

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KEITH RUPERT MURDOCH,)
 1211 Avenue of the Americas)
 New York, NY 10036.)
)
 Defendants.)
 _____)

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the acquisition by the largest cable companies in the United States of control of the only remaining high-power orbital satellite slot capable of distributing a nationwide package of video programming competitive with that offered by cable. Completion of this acquisition would effectively foreclose the use of this scarce and valuable asset to challenge defendants' monopoly power. In the hands of a competitor whose sole

economic interest would be to use this asset profitably, the satellite slot could be a vehicle for a product offering that is higher in quality and lower in cost than currently available offerings. The defendants recognize the magnitude of this competitive threat and seek to "nip it in the bud." to protect their dominance and monopoly profits for years to come.

I. NATURE OF THE ACTION

1. The United States seeks to prevent the proposed acquisition of satellite assets of defendants MCI Communications Corp. ("MCI"), The News Corporation Limited ("News Corp."), and K. Rupert Murdoch ("Murdoch") (collectively "News Corp./MCI") by defendant cable system operators acting through the vehicle of Primestar, Inc. ("Primestar") pursuant to an Asset Acquisition Agreement entered into by defendants on June 11, 1997. By placing News Corp./MCI's satellite assets in the hands of Primestar, which is controlled by five of the largest cable companies in the United States, the proposed acquisition would "substantially lessen competition" and "tend to create a monopoly" in markets for the delivery of multichannel video programming services.

2. Television viewers in the United States today are accustomed to choosing among myriad program offerings. Approximately 76%, or over 73 million, of all the television households in the United States currently pay for some form of multichannel video programming distribution ("MVPD") service. By far the dominant providers of MVPD services are the local cable companies, which collectively account for 87% of all MVPD services sold in the United States. In many local MVPD markets, the franchised cable operator's share of MVPD services exceeds 90%.

FCC000000542

3. Cable firms are in large part unregulated monopolists. Responding to Congress's instructions, the Federal Communications Commission ("FCC") reports annually on the status

Exhibit BB

discussions were between Chase Carey, News Corp.'s Chief Operating Officer, and Leo Hindery, TCI's President, who was negotiating on Primestar's behalf. Hindery's role, according to Malone, was one of "a peacemaker . . . He kept trying to convince everybody that there was more profit in peace than war." Of all the Primestar partners, Time Warner was the most vehemently opposed to any deal with News Corp. Malone personally was involved in several meetings with Time Warner and the other Primestar cable partners where he was "a proponent of, at least, exploring whether or not we could make peace [with Murdoch]."

60. At the time he was negotiating the proposed transaction with News Corp./MCI on behalf of Primestar, Hindery was not an officer or director of TSAT, but the President of TCI. Nonetheless, Hindery testified that "I felt because this company TSAT had once been part of my company -- I felt I saw a fiduciary responsibility, but one I took very seriously, to the shareholders of TSAT, many of whom were common shareholders of TCI." Hindery believed that the proposed transaction worked to the mutual benefit of TCI and TSAT and that, by reaching the agreement with News Corp./MCI, he could "serve all masters well to the benefit of all." Hindery was recently elected Chairman of the Board of Directors of the NCTA.

61. On June 11, 1997, Primestar announced that it had reached a binding agreement to purchase ASkyB's high-power DBS slot at 110 and other satellite assets. In exchange, News Corp./MCI would receive a 20% non-voting equity share in Primestar and a convertible note, which if exercised would increase News Corp./MCI's equity ownership to 31.4%. Malone testified that this agreement in effect resolved the differences between Murdoch and the cable industry because "it just really says, Hey guys, I'm not Darth Vader anymore. If you carry my programming, you won't be subsidizing the enemy and, therefore, feel free to treat me

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as a friend, not as an enemy." Although the written agreement did not so specify, at about the time the agreement was reached, certain Primestar partners' cable systems began to widely carry Murdoch's program networks.

VI. RELEVANT MARKETS

62. The relevant product market affected by this transaction is the delivery of multiple channels of video programming directly to the home. The programming can be delivered via a number of distinct methods, including cable, satellite or wireless technologies. This product market is referred to by the FCC, as well as the industry generally, as multichannel video programming distribution, or MVPD.

63. The characteristics of an MVPD service are: (1) multiple channels, typically anywhere between 35 and 175; (2) programming that includes a mixture of "basic" services (such as ESPN, CNN, USA, TNT), as well as premium services (such as HBO, Showtime, and Cinemax) that are not available "over-the-air;" and (3) a monthly subscription fee for programming.

64. Over the past decade, cable viewership has grown significantly, while viewership of broadcast TV stations has steadily declined. According to the FCC's 1997 Competition Report, the non-premium cable audience increased its television viewing hours from an average 11.5 share in the 1987-1988 broadcast year to an average 36.25 share in 1996-1997. The audience of the broadcast television stations declined from an average 87.7 share of television viewing hours to an average 66.5 share for the same time period.

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Reply Comments of the Staff of the Federal Trade Commission, *In re Satellite Carrier Compulsory License*, Copyright Office Docket No. RM 98-1 (March 1998), available on the FTC web site <<http://www.ftc.gov/os/1998/9803/dbsc.com.htm>>.

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FOR PUBLIC INSPECTION

Before the
Copyright Office, Library of Congress
Washington, D. C.

In re Satellite Carrier Compulsory License; Definition of Unserved Household

Docket No. RM 98-1

REPLY COMMENTS OF THE STAFF OF THE
FEDERAL TRADE COMMISSION⁽¹⁾

March 1998

I. Introduction

The staffs of the San Francisco Regional Office and the Bureau of Economics of the Federal Trade Commission are pleased to respond to the Notice of Inquiry ("NOI") issued by the Copyright Office of the Library of Congress.⁽²⁾ The NOI solicits comments on whether the satellite carrier compulsory license should be interpreted to permit Direct Broadcast Satellite ("DBS") operators to retransmit local broadcast signals into their home markets, and if so, whether regulations governing the conditions under which franchised cable operators deliver these local broadcast signals should apply to DBS. The satellite carrier compulsory license provides the legal framework through which satellite systems distribute broadcast signals directly to consumers' homes.⁽³⁾

The Federal Trade Commission is responsible for maintaining competition and safeguarding the interests of consumers. The staff of the FTC has extensive experience in reviewing competition issues in the area of telecommunications.⁽⁴⁾ Our purpose in responding to the NOI is to identify the policy considerations that we believe the Copyright Office should carefully evaluate. The NOI also seeks comments concerning statutory interpretation and legislative history of the Satellite Home Viewer Act.⁽⁵⁾ We express no view on the technical issues of statutory construction.

II. Satellite and Cable Compulsory Licenses

Congress has created two compulsory licenses under which multichannel video programming distributors compensate copyright owners, typically program producers and syndicators, not the broadcast stations, whose programs are retransmitted on broadcast channels. The satellite carrier compulsory license permits home satellite dish programming packagers and DBS operators to distribute the programs on superstations nationally and to import the programs on distant network affiliates into areas "unserved" by local network affiliates. A separate "cable" compulsory license applies to wired and microwave multichannel video programming distribution technologies and authorizes retransmission of the programs on superstations in all areas and on network affiliates into "unserved" areas, plus the retransmission of the programs on local channels within the channels' home markets.⁽⁶⁾ Together, these two compulsory licenses provide the legal framework under which all currently existing multichannel video programming distribution technologies carry broadcast channels. EchoStar, a DBS operator, now desires to deliver local channels within the channels' home markets under a compulsory

Exhibit CC

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closer substitute for franchised cable service, and likely lead to greater competition among multichannel video programming distributors.⁽⁹⁾ While we have no direct evidence that allowing DBS to become a better substitute for cable service will lower cable prices, some indirect evidence suggests such an outcome is likely. Empirical evidence suggests that competition between cable operators results in lower prices with no reduction in quality. For example, a recent study has found that basic cable prices are roughly 20% lower in areas with cable overbuilds than in comparable areas without overbuilds.⁽¹⁰⁾ Service quality, as measured by the number of channels provided in the basic cable package, was comparable between the two groups. Similarly, a recent FCC study examined price differences between "competitive" markets and other markets.⁽¹¹⁾ This study found that prices were 5% lower in "competitive" markets than non-competitive markets.⁽¹²⁾ In addition, the FTC, in its investigations of proposed mergers of cable overbuilds, has found that consumers benefit significantly from this direct competition through lower prices and higher quality.⁽¹³⁾

Moreover, the FCC has noted that DBS currently provides the most robust competitive alternative to cable.⁽¹⁴⁾ For this reason, enhanced DBS/cable competition is likely to have at least some of the impact on price that cable-to-cable competition provides. Consumer surveys show that the absence of the local affiliates of the broadcast networks is a primary reason why consumers continue to subscribe to franchised cable systems instead of switching to DBS.⁽¹⁵⁾ Consequently, allowing DBS operators to retransmit the local network affiliates may make DBS a better substitute for cable and tend to lower cable prices.

IV. The Application of Retransmission Rules to DBS

If the Copyright Office does conclude that the satellite compulsory license extends to the retransmission of local broadcast channels into their home markets, the question remains as to what rules would appropriately govern these retransmissions. In particular, such a policy compels the consideration of whether the "must-carry," "retransmission consent," "network nonduplication," "syndicated exclusivity," and "sports blackout" rules should apply to DBS.⁽¹⁶⁾ In evaluating whether these rules should apply to DBS, we address issues relating to economic efficiency and competition. We do not address other policies, such as the vitality of outlets for local expression, which may be important to Congress or the FCC.⁽¹⁷⁾

The "must-carry" rules, which require retransmission of all local broadcast channels, currently apply to franchised cable operators, but not to other multichannel video programming distributors, such as multichannel multipoint distribution service ("MMDS" or "wireless cable"), local multipoint distribution service ("LMDS" or "cellular cable"), and satellite master antenna television systems ("SMATVs" or "private cable"). The question addressed here is whether the "must-carry" rules should apply to DBS. In general, applying rules equally to all market participants accurately maintains the relative cost and service-quality positions of the participants. Hence, firms experiencing lower costs for a given level of service generate greater sales, thereby minimizing the total cost of producing those services. Nevertheless, two factors in this market suggest that applying "must-carry" to DBS operators would be undesirable.

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EXHIBIT DD

United States General Accounting Office, Report to the Subcommittee on Antitrust,
Business Rights, and Competition, Committee on the Judiciary, U.S. Senate,
Telecommunications: The Changing Status of Competition to Cable Television,
GAO/RCED-99-158 (July 1999).

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United States of America



UNITED STATES
GENERAL ACCOUNTING OFFICE

Pursuant to the provisions of 31 U.S.C. 704, 711, I hereby certify that the
annexed document , is a _____

true copy of the official document now on file in the United States General
Accounting Office in the following case:

Audit Report: GAO/RCED-99-158

Date: July 8, 1999

Title: TELECOMMUNICATIONS: The Changing
Status of Competition to Cable
Television

IN WITNESS WHEREOF, I have hereunto set my hand
and caused the seal of the United States General
Accounting Office to be affixed this 6th day
of July in the year 2000 at Washington.
By direction of the Comptroller General of the
United States,

Carol M. Hillier

United States General Accounting Office.

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GAO

United States General Accounting Office

Report to the Subcommittee on
Antitrust, Business Rights, and
Competition, Committee on the
Judiciary, U.S. Senate

July 1999

TELECOMMUNICATIONS

The Changing Status of Competition to Cable Television



GAO

Accountability • Integrity • Reliability

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FOR PUBLIC INSPECTION

Cable Maintains a High Market Share, but New Entrants Are Becoming Increasingly Competitive

The cable industry continues to serve 85 percent of the customers purchasing subscription television services. However, DSS companies compete against cable operators throughout the United States, and their subscriber base has increased considerably since the service was launched in 1994. Local telephone companies, expected to begin providing subscription television service after the enactment of the 1996 Telecommunications Act, have entered the market slowly and are providing only limited competition to cable. DSS companies and other competitors to cable companies are pursuing strategies to compete with incumbent cable firms on the basis of price, the channels and other services offered, and customer service; cable companies are responding to this increased competition.

Cable Continues to Maintain a High National Market Share

According to June 1998 data reported by FCC, over 65 million households, or 85 percent of all the households that have a subscription television service use cable television. Although its number of subscribers continues to grow, the cable industry's market share of subscribers has declined slightly in each of the last 4 years, from a level of 93 percent of subscribers in December 1994. Nearly all of the participants on our panel of experts stated that although competition in this industry is beginning to develop in earnest, the subscription television market is currently not very competitive. Figure 4 shows cable's and its competitors' market shares of households that pay for their television programming.

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EXHIBIT EE

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EXHIBIT EE

Joint Explanatory Statement of the Committee of Conference on the Intellectual Property and Communications Omnibus Reform Act of 1999, H.R. 1554, 145 Cong. Rec. H11792-811, produced by EchoStar [ECC0077221-77248]. This document is also available on Westlaw (145 Cong. Rec. H11769, 1999 WL 1015352).

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FOR PUBLIC INSPECTION

EXHIBIT 2

**JOINT EXPLANATORY STATEMENT
OF COMMITTEE OF CONFERENCE ON
SATELLITE HOME VIEWER
IMPROVEMENT ACT OF 1999**

Reprinted from 145 Cong. Rec.

H11792 - H11796 (daily ed. Nov. 9, 1999)

**Same text (without reference to two irrelevant provisions
dropped from the bill) appears at 145 Cong. Rec. S14708-
14712 as a "Section-by-Section" Analysis of S.1948**

M451812:1

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Exhibit EE

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subscribers.

The 1988 Act fostered a boom in the satellite television industry. Coupled with the development of high-powered satellite service, or DSS, which delivers programming to a satellite dish as small as 18 inches in diameter, the satellite industry now serves homes nationwide with a wide range of high quality programming. Satellite is no longer primarily a rural service, for it offers an attractive alternative to other providers of multichannel video programming; in particular, cable television. Because satellite can provide direct competition with the cable industry, it is in the public interest to ensure that satellite operates under a copyright framework that permits it to be an effective competitor.

The compulsory copyright license created by the 1988 Act was limited to a five year period to enable Congress to consider its effectiveness and renew it where necessary. The license was renewed in 1994 for an additional five years, and amendments made that were intended to increase the enforcement of the network territorial restrictions of the compulsory license. Two-year transitional provisions were created to enable local network broadcasters to challenge satellite subscribers' receipt of satellite network service where the local network broadcaster had reason to believe that these subscribers received an adequate off-the-air signal from the broadcaster. The transitional provisions were minimally effective and caused much consumer confusion and anger regarding receipt of television network stations.

The satellite license is slated to expire at the end of this year, requiring Congress to again consider the copyright licensing regime for satellite retransmissions of over-the-air television broadcast stations. In passing this legislation, the Conference Committee was guided by several principles. First, the Conference Committee believes that promotion of competition in the marketplace for delivery of multichannel video programming is an effective policy to reduce costs to consumers. To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical

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EXHIBIT FF

Petition to Dismiss or Deny of EchoStar Communications Corporation, *In re*
Application of TCI Satellite Entertainment, Inc., and PRIMESTAR, Inc., FCC File No.
91-SAT-TC-97 (August 22, 1997).

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FOR PUBLIC INSPECTION

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

In re Application of)
)

TCI Satellite Entertainment, Inc.)
)

and)

PRIMESTAR, INC.)
)

For Transfer of Control of)
TEMPO Satellite, Inc.)
)

File No. 91-SAT-TC-97

**PETITION TO DISMISS OR DENY
OF ECHOSTAR COMMUNICATIONS CORPORATION**

David K. Moskowitz
Senior Vice President and General Counsel
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August 22, 1997

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FOR PUBLIC INSPECTION

stand-alone competitive offering.⁴ It is therefore quite likely that a third party might have anti-competitive motives such as blocking Echostar's use of the 11 channels at the 119° W.L. orbital location. Unless the ultimate purchaser is added as a party in this proceeding, the Commission will not be able to assess all of the competitive consequences of the proposed transaction.

Even if the application could be considered at this time, it must be rejected as anti-competitive. Contrary to the applicants' claims, this "roll-up" agreement is far from a routine restructuring. It entails a shift in control of unique satellite resources from one cable-affiliated company (TSAT), which might have been expected to compete against other cable systems in their franchise areas, to a consortium of the largest cable Multiple System Operators ("MSO"s) in the country. Accordingly, the proposed transfer would have far more profound anti-competitive effects than the control of DBS channels by TSAT alone.

The proposed roll-up agreement is carefully designed to thwart any likelihood that an entity unaffiliated with cable operators, or indeed any *one* cable operator, might influence the use of the DBS spectrum to compete against other cable operators. The corporate governance provisions and right-of-first-refusal mechanism work to ensure that control of PRIMESTAR never strays from affiliates of the largest cable operators. Those provisions effectively block participation of non-cable operators in any voting and governance decisions and minimize the power of the only entity not affiliated with a cable MSO to influence the management of the company. Where the Commission had expressed competitive concerns when licensing Tempo in

⁴ See *In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, FCC 95-443 (rel. Oct. 30, 1995) at ¶ 12 (Tempo Satellite, "has indicated that even the 11 paired channels it has been assigned at the 119° orbital location, are not sufficient for a competitive system. . . ." (footnote omitted).

EXHIBIT GG

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EXHIBIT GG

Petition of EchoStar Communications Corporation to Dismiss or Deny, *In re*
Application of MCI Telecommunications Corp. and PRIMESTAR LHC, Inc., FCC File
No. 106-SAT-AL-97 (September 25, 1997).

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FOR PUBLIC INSPECTION

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

In re Application of

MCI Telecommunications Corporation

and

PRIMESTAR LHC, INC.

For Consent to Assignment of Direct
Broadcast Satellite Authorizations

File No. 106-SAT-AL-97

**PETITION OF ECHOSTAR COMMUNICATIONS
CORPORATION TO DISMISS OR DENY**

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September 25, 1997

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more equal footing. This strategy depended on use of the 28 channels at 110 MHz to provide locally transmitted signals into each of the largest metropolitan centers of the country. This plan received a decisive boost when News Corp. and EchoStar announced an alliance earlier this year that centered on use of these channels for "local-into-local" retransmissions. The alliance was widely hailed as the most serious threat yet against the cable industry. The proposed sale of MCI's 28 DBS channels to PRIMESTAR would eliminate this local-into-local plan as a viable alternative to cable. This transaction is the means through which, in the words of mutual fund manager Mr. Mario Gabelli, News Corp.'s "Deathstar" plan has been "grounded."

The sale of the MCI permit and DBS satellites to PRIMESTAR appears itself to be the product of the cable operators' market power and anti-competitive conduct.

Approximately at the same time as the Asset Acquisition Agreement was executed, News Corp. entered into a series of transactions with cable operators. Among other things, News Corp. reached a settlement agreement with Time Warner whereby News Corp. secured long-sought after carriage for its Fox News network on Time Warner's New York area cable systems. News Corp. also apparently attained other similar deals with other cable interests. These deals reportedly are a substantial part of the quid pro quo for News Corp.'s DBS firesale.

The linkage between such agreements and the Asset Acquisition Agreement has several implications. *First*, it suggests that the Applicants have not been entirely forthcoming as to all of the consideration afforded News Corp. for the assets transferred through the Asset Acquisition Agreement. The Commission should require them to fully disclose all of the agreements that refer or relate to the proposed transaction or make up part of the consideration for the proposed transfer. *Second*, this linkage strongly suggests that the cable operators

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EXHIBIT HH

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EXHIBIT HH

Federal Communications Commission, Order on Reconsideration, *EchoStar Communications Corp. v. Fox/Liberty Networks LLC*, FCC File No. CSR-5138-P, 14 FCC Rcd. 10480 (rel. June 30, 1999), available on Westlaw (1999 WL 436222) and Lexis (1999 FCC LEXIS 2992).

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Rank(R) 1 of 1

Database
FCOM-FCC1999 WL 436222 (F.C.C.), 14 F.C.C.R. 10,480, 14 FCC Rcd. 10,480
<KeyCite History>

Federal Communications Commission (F.C.C.)

Order on Reconsideration

IN THE MATTER OF: ECHOSTAR COMMUNICATIONS CORPORATION
v.

FOX/LIBERTY NETWORKS LLC

FOX SPORTS NET LLC

FOX SPORTS DIRECT

Program Access Complaint
File No. CSR-5138-P

DA 99-1271

Adopted: June 28, 1999

Released: June 30, 1999

By the Chief, Cable Services Bureau:

1. EchoStar Communications Corporation ("EchoStar") [FN1] filed a petition for reconsideration, pursuant to Sections 1.104 and 1.106 of the Commission's rules, [FN2] of the Cable Services Bureau's Memorandum Opinion and Order ("Order") in the above-captioned proceeding. [FN3] EchoStar contends that the Bureau erroneously dismissed EchoStar's program access complaint against Fox/Liberty Networks LLC, Fox Sports Net LLC and Fox Sports Direct (collectively "Fox") on the basis that the limitations period set forth in Section 76.1003(r) [FN4] had expired. [FN5] Fox filed an opposition seeking denial of EchoStar's petition. EchoStar filed a reply. For the reasons discussed below, EchoStar's petition for reconsideration is denied.

I. BACKGROUND

2. On June 26, 1996, EchoStar entered into an agreement ("RSN Distribution Agreement") with Liberty Satellite Sports, Inc. ("LSI") to distribute the regional sports programming controlled by LSI. [FN6] LSI is a predecessor-in-interest to Fox Sports Direct. [FN7] The RSN Distribution Agreement provided for a package of regional professional and non-professional sports programming to be delivered nationwide to DBS subscribers. [FN8] In a letter dated August 29, 1997, Fox offered to amend and extend its RSN Distribution Agreement with EchoStar. [FN9] Before EchoStar could accept the offer, by letter dated September 5, 1997, Fox revoked the offer made to EchoStar in its August 29, 1997 letter. [FN10] By letter dated September 24, 1997, EchoStar expressed dissatisfaction with Fox's decision to revoke the terms of its August 29, 1997 offer and gave Fox notice of its intent to file a program access complaint with the Commission. [FN11] After additional letters between the parties failed to

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settle the dispute, EchoStar filed a program access complaint on October 27, 1997. EchoStar filed the complaint pursuant to Section 628(c)(2)(B) of the Communications Act of 1934, as amended ("Communications Act") [FN12] and Section 76.1002(b) of the Commission's rules. [FN13] EchoStar alleged that Fox had engaged in unlawful discrimination against EchoStar in the prices, terms and conditions that Fox imposed upon EchoStar for making available the regional sports programming that it controls. Fox filed an answer denying discrimination and requesting that the Commission dismiss the Complaint with prejudice because EchoStar's complaint was barred by the limitations period of Section 76.1003(r). [FN14]

3. In the Order, the Bureau dismissed EchoStar's program access complaint against Fox as untimely filed. [FN15] Section 76.1003(r) of the Commission's rules states:

Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following occurs:

(1) The satellite cable programming or satellite broadcast programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) The satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules . . . [FN16]

4. The Order found that pursuant to Section 76.1003(r)(1) of the Commission's rules, EchoStar had one year from the date of entering into the contract with Liberty Satellite Sports, Inc./Fox Sports Direct to file a program access complaint with the Commission. [FN17] Thus, EchoStar had until June 26, 1997 to file such a complaint. EchoStar did not bring its complaint within that period and was therefore found to be time barred. The Order found that Fox's subsequent August 29, 1997 letter did not revive the limitations period regarding the rates, terms and conditions of the June 26, 1996 contract, nor could Fox's August 29, 1997 letter be viewed as a separate offer which triggered the limitations period. [FN18] The Order recognized the public policy of avoiding unnecessary regulatory interference regarding contracts entered into by consenting parties, and concluded that once the one year period had elapsed, subsequent renegotiations would not subject such contracts once again to program access review unless the parties entered into a new contract. [FN19] Because the matter was decided on procedural grounds, the Order did not address the merits of EchoStar's claims regarding violations of the program access rules.

II. DISCUSSION

5. EchoStar provides five specifications of error relating to the Bureau's Order. EchoStar argues that the Bureau's Order: (i) ignored the express language of Section 76.1003(r); (ii) relied on a distinction not relevant to Section 76.1003(r); (iii) disregarded other program access precedent; (iv) relied on a previously unmentioned public policy; and (v) failed to apply the "discovery rule" to toll the Section 76.1003(r) limitations period. In addition, EchoStar argues that the Bureau's Order creates the wrong incentives for both allegedly wronged MVPDs and vertically-integrated programming providers. We find that the arguments made by EchoStar in its petition do not warrant reversal of the Bureau's Order. Our conclusions with respect to each of the errors specified by EchoStar are set forth below.

6. EchoStar argues the Bureau's decision contravenes the Commission's program

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access rules regarding the filing of discrimination complaints. [FN20] EchoStar argues that under the express language of Section 76.1003(r)(2), an offer is just as adequate as the execution of a contract for starting the clock for the program access limitations period. EchoStar contends that the Bureau's finding that a new offer does not restart the clock if there is a contract between the parties at the time the offer is made is contrary to the clear language of Section 76.1003(r)(2). EchoStar maintains that the Bureau's decision effectively rewrites the rule by adding language to subsection (r)(2) to limit its application to situations in which there is no contract between the parties. [FN21] EchoStar believes that the Bureau has acted beyond its delegated authority to implement the Commission's rules by introducing exceptions to them. In response, Fox argues that the letter of August 29, 1997 did not start a new one year limitations period or afford an independent basis for jurisdiction because the parties were bound by the RSN Distribution Agreement that had been in effect for fourteen months. [FN22] Fox maintains that allowing correspondence and discussion about existing contracts between the parties to form the basis for program access complaints would render the limitations period meaningless. [FN23] Further, Fox argues that the Bureau acted within the limits of its jurisdiction by acting within the plain meaning of the Commission's rules. [FN24]

7. We are unpersuaded that the decision in the Order is contrary to the language of Section 76.1003(r), and affirm our conclusion that EchoStar's program access complaint is barred by the limitations period. Looking at the particular language at issue, Section 76.1003(r)(1) establishes a firm period for bringing program access claims once the parties have entered into a contract. The Order found that the parties were bound by this limitations period regardless of Fox's subsequent offer. Limited regulatory oversight of the relationship between an MVPD and a vertically integrated programming vendor serves the Congressional intent of prohibiting unfair or anticompetitive actions without undue regulatory disruption of the multichannel video programming market. The purposes of Section 628 are: (1) promoting the public interest by increasing competition and diversity in the multichannel video programming market; (2) increasing the availability of satellite cable and broadcast programming to persons in rural and other areas that are not currently able to receive such programming; and (3) encouraging the development of communications technologies. [FN25] Section 76.1003(r) furthers these goals by establishing a limited period for a party aggrieved by conduct alleged to violate the program access provisions to commence an adjudicatory proceeding before the Commission. A party has one year to seek redress for actions that entail unfair or anti-competitive practices by a vertically-integrated program supplier. After that period, the parties should rely on the marketplace to dictate their business relationship. We believe this is consistent with the realities of the marketplace and best achieves the goals of Section 628.

8. Parties may have numerous reasons for seeking a change of the terms of a programming contract. For instance, a programmer may offer a new channel of programming or technological changes in the delivery in programming, or an MVPD may add subscribers and thus seek a different price for programming based on the new volume of subscribers. Under EchoStar's interpretation of Section 76.1003(r), any interaction subsequent to the program vendor entering into a contract with a MVPD could lead to a program access complaint regardless of the period of time that has passed since the parties entered into a contract. This was not the Commission's intent. Accordingly, the Commission adopted the

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limitations period set forth in Section 76.1003(r). EchoStar's interpretation of that provision could thwart a programmer's ability to offer new programming, or even suggest a lower price for existing programming. Allowing EchoStar's interpretation of Section 76.1003(r) could affect the ability of consumers to receive new programming or services. We do not believe such consequences are consistent with the Congress' purposes in creating Section 628.

9. Secondly, EchoStar argues that the Order relied on a distinction not found in the rules. EchoStar believes that the decision attached importance to whether the parties contract amendment discussions took place more than one year after the date of the initial contract. [FN26] EchoStar argues that there is no basis in the program access rules for a distinction based on the timing of the offer because any offer restarts the clock without regard as to when negotiations started. [FN27] EchoStar contends that in any event, the negotiations that formed the basis of its complaint had started less than one year after execution of the agreement, citing a letter between the parties dated April 9, 1997. [FN28]

10. Our decision in the Order to dismiss EchoStar's complaint was not based on the timing of the parties contract amendment discussions. As stated in the Order, EchoStar's complaint was dismissed because it was not brought within one year following the execution of the RSN Distribution Agreement. [FN29] The Order found that subsequent discussions following the execution of a contract do not revive the limitations period unless the parties enter into a new contract. [FN30] EchoStar's contention that renegotiations started before the limitations period had expired does not bear on this conclusion. Under Section 76.1003(r), the limitations period began to run once the parties entered into a contract and was unaffected by their subsequent negotiations.

11. Third, EchoStar argues that the Bureau's decision is inconsistent with its decision in a prior program access complaint, *Turner Vision v. Cable News Network, Inc.* [FN31] EchoStar argues that, in *Turner Vision*, the Bureau held that post-contract negotiations are enough to restart the statute of limitations. [FN32] EchoStar maintains that the instant situation presents a more compelling reason to restart the clock because the parties moved beyond discussions after Fox made a written offer, and had the offer been accepted, the limitations period would have restarted under the Commission's rules. In opposition, Fox contends that the Bureau's decision is consistent with *Turner Vision*. [FN33] Fox argues that the *Turner Vision* decision noted that the defendants had agreed to prevent the statute of limitations from tolling because of ongoing negotiations, which is dissimilar to the instant situation. [FN34] Fox maintains that EchoStar was solely responsible for the delay in filing the complaint. [FN35]

12. We believe that the facts underlying *Turner Vision* are distinguishable. In *Turner Vision*, the parties recognized that their underlying contract was subject to a limitations period. In order to protect their rights to file a program access complaint, the parties executed agreements expressly tolling the limitations period. [FN36] In the present situation, the parties made no similar arrangement. Unlike the situation in *Turner Vision*, the record lacks evidence showing that both parties intended to extend the deadline for filing program access complaints.

13. One of the reasons cited for dismissing EchoStar's program access complaint was to avoid unnecessary regulatory interference regarding contracts entered into by consenting parties. [FN37] EchoStar's fourth error specification maintains that the Bureau's narrowing the statute of limitations rules in the

name of a policy of avoiding interference with private contracts is not a policy determination recognized by the Commission. EchoStar argues that the Order implementing the program access rules does not discuss a Commission policy regarding interference with private contracts. [FN38] EchoStar contends, that contrary to the position espoused in the Bureau's Order, Congress made the determination to interfere with private contracts in order to prevent discrimination by cable-affiliated programming vendors. [FN39] EchoStar believes the determination in the Order to view the limitations period in light of a policy of minimizing interference with private contracts is contrary to that Congressional determination.

14. We affirm the conclusion in the Order that public policy requires minimal regulatory interference with private contracts entered into by consenting parties. All limitations periods and statutes of limitations are premised upon a recognition that, at some specified point in time, potential defendants should be able to proceed with their affairs without the looming possibility of liability. [FN40] By adopting a limitations period for program access complaints, the Commission inherently recognized that, following a reasonable period of time in which to raise allegations of discrimination or unfair practices, the parties to a programming agreement must operate under the terms thereof or negotiate amendments thereto free of the program access specter.

15. We believe that the policy adopted by the Commission is consistent with the Congressional policy of the Cable Television Consumer Protection and Competition Act of 1992, the legislation that mandated implementation of the program access rules. [FN41] The statement of policy of the Act included a determination by Congress to rely on the marketplace, to the maximum extent possible, to achieve the availability of a diversity of views and information through cable television and other video distribution media. [FN42] The limitations period provides a limited period of time to contest allegedly unfair or discriminatory contracts and is consistent with Congress' policy of reliance on the marketplace to the maximum extent possible. [FN43] For the one-year limitations period, an exception to reliance on the marketplace is allowed because of Congress' concern that vertically-integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other MVPDs. [FN44]

16. Finally, EchoStar argues that even if the Bureau's determination that Fox's August 1997 offer did not restart the statute of limitations was correct, the statute should have been tolled because EchoStar was not aware of the discrimination to which it was subject until it received the August 29, 1997 letter. EchoStar maintains that prior Commission decisions finding that the "discovery rule," which postpones the beginning of the limitations period until the discovery of the right or wrong or facts on which such knowledge is chargeable in law, is applicable to program access complaints. [FN45] EchoStar believes that the discovery rule has special importance in the program access area where facts needed to establish a discrimination claim are typically in the exclusive possession of the vendor, making discovery of a wrong particularly difficult. EchoStar maintains that throughout this litigation, it has requested that Fox provide it with information necessary to allow it to determine the extent of Fox's discrimination, but Fox has refused. EchoStar argues that refusing to apply the discovery rule would allow Fox to profit from withholding the very information that would have enabled EchoStar to proceed with its complaint. [FN46]

17. We are not persuaded that the discovery rule is applicable to the instant

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proceeding. In other contexts, the Commission has found that a limitations period is not discretionary. [FN47] Its purpose is to protect a potential defendant against "stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." [FN48] The discovery rule postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date he discovers he has been injured. [FN49] The Commission has recognized the discovery rule to toll a limitations period in situations when it cannot be clearly determined when the plaintiff's claim accrued. [FN50] EchoStar's situation is distinguishable because there is no uncertainty regarding when the right to sue accrued. Under Section 76.1003(r)(1), a cause of action accrues upon the occurrence of a specific act; EchoStar's execution of the allegedly discriminatory contract between the parties. Accordingly, the application of the discovery rule is not appropriate in this proceeding.

18. Nor do we find merit in EchoStar's claim that the beginning of the limitations period should be postponed by Fox's failure to provide information. In the program access context, the Commission has addressed concerns regarding MVPDs' lack of access to information. The program access complaint procedures were designed to place the least necessary evidentiary burden on those seeking relief under the program access rules. [FN51] For discrimination complaints, the Commission allows an MVPD that has been unable to obtain rate information from a program vendor to file a complaint based on information and belief of an impermissible rate differential, supported by an affidavit, along with a statement that the vendor refused to provide the necessary specific comparative information. [FN52] The rules provided EchoStar a suitable method to provide evidence in support of its program access complaint regardless of the information supplied by Fox.

19. EchoStar also argues that the Bureau Order creates undesirable policy incentives for both vertically-integrated programmers and MVPDs. While these arguments are not legal specifications of error, we will address them in the interests of fully explicating our rationale in this matter. EchoStar asserts that the Bureau's determination that an offer to renegotiate an existing contract does not restart the statute of limitations eliminates programming vendors' incentive to renegotiate a discriminatory contract once the statute of limitations has expired. [FN53] EchoStar maintains that a vendor that has signed a discriminatory contract does not have any basis to make a non-discriminatory offer unless there is a commercial advantage to make a new offer.

20. We disagree with the claim that the decision eliminates vendor's incentives to renegotiate existing contracts. To the contrary, we believe that a clearly defined limitations period for parties that have entered into a contract encourages unsolicited offers. A statute of limitations requires a party to exercise its rights within a reasonable time period. Parties that do not exercise their rights within the limitations period forego those rights. [FN54] After the limitations period has elapsed, the parties may renegotiate the terms of an existing contract without fear that the negotiations could lead to the filing of a program access complaint.

21. EchoStar asserts that the Bureau's erroneous decision has the effect of rewarding Fox for its retraction of the offer. EchoStar maintains that if the offer had not been retracted and led to a new contract, the new contract would have restarted the statute and allowed a program access complaint to be brought. EchoStar believes this decision signals to MVPDs who believe their existing contracts are discriminatory to accept contract offers they know are

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discriminatory in order to have a cause of action when the limitations period will not let them bring an action under the existing contract. [FN55]

22. We disagree with EchoStar's contention. The Bureau's decision is not intended to reward either party. The decision allows the parties to receive the benefits of the contract they entered subject to program access scrutiny for one year. Under EchoStar's view, the Commission must arbitrate program access disputes between EchoStar and Fox for the entire period that a contract exists between them because at any time, one of the parties may seek to renegotiate it. As discussed above, such a situation is precisely what the program access limitations period is intended to avoid. EchoStar believes the decision signals to MVPDs to accept discriminatory contract offers in order to have a cause of action when the statute of limitations has run on an existing contract. [FN56] Again, we disagree with EchoStar. If, after the one year limitations period has expired, a vertically integrated programmer offers new contract terms, an MVPD is free to accept or reject those terms in its business judgement. If the MVPD finds the new terms acceptable, it will contract with the programmer. If the terms are unacceptable, the MVPD will reject them and continue under the existing contract. We do not believe that MVPDs will generally enter into contracts that they believe to be discriminatory, based on the possibility that the Commission will in the future rule favorably on a program access claim. However, if a MVPD does contract with the vertically integrated programmer, it will have one year from the date of such contract to bring its claim. [FN57]

III. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that the petition for reconsideration filed by program access complaint filed by EchoStar Communications Corporation against Fox/Liberty Networks LLC, Fox Sports Net LLC and Fox Sports Direct IS DENIED.

24. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. [FN58]

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen
Chief
Cable Services Bureau

FN1. EchoStar, a provider of Direct Broadcast Satellite ("DBS") programming services, operates two DBS satellites that allow it to provide approximately 120 channels of digital television programming to subscribers throughout the continental United States. EchoStar states that it competes against cable operators in every cable franchise area and is therefore a "multichannel video programming distributor" ("MVPD") as defined by Section 76.1000(e) of the Commission's rules.

FN2. 47 C.F.R. ss 1.104 and 1.106.

FN3. EchoStar Communications Corp. v. Fox Liberty Networks, et al., 13 FCC Rcd 21841 (1998).

FN4. The Commission subsequently amended the program access rules. The limitations period for filing program access complaints is now set forth in 47

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C.F.R. s 76.1003(f). See 1998 Biennial Review - Part 76 Cable Television Service Pleading and Complaint Rules, Report and Order, CS Docket No. 98-54, FCC 98-348 (rel. Jan. 8, 1999) (petition for reconsideration pending).

FN5. Fox/Liberty Networks LLC is a joint venture between The News Corporation Ltd. and the Liberty Media Group of Tele-Communications, Inc. ("TCI") (TCI has since merged with AT&T. The legal owner of the Liberty Media Group is now AT&T). See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T, Memorandum Opinion and Order, FCC 99-24 (released Feb. 17, 1999). Fox Sports Net LLC and Fox Sports Direct are divisions of Fox/Liberty Networks LLC. AT&T, a cable system operator, has an interest in Fox because its Liberty Media Group is a 50% participant in the Fox/Liberty Networks LLC joint venture. Order, 13 FCC Rcd at 21841.

FN6. Order, 13 FCC Rcd at 2844.

FN7. Id.

FN8. Id. at 21845.

FN9. Id.

FN10. Id.

FN11. Id.

FN12. 47 U.S.C. s 548(c)(2)(B).

FN13. 47 C.F.R. s 76.1002(b).

FN14. Order, 13 FCC Rcd at 21849.

FN15. Id. at 21846.

FN16. 47 C.F.R. s 76.1003(r).

FN17. 47 C.F.R. s 76.1003(r)(1).

FN18. Order, 13 FCC Rcd at 21849.

FN19. Id.

FN20. EchoStar Petition at 3.

FN21. Id. at 4.

FN22. Fox Opposition at 4.

FN23. Id. at 6.

FN24. Id. at 7.

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- FN25. 47 U.S.C. s 548(a).
- FN26. EchoStar reached this conclusion based on a footnote in the Order which noted that "the parties first contract amendment discussions took place on August 20, 1997, after the one year limitations period expired." EchoStar Petition at 5, citing Order, 13 FCC Rcd at 21846 n.61.
- FN27. Id. at 5.
- FN28. Id. at 6 and Attachment 1 (Letter from Mr. Glen Gurgiolo to Ms. Jessica Heacock (April 9, 1997)).
- FN29. Order, 13 FCC Rcd at 21849.
- FN30. Id.
- FN31. Turner Vision v. Cable News Network, Inc., 13 FCC Rcd 12610 (1998) ("Turner Vision").
- FN32. EchoStar Petition at 7.
- FN33. Fox Opposition at 6.
- FN34. Id., citing Turner Vision at 12611 n.6.
- FN35. Fox Opposition at 7.
- FN36. See Consumer Satellite Services, Inc., et al. Consolidated Reply in CSR Docket No. 4676-P at exhibits 7 - 10.
- FN37. Order, 13 FCC Rcd at 21849.
- FN38. EchoStar Petition at 9, citing Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report and Order, 8 FCC Rcd 3359 (1993) ("Program Access Order").
- FN39. EchoStar Petition at 10.
- FN40. See Bunker Ramo Corp., 31 FCC 2d 449 (1971).
- FN41. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.
- FN42. Id. at s 2(b), 106 Stat. 1463.
- FN43. See Chambers Development Co., Inc. v. Passaic County Util. Auth., 63 F.3d 582, 589 (3rd Cir. 1995) (discussing sanctity of contracts).
- FN44. See Cable Television Consumer Protection and Competition Act of 1992 at s 2(a)(5), 106 Stat. 1462.
- FN45. EchoStar Petition at 15.

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FN46. Id. at 16.

FN47. Bunker Ramo Corp., 31 FCC 2d 449 (1971).

FN48. Id., citing Riddlesbarger v. Hartford Insurance Co., 74 U.S. 386 (1896).

FN49. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 449 (7th Cir. 1990).

FN50. Accrual is the date on which the statute of limitations begins to run. Id. In Bunker Ramo, Petitioner alleged that defendant common carrier had deteriorated services and thereafter failed to supply, maintain and restore communications circuits and facilities. As a preliminary issue, the Commission addressed whether Petitioner's untimely petition could be entertained. Petitioner argued that because of the difficulty in recognizing precisely when injury as a result of the acts became apparent, it was difficult to determine precisely at what time the limitations period began to run against petitioner, and accordingly, the period should be tolled. In recognizing the discovery rule, the Commission postponed ruling on the limitations period issue until all of the facts could be fully developed in an evidentiary hearing. See Bunker Ramo Corp., 31 FCC 2d 449 (1971).

FN51. Program Access Order, 8 FCC Rcd at 3362.

FN52. Id. at 3417.

FN53. EchoStar Petition at 12.

FN54. 51 AM. JUR. 2d Limitation of Actions s 50 (1970).

FN55. EchoStar Petition at 14.

FN56. Id.

FN57. Order, 13 FCC Rcd at 21849.

FN58. 47 C.F.R. s 0.321.

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END OF DOCUMENT

EXHIBIT II

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