

## EXHIBIT II

Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Comcast Corp.*, FCC File No. CSR-5244-P, 14 FCC Rcd. 2089 (rel. January 26, 1999), available on Westlaw (1999 WL 27028) and Lexis (1999 FCC LEXIS 307).

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1999 WL 27028 (F.C.C.), 14 F.C.C.R. 2089, 14 FCC Rcd. 2089,  
15 Communications Reg. (P&F) 803

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF ECHOSTAR COMMUNICATIONS CORPORATION COMPLAINANT,  
v.

COMCAST CORPORATION, COMCAST-SPECTACOR, L.P., PHILADELPHIA SPORTS MEDIA, L.P.,  
DEFENDANTS.

File No. CSR 5244-P

DA 99-235

Adopted: January 22, 1999

Released: January 26, 1999

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. EchoStar Communications Corporation ("EchoStar") filed a program access complaint ("Complaint") against Comcast Corporation ("Comcast"), Comcast-Spectacor, L.P., and Philadelphia Sports Media, L.P. (collectively referred to as "Defendants") alleging violations of Sections 628(b) and (c) of the Communications Act of 1934, as amended ("Communications Act"), [FN1] and Sections 76.1001, 76.1002(a) and 76.1002(b) of the Commission's rules, [FN2] by engaging in discrimination and unfair practices and exercising undue influence over the distribution of satellite cable programming.

II. BACKGROUND

2. Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") [FN3] to promote competition, with the view that regulation would be transitional until the video programming distribution market becomes competitive. [FN4] In enacting the program access provisions, codified in Section 628 of the Communications Act, [FN5] Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other multichannel video programming distributors ("MVPDs") in the sale of satellite cable and satellite broadcast programming. [FN6]

3. Section 628(b) of the Communications Act states that:

[i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. [FN7]

In Section 628(c), Congress instructed the Commission to promulgate regulations

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that:

(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor; [and] [FN8]

(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other MVPDs or their agents or buying groups.... [FN9]

4. In Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, First Report and Order ("Program Access Report and Order"), [FN10] the Commission concluded that non-price discrimination is included within the prohibition against discrimination set forth in Section 628(c)(2)(B). While the Commission did not attempt to identify all types of non-price discrimination that could occur, the Commission stated that "one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell', or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor." The Commission cautioned, however that "'unreasonable' refusals to sell" should be distinguished from "certain legitimate reasons that could prevent a contract between a vendor and a particular distributor." [FN11] Such legitimate reasons would include:

(i) the possibility of [the] parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor. [FN12]

5. "Satellite cable programming" is "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." [FN13] "Satellite broadcast programming" is broadcast programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster. [FN14]

### III. THE FACTS

6. Complainant, EchoStar, is a direct broadcast satellite ("DBS") provider that offers multichannel video programming distributor ("MVPD") service to approximately 950,000 subscribers across the continental United States. [FN15] EchoStar operates three DBS satellites to offer up to 200 channels of digital programming. [FN16] As an MVPD, EchoStar competes directly with cable operators in each and every cable franchise area, including the Philadelphia metropolitan area. [FN17]

7. Defendant Comcast is a multiple system operator ("MSO") based in Philadelphia that owns and operates several cable systems and cable programming services. [FN18] Comcast is one of the nation's largest cable operators, and an

incumbent cable operator in the Philadelphia market. [FN19] In July 1996, Comcast acquired a 66% interest in the Philadelphia Flyers L.P., to form a new partnership named Comcast-Spectacor, L.P. [FN20] Comcast-Spectacor owns the following assets: 1) the Philadelphia Flyers National Hockey League ("NHL") team; 2) the Philadelphia 76ers National Basketball Association ("NBA") team; and 3) the CoreStates Spectrum and Corestates Center sports arenas. [FN21] Also in 1996, Comcast-Spectacor entered into a partnership with the Philadelphia Phillies Major League Baseball ("MLB") team to form Philadelphia Sports Media, L.P. [FN22]

8. The facts underlying EchoStar's complaint are undisputed. SportsChannel Philadelphia ("SportsChannel") and PRISM were commonly owned cable networks that served the Philadelphia market. [FN23] SportsChannel was a satellite delivered basic tier network that offered numerous Philadelphia professional major league sport contests, including Philadelphia Flyers hockey games, Philadelphia 76ers basketball games, and Philadelphia Phillies baseball games. [FN24] PRISM was a network that produced and distributed movies and other entertainment programming, including Philadelphia professional major league sport contests. [FN25] Unlike SportsChannel, PRISM was delivered through terrestrial technology, and its programming was available only as a premium priced subscription service. [FN26] Both SportsChannel and PRISM terminated operations on September 30, 1997. [FN27] Because SportsChannel distributed its programming through satellite technology, it was considered "satellite cable programming" subject to the program access rules. [FN28] EchoStar never carried SportsChannel or PRISM programming.

9. On October 1, 1997, Comcast SportsNet ("SportsNet") debuted as a new channel on Comcast's, and other cable operators', basic service tier ("BST") in the Philadelphia market. Defendants distribute SportsNet only through terrestrial microwave and fiber technology. [FN29] In addition to the professional sporting events previously offered through SportsChannel and PRISM, SportsNet's programming includes various professional and collegiate sporting events that had not been carried on either channel. [FN30] SportsNet offers locally produced programming, such as sports-related talk-shows and sports news shows. [FN31] These shows are all original and have never appeared before on any programming service, including SportsChannel and PRISM. [FN32]

10. Defendants have indicated that they license SportsNet programming to a wide variety of MVPDs in the Greater Philadelphia market, including local cable operators, wireless cable systems, also known as multichannel multipoint distribution systems ("MMDS"), satellite master antenna television ("SMATV") providers, and potential open video systems ("OVS"). [FN33] In letters dated December 9, 1997, and December 31, 1997, EchoStar attempted to negotiate with Defendants for the carriage rights of SportsNet's programming. [FN34] EchoStar requested that Defendants send a copy of SportsNet's affiliation agreement and applicable rate card. EchoStar's efforts were unsuccessful. In a letter to EchoStar dated January 7, 1998, the general counsel of Comcast-Spectacor, L.P. stated that SportsNet's programming would not be available to "any satellite delivered service in the Philadelphia market." [FN35] After providing Defendants with the requisite notice of its intent to file a program access complaint, EchoStar filed the instant action alleging that Defendants' refusal to sell SportsNet programming to EchoStar violates the program access provisions of the Communications Act. [FN36]

#### IV. THE PLEADINGS

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11. EchoStar alleges that Defendants' refusal to offer its regional sports programming to EchoStar and other DBS providers constitutes an impermissible refusal to sell prohibited by Section 628(c)(2)(B). [FN37] EchoStar maintains that if the regional sports programming were transmitted by satellite, Defendants' refusal to sell would be an impermissible form of non-price discrimination. [FN38] EchoStar argues that Defendants distribute SportsNet's programming through terrestrial means in order to evade application of the program access rules. [FN39] EchoStar contends that the Commission has authority under Sections 4(i) and 303(r) to ensure that its regulations are not evaded. [FN40]

12. EchoStar argues that Defendants' claim of cost savings is not a valid basis to move to terrestrial delivery of SportsNet. [FN41] EchoStar alleges that Defendants' primary reason to switch to terrestrial facilities was to avoid application of the Commission's rules and thus secure the additional monopoly rents available from exclusive carriage of SportsNet. [FN42] EchoStar maintains that Defendants have no cost justification to support its allegedly discriminatory conduct toward EchoStar, contending that it and other DBS providers offered to share in SportsNet's satellite distribution costs. [FN43] EchoStar notes it has a well-established and recognized record of creditworthiness and financial stability. [FN44] EchoStar believes that Defendants' decision to make its programming available to other MVPDs highlights Defendants' discriminatory treatment of EchoStar as compared to the other MVPDs. [FN45] EchoStar notes that even if the sports programming is considered a new service containing programming previously unavailable by satellite in the Philadelphia area, if the use of terrestrial transmission was intended to evade the Commission's prohibition on refusing to sell satellite cable programming, it does not matter whether the programming was switched from satellite transmission or was transmitted by terrestrial means from the outset. [FN46]

13. EchoStar alleges that Defendants have unduly influenced the decision of Comcast-Spectacor and Philadelphia Sports Media, L.P. to deny EchoStar the opportunity to carry the regional sports programming in violation of Section 628(c)(2)(A). [FN47] EchoStar further states that Defendants' unwillingness to negotiate to carry SportsNet, while offering it to certain MVPDs (including Comcast), constitutes an unfair practice under Section 628(b). [FN48] EchoStar maintains that the sports programming offered by Defendants is important to its success and ability to compete in the Philadelphia MVPD market, and the unavailability of SportsNet precludes EchoStar from competing effectively with Comcast. [FN49] EchoStar believes that the statutory prohibition contained in Section 628(b) is broader than the specific prohibitions on discrimination in Section 628(c), arguing that the only requirement for triggering the prohibition in Section 628(b) is that the unfair conduct in question prevents an MVPD "from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." [FN50] EchoStar argues that if Defendant's refusal to sell its sports programming to EchoStar hinders EchoStar's provision of satellite programming to consumers, the status of the sports programming as "satellite cable programming" is irrelevant as long as EchoStar can show it has been harmed in its ability to provide satellite cable programming. [FN51]

14. EchoStar maintains its construction of Section 628(b) is consistent with the plain language of the statute. [FN52] EchoStar also maintains that the Commission has read Section 628(b) as a "catch-all" provision intended to cover anti-competitive practices not directly covered by other regulations and statutory provisions, such as the use of terrestrial transmission to avoid

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Section 628(c) obligations. [FN53] EchoStar argues that a violation of Section 628(b) has occurred because Defendants' refusal to allow EchoStar to carry regional sports programming in Philadelphia hinders EchoStar's ability to sell other programming which qualifies as "satellite cable programming." [FN54] EchoStar contends that regional sports programming is important to the success of an MVPD. [FN55] EchoStar claims the harm caused by Defendant's actions is demonstrated by the fact that there is a huge disparity between its and Comcast's subscriber count in the Philadelphia even though EchoStar offers less expensive services. [FN56] EchoStar maintains that because the effect of not having access to SportsNet is enough to find a violation of Section 628(b), the Commission does not need to find that Defendants' purpose for not selling its programming to EchoStar was to inhibit EchoStar as an MVPD competitor. [FN57]

15. In their Answer, Defendants asserts that their conduct does not violate Sections 628(b) or 628(c) of the Communications Act. Defendants maintain that the SportsNet is not satellite cable programming. [FN58] Defendants argue that the Commission is granted only limited authority to adjudicate disputes regarding access to satellite cable programming, which is defined as "video programming which is transmitted via satellite." [FN59] Defendants cite Congress' deliberate, consistent, and repeated use of the phrase "satellite cable programming" as evidence that Congress intended to limit application of the program access rules to satellite programming. [FN60] Defendants argue that the legislative history reveals that Congress considered and rejected the idea that the program access rules apply to terrestrially delivered programming. [FN61] Defendants reason that if the Commission were to extend the application of the statute to terrestrial programming, despite the clear language of the statute, it would violate well established principles of statutory construction. [FN62] Defendants state that because SportsNet falls outside of the scope of the statute, the Commission does not have authority to grant the requested relief. [FN63]

16. Defendants also challenge EchoStar's claim that SportsNet is terrestrially delivered in order to evade the program access rules. [FN64] According to Defendants, SportsNet constitutes a new and original programming service entirely unrelated to SportsChannel. [FN65] In support of its claim, Defendants detail how SportsNet is different in ownership, management, name, and content from SportsChannel. [FN66] Defendants allege that SportsNet will telecast significant amounts of programming never before seen on SportsChannel or PRISM, including various collegiate games, sports news shows, and a host of original and locally-produced shows. [FN67] Defendants maintain that the only programming overlap between SportsNet and SportsChannel consists of Flyers, Phillies and 76ers games. [FN68] Defendants argue that SportsNet has always been terrestrially delivered, and has never been moved from satellite delivery. [FN69]

17. Defendants also dispute EchoStar's suggestion that its motivation for creating SportsNet was to deny competitors access to sports programming. [FN70] Defendants explain that adoption of terrestrial distribution for SportsNet was a rational and legitimate business decision based on a determination that terrestrial distribution is significantly less expensive than satellite distribution. [FN71] In this regard, Defendants note that they had access to the pre-existing terrestrial infrastructure of PRISM to deliver SportsNet and that SportsNet was being offered to essentially the same base of terrestrial operators that formerly distributed PRISM. [FN72] Because a microwave and fiber-optic distribution system was already in place, Defendants argue that it was

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both logistically simple and economical to adopt terrestrial distribution for SportsNet. Defendants also claim that satellite distribution substantially increases the costs of policing against signal theft. [FN73] Defendants believe that because SportsNet is a regional service, there is no reason to incur the higher costs associated with satellite distribution. [FN74] Defendants maintain that their decision to refuse EchoStar's offer to pay to have SportsNet uplinked to a satellite cannot be characterized as an evasion of the program access rules. Defendants argue that EchoStar's offer to pay for the uplink to satellite does not transform terrestrially delivered programming into satellite cable programming. Defendants note that other competing MVPDs in the Greater Philadelphia market will have access to SportsNet including MMDS, OVS providers, SMATV, as well as all local cable systems. [FN75]

18. Defendants assert that EchoStar has failed to state a claim under Section 628(b) and that there is no legal support for EchoStar's theory. Defendants argue that, under EchoStar's view of Section 628(b), anything that Defendants do to compete in the marketplace will constitute a program access violation because such an action could help Comcast gain or retain subscribers at the expense of EchoStar. [FN76] Defendants further argue that the decision not to offer SportsNet to EchoStar is not an unfair practice because this decision is specifically permitted under law. [FN77] Defendants contend that because the program access provisions of the 1992 Cable Act and the Commission's rules exclude terrestrially delivered programming, Defendants may decide whether or not to offer SportsNet to any MVPD. [FN78] Finally, Defendants argue that EchoStar fails to state a claim under Section 628(b) because it does not make a showing of harm as required by Section 76.1000(c)(1)(xii) of the Commission rules. [FN79] Defendants contend that EchoStar presents no evidence to support its claim that the absence of SportsNet has directly lead to a low subscriber count.

## V. DISCUSSION

19. At the outset of our discussion, we note that EchoStar's complaint presents essentially the same facts and legal issues recently resolved by the Cable Services Bureau in *DIRECTV, Inc. v. Comcast Corporation, et al.* [FN80] In resolving EchoStar's complaint, we rely substantially on the analysis set forth therein. As in *DIRECTV*, there appear to be three interrelated matters of dispute in this proceeding:

- (1) Is the programming in question "satellite cable programming" so that Defendants' conduct is actionable under Section 628(c) of the program access rules?
- (2) Does the Commission have the authority to take action against evasions of the program access rules and, if so, is Defendants' conduct actionable as an evasion?
- (3) Does Defendants' conduct involve unfair or anti-competitive action to deprive EchoStar of "satellite cable programming" under Section 628(b)?

20. Section 628 is generally understood to be a mechanism for ensuring that MVPDs that are competing with traditional cable television systems are not deprived, through exclusive contracts, discriminatory pricing, or otherwise, of access to vertically integrated "satellite cable programming." Section 628(c)(2)(A) prohibits a cable operator from unduly or improperly influencing the decision of a "satellite cable programming vendor" to sell, or the prices terms and conditions of sale, of satellite cable programming to unaffiliated

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MVPDs. [FN81] Section 628(c)(2)(B) prohibits a "satellite cable programming vendor" in which a cable operator has an attributable interest from engaging in discrimination in the prices, terms or conditions of the sale or delivery of satellite cable programming to competing MVPDs. [FN82] As in DIRECTV, the success of EchoStar's Section 628(c) claim hinges upon whether SportsNet can be said to be a satellite cable programming vendor.

21. EchoStar's complaint makes little effort to demonstrate that SportsNet is in fact "satellite cable programming." Rather, it argues that, if the programming were satellite delivered, it would be subject to the program access provisions of the Communications Act. The first step in our analysis is to determine what Congress intended the term "satellite cable programming" to mean. The Supreme Court, in its Chevron decision [FN83] speaks to the proper statutory interpretation analysis in situations such as this. That decision states:

[F]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. ... if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [FN84]

We believe that the correct reading of Section 628(c) is that the provisions in question apply to satellite cable programming, not programming that was "previously" satellite-delivered, or the "equivalent" of satellite cable programming, or programming that would qualify as satellite cable programming, but for its terrestrial delivery. The statute defines "satellite cable programming" as that which is transmitted via satellite. [FN85] This reading is consistent with the legislative history of Section 628 which indicates that the version of the program access provision that the Senate adopted would have extended to terrestrially-delivered programming services but the House bill, that was eventually adopted, did not. [FN86] This indicates a specific intention to limit the scope of the provision to satellite services. [FN87] Given the new content of the service in question it is also not clear that this is a service which can be considered "previously" distributed by satellite. Because we find that SportsNet is not satellite cable programming, we deny EchoStar's Section 628(c)(2)(B) refusal to sell claim and its Section 628(c)(2)(A) undue influence claim.

22. The next question presented has to do with the scope of the Commission's authority to act against evasions of Section 628 and whether the conduct of Defendants could in fact be considered an evasion. Assuming for the sake of argument that the Commission has the authority to act against evasions in some circumstances (an issue the Commission has considered elsewhere), [FN88] we are not persuaded here that the totality of the circumstances demonstrates an intent to evade our rules.

23. Here, for instance, we find evidence that the service in question is not simply a service that has moved from satellite to terrestrial distribution but is in fact a new service. [FN89] The majority of the programming content on SportsNet is not duplicative of content on SportsChannel Philadelphia. A significant amount of the sports content on the channel consists of sports events that were on PRISM, a terrestrially delivered service, operating in the Philadelphia market for over two decades, that in its last season distributed some 124 games of the Philadelphia Flyers, Philadelphia 76ers and the Philadelphia Phillies. [FN90] In contrast, in its last year of operation,

SportsChannel Philadelphia distributed 67 such games. In this regard, we believe that it bears repeating that EchoStar never purchased programming from SportsChannel or PRISM. SportsNet is a brand new service in ownership, name, management, and content. [FN91] It is described as featuring more locally-produced sports coverage -- including events, news, opinion, and programming -- than any other regional sports network in the United States. [FN92] As a further departure from its predecessors, Defendants have returned 22 games of the Philadelphia 76ers back to broadcast television. [FN93]

24. In addition, according to Defendants, the terrestrial distribution of this service is dramatically less expensive than satellite distribution. [FN94] An affidavit filed by Defendants, indicates that it costs approximately \$600,000 per year to deliver the SportsNet service terrestrially. The cost of delivering the service would be approximately \$2,280,000 per year using a full band satellite transponder, \$1,400,000 using a second tier satellite transponder, or between \$720,000 and \$900,000 using shared digital capacity. [FN95] In addition, a one time cost of \$250,000 for an up-link facility would be required plus \$24,000 a year to uplink and a cost of \$190,000 for encoding the signal prior to uplinking it and decoding at the headend of the individual recipients. Although not cited as an extra cost by Defendants, EchoStar itself notes if it received the service it would split the cost of uplinking SportsNet to a satellite if that was the only thing standing in the way of Comcast's making the sports programming available to DBS. [FN96] The terrestrial infrastructure used by PRISM, according to Defendants, had available capacity and the base of operators receiving the Service is substantially that same as that which received PRISM, so use of that network became a logistically simple and economical choice. [FN97] None of these facts are disputed by EchoStar.

25. Given all these facts, including the differences between the old and the new service, the incorporation of the old PRISM terrestrially delivered content and distribution process, and the unchallenged cost advantages of terrestrial distribution, we cannot conclude that evasive conduct is involved. Because we conclude that evasive conduct is not present, we do not address EchoStar's argument that the Commission can act to prevent such conduct under Sections 4(i) and 303(r) of the Communications Act.

26. We also find unpersuasive EchoStar's assertion that Defendants' failure to pursue EchoStar's offer to share the cost of uplinking SportsNet for satellite delivery constitutes evidence that the primary purpose for terrestrially delivering SportsNet was evading the program access requirements, rather than selecting the most cost effective delivery method. As discussed above, Defendants have presented evidence that they enjoy significant cost savings by employing terrestrial distribution methods. EchoStar's subsequent offer to share the costs of uplinking SportsNet's signal for purposes of satellite distribution by EchoStar and, perhaps, other DBS providers, does not alter the logic of defendants' initial business decision to utilize terrestrial delivery methods. Having employed terrestrial distribution for legitimate business means and not for purposes of evading the program access rules, Defendants' introduced SportsNet, a new programming service. As a new, terrestrially delivered service, SportsNet is not subject to the program access rules and not required to provide access to all interested MVPDs. Accordingly, EchoStar's subsequent offer to share uplinking costs after Defendants have legitimately chosen terrestrial delivery methods is not relevant to our determination. [FN98]

27. The final argument that EchoStar makes is that Defendants' conduct violates Section 628(b) of the Communications Act. This provision reads as

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follows:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

EchoStar asserts that Section 628(b) has broad applicability and does not specifically require that the unfair practices in question hinder the distribution of the programming at issue. Because its own service is satellite delivered, EchoStar asserts that Defendants' unfair denial of SportsNet violates Section 628(b) because it hinders the provision of EchoStar's satellite delivered service.

8. We are not persuaded that the facts alleged are sufficient to constitute a Section 628(b) violation. In order to find a violation of Section 628(b), the Commission must make two independent determinations. First, the Commission must determine that the defendant has engaged in unfair methods of competition or unfair or deceptive acts or practices. Second, the Commission must determine that the unfair acts or practices, if found, had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming to subscribers or consumers. Here, we do not believe that the record supports a conclusion that Defendants have engaged in unfair or deceptive acts creating, packaging and distributing SportsNet. [FN99] In enacting Section 628(b), Congress determined that while cable operators generally must make programming available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered. EchoStar's argument would have us find that it is somehow unfair for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it means that a competing MVPD may no longer be afforded access to the service. We find no evidence in Section 628 that Congress intended such a result. Congress did not prohibit cable operators from delivering any particular type of service terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that program access obligations remain with a programming service that has been so moved. Thus, given our prior finding that Defendants' actions do not amount to an attempt to evade our rules, we decline to find that, standing alone, Defendants' decision to deliver SportsNet terrestrially and to deny that programming to EchoStar is "unfair" under Section 628(b).

9. Section 628(b) remains, as the Commission has stated previously, "a clear demarcation of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming." [FN100] It cannot, however, be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate.

10. Following the release of our DIRECTV order, EchoStar filed a Motion to Compel Production of Documents ("Motion"). Defendants filed an Opposition and Request to Strike to which EchoStar filed a Reply. While stating numerous times its Motion that the record in this proceeding contains sufficient evidence to establish violations of Section 628, [FN101] EchoStar states that it must seek

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discovery in light of the Bureau's DIRECTV decision. In support of its Motion, EchoStar states that the Bureau in DIRECTV found that "the record in that case did not contain enough evidence to establish that Comcast's conduct was 'unfair' for purposes of the Section 628(b) prohibition." [FN102] EchoStar mischaracterizes the Bureau's decision in DIRECTV. In that case, the Bureau stated "[w]e are not persuaded that the facts alleged are sufficient to constitute a Section 628(b) violation. ... Here, we do not believe that the record supports a conclusion that Comcast has engaged in unfair or deceptive acts in creating, packaging and distributing Comcast SportsNet." [FN103] Contrary to EchoStar's assertion, the Bureau's decision in DIRECTV did not deny DIRECTV's claim based on insufficient evidence. Rather, the Bureau, assuming the facts alleged by DIRECTV to be true, determined that DIRECTV failed to establish a violation of Section 628(b).

31. EchoStar also argues in its Motion that "the facts underlying the EchoStar and DIRECTV complaints are different in at least one significant respect ... Comcast [publicly admitted that it] decided to withhold its sports programming from certain competitors to counter those competitors' own exclusive programming. EchoStar, however, does not enjoy any such exclusive rights, unlike DIRECTV." [FN104] These facts do not serve to alter our conclusions herein or persuade us that discovery is warranted. As stated above:

EchoStar's argument would have us find that it is somehow unfair for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it means that a competing MVPD may no longer be afforded access to the service. ... [G]iven ... that Defendants' actions do not amount to an attempt to evade our rules, we decline to find that, standing alone, Defendants' decision to deliver SportsNet terrestrially and to deny that programming to EchoStar is "unfair" under Section 628(b). [FN105] Our decision herein, as in DIRECTV, is unrelated to the complainant's possession, or lack thereof, of an exclusive source of sports programming. EchoStar has not persuaded us that discovery is necessary or that the record compiled herein is insufficient. Accordingly, EchoStar's Motion is denied.

## VI. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED, that the complaint filed in CSR 5244-P by EchoStar Communications Corporation IS DENIED.

33. IT IS FURTHER ORDERED, that EchoStar Communications Corporation's Motion to Compel Production of Documents IS DENIED.

34. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. s 0.321.

## FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen  
Chief  
Cable Services Bureau

FN1. 47 U.S.C. s 548(b), (c).

FN2. 47 C.F.R. ss 76.1001, 76.1002(a), (b).

FN3. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in

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scattered sections of 47 U.S.C.).

FN4. 1992 Cable Act s 2(b)(2), 106 Stat. 1463. See also Communications Act s 601(6), 47 U.S.C. s 521(6) ("The purposes of this title are to ... promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.")

FN5. 47 U.S.C. s 548.

FN6. 1992 Cable Act s 2(a)(5), 106 Stat. 1460-61.

FN7. 47 U.S.C. s 548(b).

FN8. Communications Act s 628(c)(2)(A), 47 U.S.C. s 548(c)(2)(A).

FN9. Communications Act s 628(c)(2)(B), 47 U.S.C. s 548(c)(2)(B). Congress provided limited exceptions to this prohibition. A satellite programming vendor is not prohibited from:

(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality; (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming; (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or (iv) entering into an exclusive contract that is permitted under subparagraph (D) [of this section].  
Id.

FN10. 8 FCC Rcd 3359 (1993).

FN11. Id.

FN12. Id. (footnote omitted).

FN13. 47 U.S.C. s 601(d)(1).

FN14. 47 U.S.C. s 548(i)(3).

FN15. Complaint at 2, Exhibit 2.

FN16. Id. at 2.

FN17. Id. at 3.

FN18. Comcast has ownership interests in a number of cable television programming services, including QVC, E!, Outdoor Life and Speedvision. Answer at Exhibit 2.

FN19. Complaint at 4; Answer at 32.

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FN20. Complaint at 3; Answer at 32.

FN21. Complaint at 3; Answer at 32.

FN22. Complaint at 3; Answer at 32.

FN23. Answer at 4-5.

FN24. Id.

FN25. Id.

FN26. Id.

FN27. Id.

FN28. 47 U.S.C. ss 548(a), 605(d)(1).

FN29. Answer at Exhibit 3.

FN30. Id. at 16-17.

FN31. Id. at Exhibit 4.

FN32. Id.

FN33. Answer at 6.

FN34. Complaint at 5, Exhibit 2.

FN35. Complaint at Exhibit 4 (letter from Philip Weinberg, General Counsel, Comcast-Spectacor to Michael Schwimmer, Vice President -- Programming, EchoStar (Jan. 7, 1998)).

FN36. 47 U.S.C. ss548(b), (c); see 47 C.F.R. s 76.1003(a).

FN37. 47 U.S.C. s 548(c)(2)(B).

FN38. Complaint at 7.

FN39. Id. at 8.

FN40. Id. at 8-9, citing Communications Act ss 4(i) and 303 (r), 47 U.S.C. s 154(i) and 47 U.S.C. s 303(r). Section 4(i) states "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 303(r) states that one of the general powers of the Commission is to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...."

FN41. Id. at 8, n.15. EchoStar stated that it would share in the costs of

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uplinking SportsNet programming to satellite.

FN42. Complaint at 9.

FN43. Complaint at 12.

FN44. Id.

FN45. Reply at 13.

FN46. Id.

FN47. 47 U.S.C. s 548(c)(2)(A), 47 C.F.R. s 76.1002(a). Complaint at 13.

FN48. 47 U.S.C. s 548(b), 47 C.F.R. s 76.1001.

FN49. Complaint at 16.

FN50. Reply at 3 citing 47 C.F.R. s 76.1001.

FN51. Reply at 3.

FN52. Id. at 4.

FN53. Id. at 5.

FN54. Complaint at 16.

FN55. Reply at 7.

FN56. EchoStar asserts its subscribers in the Philadelphia area are a small percentage of the number of Comcast subscribership the same area, although its entry level package costs \$19.99 a month while comparable programming offered by Comcast costs \$35.39 a month. Complaint at 16.

FN57. Reply at 9.

FN58. Answer at 15.

FN59. Id. at 16.

FN60. Id. Defendants note the phrase "satellite cable programming" was used 18 times in Section 628.

FN61. Id. Defendants maintain that the program access provisions that the Senate adopted provisions adopted extended to terrestrially delivered programming services, but the House bill, which was ultimately enacted, applied only to satellite delivered programming services.

FN62. Answer at 18 (citing Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); Estate of Colwart v. Nicklose Drilling Co., 505 U.S. 469, 476 (1992); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,

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447 U.S. 102, 108 (1980)).

FN63. Id. at 19.

FN64. Id.

FN65. Id. at 20.

FN66. Answer at 21.

FN67. Id.

FN68. Id.

FN69. Id. at 21-22.

FN70. Answer at 22.

FN71. Id. at 23. According to Defendants, terrestrial distribution of SportsNet costs approximately \$600,000 per year, whereas satellite distribution costs approximately \$1,400,000 to \$2,280,000 per year, depending upon the type of satellite transponder employed.

FN72. Id. at 24.

FN73. Answer at 24.

FN74. Id.

FN75. Id. at 26.

FN76. Id. at 27.

FN77. Answer at 28.

FN78. Id. at 28.

FN79. Id. at 29.

FN80. DIRECTV, Inc. v. Comcast Corporation, et al., DA 98-2151 (rel. October 27, 1998), app. for rev. pending.

FN81. Communications Act s 628(c)(2)(A), 47 U.S.C. s 548 (c)(2)(A).

FN82. Communications Act s 628(c)(2)(B), 47 U.S.C. s 548 (c)(2)(B).

FN83. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). See also Estate of Colwart v. Niclose Drilling Co., 505 U.S. 469, 476 (1992); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

FN84. Id.

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FN85. 47 U.S.C. s 605(d)(1) (emphasis added).

FN86. See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 91-3 (1993).

FN87. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."); *Tanner v. United States*, 483 U.S. 107, 125 (1987) ("the legislative history demonstrates with uncommon clarity that Congress specifically understood, considered and rejected" other language.)

FN88. See Report and Order, FCC 98-189 at P 71 (released Aug. 7, 1998). In the Report and Order, the Commission stated:

The record developed in this proceeding fails to establish that the conduct complained of, i.e., moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules, is significant and causing demonstrative competitive harm at this time. The Commission has received only two complaints against the same vertically-integrated programmer related to moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules. Where the record fails to indicate a significant competitive problem, we are reluctant to promulgate general rules prohibiting activity particularly where reasonable issues are raised regarding the scope of the statutory language. In circumstances where anti-competitive harm has not been demonstrated, we perceive no reason to impose detailed rules on the movement of programming from satellite delivery to terrestrial delivery that would unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers. While the record does not indicate a significant anti-competitive impact necessitating Commission action at this time, we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace. We note that Congress is considering legislation which, if enacted, would introduce important changes to the program access provisions, including clarification of the Commission's jurisdiction over terrestrially-delivered programming. The Commission will continue to monitor this issue and its impact on competition in the video marketplace.

Id.

FN89. Answer at 14.

FN90. Id. at 2.

FN91. Id. at 3.

FN92. Id.

FN93. Id. at 3, 16.

FN94. Id. at 23.

FN95. Id. at 23-24, n.5.

FN96. Complaint at 12.

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FN97. Answer at 24.

FN98. We note that EchoStar presents no evidence that its uplinking offer, although publicly articulated, was ever formally presented to SportsNet.

FN99. Because we do not find Comcast's actions to be unfair or deceptive, we need not address whether such actions had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming to subscribers or consumers.

FN100. Program Access Report and Order, 8 FCC Rcd at 3374.

FN101. Motion at 1-2, 3, 4, 5, 6.

FN102. Motion at 2, citing DIRECTV, DA 98-2151 at P 32.

FN103. DIRECTV, DA 98-2151 at P32.

FN104. Motion at 3.

FN105. See supra P 28; see also DIRECTV, DA 98-2151 at P 31.  
1999 WL 27028 (F.C.C.), 14 F.C.C.R. 2089, 14 FCC Rcd. 2089, 15 Communications  
Reg. (P&F) 803  
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**EXHIBIT JJ**

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**EXHIBIT JJ**

Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Speedvision Network, LLC*, FCC File No. CSR-5364-P, 14 FCC Rcd. 9327 (rel. June 14, 1999), available on Westlaw (1999 WL 381800) and Lexis (1999 FCC LEXIS 2698).

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Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF: ECHOSTAR COMMUNICATIONS CORPORATION  
v.

SPEEDVISION NETWORK, L.L.C., OUTDOOR LIFE NETWORK, L.L.C.

Program Access Complaint  
CSR-5364-P

DA 99-1148

Adopted: June 10, 1999

Released: June 14, 1999

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. EchoStar Communications Corporation ("EchoStar") has filed a program access complaint against Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C. (collectively referred to as "the Networks") alleging that the Networks are in violation of Section 628(c)(2)(B) of the Communications Act of 1934, as amended ("Communications Act"), [FN1] and Section 76.1002(b) of the Commission's rules [FN2] because the Networks have unreasonably refused to offer programming to EchoStar on fair and nondiscriminatory rates, terms and conditions. EchoStar also alleges that the Networks are in violation of Section 628(b) of the Communications Act [FN3] and Section 76.1001 of the Commission's rules [FN4] because the Networks have engaged in unfair practices by unreasonably refusing to sell their programming to EchoStar. [FN5]

2. The Networks filed an answer arguing that Echostar failed to state any cognizable claim for violation of the Commission's program access rules and, accordingly, its complaint should be dismissed with prejudice. EchoStar filed a reply pleading. [FN6] Because of the pendency of a breach of contract suit between the parties in federal district court, the Networks filed a "Motion to Dismiss or, in the Alternative, to Hold Proceeding in Abeyance Pending Resolution in Federal District Court." [FN7] EchoStar filed an opposition to the motion. [FN8] For the reasons discussed below, EchoStar's program access complaint is denied.

II. BACKGROUND

3. Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") to promote competition, with the view that regulation would be transitional until the video programming distribution market becomes competitive. [FN9] By enacting the program access provisions, which are codified in Section 628 of the Communications Act, [FN10] Congress sought to minimize the incentive and ability of vertically integrated programming

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suppliers to favor affiliated cable operators over nonaffiliated cable operators or other multichannel video programming distributors ("MVPDS") in the sale of satellite cable and satellite broadcast programming. [FN11]

4. In Section 628(b) of the Communications Act, Congress states that:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. [FN12]

In Section 628(c)(2), Congress instructed the Commission to promulgate regulations that:

(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor; [and] [FN13]

(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other MVPDS or their agents or buying groups.... [FN14]

5. In Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, Report and Order, MM Docket No. 92-265 (Program Access Order), [FN15] the Commission concluded that non-price discrimination is included within the prohibition against discrimination set forth in Section 628(c)(2)(B). While the Commission did not attempt to identify all types of non-price discrimination that could occur, the Commission stated that "one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor." The Commission cautioned, however that "unreasonable" refusals to sell" should be distinguished from "certain legitimate reasons that could prevent a contract between a vendor and a particular distributor." [FN16] Such legitimate reasons would include:

(i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other programming contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor. [FN17]

6. The term "satellite cable programming" is video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers. [FN18] The term "satellite broadcast programming" is broadcast programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster. [FN19]

## III. THE FACTS

7. EchoStar is a direct broadcast satellite ("DBS") provider that offers multichannel video programming distributor ("MVPD") service throughout the United States. [FN20] EchoStar operates four satellites that allow it to offer hundreds of channels of digital television programming to its subscribers. [FN21] As an MVPD, EchoStar competes against cable operators and other MVPDs in each and every cable franchise area, as well as against other DBS providers. [FN22]

8. The Networks are satellite cable programming vendors. [FN23] Speedvision is a network that provides comprehensive coverage of the automotive, motorcycle, aviation and marine industries. [FN24]

Outdoor Life is a network that features outdoor recreational activities, including cycling, fly fishing, sailing, skiing, snowboarding and windsurfing. [FN25] Speedvision is owned by TMJV, Inc. (affiliated with Cox Communications, Inc.), Comcast Programming Ventures, Inc., Fostoria Communications, Inc. (affiliated with MediaOne, Inc.), Daniels Properties, L.L.P., Fox/Liberty SV, L.L.C. (affiliated with AT&T, formerly Tele-Communications, Inc.), and Roger Werner. [FN26] Outdoor Life is owned by TMJV, Inc., Comcast Programming Ventures, Inc., Fostoria Communications, Inc., Fox/Liberty OL, L.L.C., and Roger Werner. [FN27] Fox/Liberty Networks, which has a one-third ownership interest in the Speedvision and Outdoor Life Networks, is 50 percent owned by AT&T, one of the largest cable multiple system operators ("MSOs") in the United States. [FN28] The Commission has determined previously that the ownership interests in the Networks constitute an "attributable interest," as defined in Section 76.1000(b) of the Commission's rules, thereby making the Networks vertically integrated satellite cable programming vendors subject to the Commission's program access rules. [FN29]

9. On November 18, 1998, the Networks and EchoStar entered into an agreement for the carriage of the Networks' programming. [FN30] While the agreement prohibited the carriage of the Networks on an a la carte basis, it permitted EchoStar to carry the programming in one of three ways: 1) on EchoStar's expanded basic package; 2) on a specialty tier of programming later known as EchoStar's "Action Plus" package; or, 3) on a sports tier. [FN31] On December 2, 1998, EchoStar launched its "Action Plus" package which included both Speedvision and Outdoor Life in its programming line-up. [FN32]

10. On December 7, 1998, following the discovery of an alleged breach of the agreement regarding the packaging of the Networks' programming, the Networks deauthorized EchoStar's reception of Speedvision and Outdoor Life. [FN33] According to EchoStar, approximately 23,000 "Action Plus" package subscribers were left without service. [FN34] The Networks alleged that EchoStar had not properly packaged its programming because in addition to the Networks, only one other programming service was included in the package when EchoStar was to have included at least two other programming services other than Outdoor Life and Speedvision. [FN35] The Networks also alleged that EchoStar violated the a la carte prohibition of the agreement. [FN36] Also, on December 7, 1998, the Networks filed a complaint against EchoStar in the United States District Court for the District of Connecticut alleging, inter alia, breach of contract, fraudulent inducement and trademark infringement. [FN37]

11. On December 9, 1998, in a letter sent to the Networks, EchoStar offered to add another programming service to the "Action Plus" package. [FN38] In a letter dated December 11, 1998, the Networks rejected EchoStar's offer by stating its

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position that the agreement was breached and therefore void, and that it was too late to remedy EchoStar's noncompliance by adding another programming service to the package. [FN39] After providing the Networks with the requisite ten days notice of its intent to file a program access complaint, EchoStar filed the instant complaint on January 14, 1999. [FN40]

#### IV. ARGUMENTS OF THE PARTIES

12. EchoStar alleges that the Networks have unreasonably refused to offer their programming to EchoStar on fair and nondiscriminatory rates, terms and conditions in violation of Section 628(c)(2)(B) of the Communications Act [FN41] and Section 76.1002(b) of the Commission's rules. [FN42] EchoStar argues that the Networks' unilateral termination of their programming and their continuing refusal to provide it to EchoStar constitutes an unreasonable refusal to deal which is recognized by the Commission as a form of non-price discrimination. [FN43] According to EchoStar, the Networks' allegations of contractual breach do not excuse cable-affiliated programming vendors, such as the Networks, from the obligation to provide their programming to a MVPD, such as EchoStar, in a fair and non-discriminatory manner. [FN44] EchoStar contends that the Networks have the option of pursuing their legal claims for alleged breach of contract in court while still allowing EchoStar to carry the Networks' programming. [FN45]

13. Although EchoStar denies the alleged breach of contract, EchoStar states that, in a spirit of compromise, it has offered to carry the Networks' programming in a manner that is indisputably consistent with the Networks' interpretation of the contract. In that regard, EchoStar states that it has offered to include one more programming service -- the WingSpan aviation channel -- in the "Action Plus" package. [FN46] However, the Networks have rejected EchoStar's offer and EchoStar claims that the Networks' refusal to provide its programming even on the terms that the Networks maintain is required by the contract evidences lack of good faith on the part of the Networks. [FN47] Furthermore, EchoStar contends that as a matter of industry practice in the programming distribution area, a programmer does not terminate its relationship with an allegedly breaching distributor before giving the distributor an opportunity to conform its conduct to the programming vendor's reading of the programming agreement. [FN48]

14. EchoStar also alleges that the Networks have engaged in unfair practices in violation of Section 628(b) of the Communications Act and Section 76.1001 of the Commission's rules [FN49] because they have terminated distribution of their programming to EchoStar and since that termination consistently have refused to allow EchoStar access to their programming. [FN50] EchoStar notes that Section 628(b) of the Communications Act was intended to be a repository of "Commission jurisdiction to adopt additional rules or to take additional actions to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming." [FN51] Thus, with regard to the distribution of the Networks' programming, EchoStar alleges that the Networks' unfair conduct has prevented EchoStar from serving consumers which EchoStar argues is the core constituency intended to be protected by the program access laws. [FN52] EchoStar argues that because of the Networks' conduct, EchoStar's subscribers were deprived of the Networks' programming five days after they purchased it and started to receive it, and as a result EchoStar was inundated with complaints that it was powerless to resolve. [FN53]

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15. EchoStar further argues that the Networks' unfair conduct has prevented it from launching the specialty tier that it planned to build around the Networks' programming. [FN54] EchoStar argues that the Networks' programming is important for the purpose of attracting large categories of consumers with special interests. For instance, EchoStar notes that the NASCAR races covered by Speedvision are among the nation's most watched and fastest growing sports events on television. [FN55] In addition, EchoStar asserts that Outdoor Life Network is a leader in outdoor adventure programming. [FN56] Therefore, without the Networks' programming, EchoStar argues that it is at a competitive disadvantage with competing MVPDs that carry the Networks' programming in "digital cable" and other tiers outside their expanded basic package. [FN57]

16. Finally, EchoStar requests damages for the harm it alleges to have suffered because of the Networks' alleged unfair and discriminatory conduct in this matter. [FN58] EchoStar states that it has suffered damages in the form of refunds and credits that it had to pay the 23,000 customers that subscribed to the "Action Plus" package at the time of its termination. [FN59] EchoStar also claims loss of profits for the program package from these customers, as well as for additional subscribers that EchoStar states that it would have secured with this programming. [FN60] In addition, EchoStar also claims loss of profit from disgruntled subscribers who EchoStar believes may have abandoned its programming altogether because of the termination of the Networks' programming. [FN61] EchoStar also requests damages for marketing costs, both out-of-pocket and overhead that were incurred to promote the Networks' programming; overhead expenses incurred for handling the consequences of the Networks' conduct, such as the cost of processing phone calls from affected customers; and, the loss of goodwill. [FN62]

17. The Networks respond by asserting that their decision to deauthorize EchoStar's carriage of the Networks' programming does not constitute an unreasonable refusal to deal in a nondiscriminatory manner or constitute an unfair practice under the Commission's program access rules. [FN63] The Networks argue that their decision was lawful and an appropriate business response to what they allege to be EchoStar's breach of the clear and express terms of the parties' contract. [FN64] Moreover, the Networks contend that the action they took was necessary to protect their reputation and the good will that they have earned with viewers, advertisers, program suppliers and other distributors. [FN65] The Networks also note that they have pursued carriage on EchoStar for over three years and that throughout that period they made at least 14 formal offers of carriage to EchoStar until the parties finally signed a mutually acceptable agreement on November 18, 1998. [FN66]

18. Specifically, the Networks argue that their actions in this matter do not constitute an unreasonable refusal to deal because the deauthorization of EchoStar's receipt of their signals occurred after EchoStar breached a crucial packaging condition of their agreement. [FN67] The Networks note that in adopting the program access rules, the Commission recognized that there are certain situations in which a vertically integrated programming vendor would be justified in refusing to deal with a distributor, such as when parties reach an "impasse on particular terms." [FN68] In this case, the Networks argue that where a programming distributor, such as EchoStar, breaches the express, material terms of a distribution agreement and federal court litigation ensues, an impasse has clearly occurred and the Networks' refusal to deal with such a distributor is reasonable. [FN69]

19. The Networks argue further that their signal deauthorization is reasonable

after the breach of such an important condition under general principles of contract and antitrust law. [FN70] The Networks assert that under contract law, a contracting party's failure to abide by a condition or material term of that contract is grounds for non-performance by the other party to the contract. [FN71] In addition, the Networks contend that breach of contract has been found to constitute a reasonable ground upon which vertically integrated programming vendors may refuse to distribute programming to DBS providers. [FN72] Specifically, the Networks refer to the PrimeStar Consent Decree, approved by the United States District Court for the Southern District of New York, as an example where breach of contract was considered a reasonable basis upon which PrimeStar Partners, L.P. could refuse to distribute programming to DBS or MMDS providers. [FN73] The Networks also assert that under antitrust law, a party may refuse to deal with another entity where a valid business justification exists. [FN74]

20. The Networks also contend that their decision to deauthorize EchoStar's receipt of their programming after a contractual breach does not constitute an unfair practice under the Communications Act and the Commission's rules. [FN75] The Networks argue that their refusal to provide programming after EchoStar's alleged breach was reasonable and if the Commission agrees, it cannot find that the Networks acted unfairly in violation of the prohibition on unfair acts or practices. [FN76] The Networks assert that Section 628(b) of the Act was not intended as a mechanism to declare unfair that which is permitted under the Act's specific provisions. [FN77] The Networks argue that the Commission has ruled that actions that are legal under one section of the program access rules should not be considered illegal under the broad unfair practices language of Section 628(b). [FN78] In that regard, the Networks contend that EchoStar has not alleged any facts or circumstances in their unfair practices allegation that are not encompassed by their unreasonable refusal to deal or non-price discrimination allegation. [FN79] Accordingly, the Networks argue that if the Commission finds that the Networks' refusal to provide programming to EchoStar was not unreasonable, then consequently the Commission cannot find that the Networks acted unfairly in this matter. [FN80]

## V. DISCUSSION

21. For the reasons discussed below, we deny EchoStar's program access complaint against the Networks. The Commission recognizes that Section 628(c)'s prohibition against discrimination also encompasses forms of non-price discrimination. [FN81] In that regard, the Commission has stated:

[W]e believe that one form of non-price discrimination could occur through a vendor's "unreasonable refusal to sell," including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor. We believe that the Commission should distinguish "unreasonable" refusals to sell from certain legitimate reasons that could prevent a contract between a vendor and a particular distributor, including (i) the possibility of parties reaching an impasse on particular terms, (ii) the distributor's history of defaulting on other contracts, or (iii) the vendor's preference not to sell a program package in a particular area for reasons unrelated to an existing exclusive arrangement or a specific distributor. [FN82]

22. We note at the outset that this is not the usual "refusal to deal" or "refusal to sell" case. This is not a matter where programming vendors, such as

the Networks, refused to sell their programming to a distributor, such as EchoStar, or refused to initiate discussions about the sale of programming when the vendors have sold their programming to that distributor's competitor. Instead, in the instant case, after three years of negotiations between the parties and 14 formal offer of carriage made from the Networks to EchoStar, the parties entered into a mutually acceptable agreement on November 18, 1998. [FN83] Thus, despite the length of negotiations, the Networks did deal with EchoStar and ultimately sold both Speedvision and Outdoor Life programming to EchoStar on terms agreed to by both parties. If not for the alleged breach of contract on the part of EchoStar, the Networks would still be providing their programming to EchoStar.

23. Nonetheless, EchoStar argues that the Networks' unilateral termination of their programming and their continuing refusal to provide that programming, even after an alleged breach of contract, constitutes an unreasonable refusal to deal which is recognized by the Commission as a form of non-price discrimination. The record reveals that the Networks' breach of contract action was filed more than a month before EchoStar's program access complaint. While the Commission's jurisdiction to resolve program access disputes is not subject to question, the resolution of EchoStar's program access complaint is inextricably intertwined with the reasonableness of the Networks' actions resulting from EchoStar's alleged breach of contract. The Commission cannot resolve EchoStar's program access complaint without making factual determinations related to the actions of the parties under the programming contract. Where, as here, a court of competent jurisdiction first has been presented with the same set of operative facts that constitute a program access case which involves a material breach and is not evidently interposed for purposes of evading or delaying the Commission's exercise of jurisdiction, we will not substitute our judgment on these issues for that of the court. The federal court has jurisdiction to examine the parties' contractual dispute and determine whether EchoStar breached a material term of the November 18, 1998 agreement. While we understand EchoStar's concern that during the time when this dispute is pending in federal court some of EchoStar's subscribers will be denied access to the Networks' programming, we do not believe that our program access rules were designed to force a programming vendor to continue to provide its programming to a distributor during the pendency of a non-frivolous breach of contract action on an underlying programming contract. [FN84] Our decision is without prejudice to EchoStar filing a program access complaint after the contractual dispute between the parties is resolved by the federal district court.

24. With regard to EchoStar's allegation that the Networks engaged in unfair practices, we agree with the Networks that EchoStar has not alleged any facts or circumstances in connection with that allegation that are not encompassed by their unreasonable refusal to sell or non-price discrimination allegation. In view of our decision on EchoStar's non-price discrimination claim, we find it unnecessary to address this allegation.

## VI. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that the program access complaint filed by EchoStar against Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C. IS DENIED WITHOUT PREJUDICE.

26. IT IS FURTHER ORDERED that the Motion to Dismiss or, in the Alternative, to Hold Proceeding in Abeyance Pending Resolution in Federal District Court

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filed by Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C. IS DISMISSED AS MOOT.

27. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. [FN85]

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen  
Chief  
Cable Services Bureau

FN1. 47 U.S.C. s 548(c)(2)(B).

FN2. 47 C.F.R. s 76.1002(b).

FN3. 47 U.S.C. s 548(b).

FN4. 47 C.F.R. s 76.1001.

FN5. Pursuant to 47 C.F.R. s 76.1003(h), which provides for the confidentiality of proprietary information falling within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. s 552(b) ("FOIA"), the parties requested that portions of the record regarding this program access complaint be treated as confidential because they contain proprietary information. This Memorandum Opinion and Order observes the requested confidentiality. The parties also submitted redacted copies of their pleadings for inclusion in the Commission's public file.

FN6. Both parties requested and were granted extensions of time in which to file their responsive pleadings. The Networks were granted a two week extension of time in which to file an answer to EchoStar's complaint. EchoStar v. Speedvision et al., Memorandum Opinion and Order, DA 99-262 (released February 1, 1999). Likewise, EchoStar was granted a two week extension of time in which to file its reply pleading in this matter. EchoStar v. Speedvision et al., Memorandum Opinion and Order, DA 99-508 (released March 16, 1999). EchoStar also later filed a supplemental reply.

FN7. See Outdoor Life Network, L.L.C. and Speedvision Network, L.L.C. v. EchoStar Satellite Corporation and EchoStar Communications Corporation, No. 3:98CV2378 (AHN).

FN8. The Networks also submitted a "Reply Memorandum" in support of their Motion to Dismiss or Hold in Abeyance.

FN9. 1992 Cable Act s 2(b)(2), 106 Stat. 1463. See Communications Act s 601(6), 47 U.S.C. s 521(6) ("The purposes of this title are to -- ... (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.").

FN10. 47 U.S.C. s 548.

FN11. 1992 Cable Act ss 2(a)(2), 2(b)(5), 106 Stat. 1460, 1463.

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FN12. 47 U.S.C. s 548(b).

FN13. 47 U.S.C. s 548(c)(2)(A).

FN14. 47 U.S.C. s 548(c)(2)(B). Congress provided limited exceptions to this prohibition. A satellite programming vendor or satellite broadcast programming vendor is not prohibited from:

(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality; (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming; (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonable attributable to the number of subscribers served by the distributor; or (iv) entering into an exclusive contract that is permitted under subparagraph (D) [of this section].  
Id.

FN15. 8 FCC Rcd 3359 (1993).

FN16. Id. at 3412.

FN17. Id. (footnote omitted).

FN18. 47 U.S.C. s 605(d)(1); 47 C.F.R. s76.1000(h).

FN19. 47 U.S.C. s 548(i)(3); 47 C.F.R. s 76.1000(f).

FN20. Complaint at 2.

FN21. Id.

FN22. Id. On April 27, 1999, the Networks filed a "Motion for Leave to Supplement Defendants' Answer and Motion to Dismiss." As an exhibit to their motion, the Networks attach EchoStar's responses to the Networks' first set of interrogatories in the parties' federal district court case. Referring to the interrogatories, the Networks argue that EchoStar asserted in the federal district court action that it was not a party to the agreement at issue and did not distribute programming services at any time in this matter. The Networks argue that EchoStar is not a MVPD and therefore does not have standing to file a program access complaint. On May 7, 1999, EchoStar filed an "Opposition to Motion for Leave to Supplement Defendants' Answer and Motion to Dismiss" and "Motion to Supplement Complaint." EchoStar argues that while it was not the signatory to the agreement at issue with the Networks, the signatory was EchoStar Satellite Corporation ("ESC") which is wholly-owned by EchoStar. ESC is a wholly-owned subsidiary of EchoStar DBS Corporation, which is in turn, a wholly-owned subsidiary of EchoStar. In its "Motion to Supplement Complaint," EchoStar requests that ESC be added as a joint complainant to its program access complaint. In response, on May 17, 1999, the Networks filed "Defendants' Reply in Support of Motion for Leave to Supplement and Response to Complainant's Motion to Supplement" to which EchoStar filed a reply on May 24, 1999. In light

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of our action in this proceeding, we do not address this issue.

FN23. Complaint at 2, 7; Networks Answer at 6. The term "satellite cable programming vendor" means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast vendor. 47 U.S.C. s 548(i)(2); 47 C.F.R. s 76.1000(i).

FN24. Complaint at 2, Exhibit 1; Networks Answer at 6.

FN25. Complaint at 3, Exhibit 2; Networks Answer at 6.

FN26. Networks Answer at 6; see also Complaint at 3. On February 18, 1999, the Commission approved the transfer of Commission licenses and authorizations from Tele-Communications, Inc. ("TCI") to AT&T in connection with the companies' planned merger. On March 9, 1999, AT&T and TCI consummated the merger.

FN27. Id.

FN28. Id.

FN29. See Outdoor Life Networks and Speedvision Network (Petition for Exclusivity pursuant to 47 C.F.R. s 76.1002(c)(4) and (5), 13 FCC Rcd 12226, 12227-8 (1998).

FN30. Complaint at 8.

FN31. Id. at 9-10. Both parties have requested confidentiality with regard to the precise terms of the November 18, 1998 agreement attached as Exhibit 10 to the Complaint. As such, we will only refer to the agreement in its most general terms.

FN32. Id. at 10. EchoStar states that in addition to Speedvision and the Outdoor Life Network, the "Action Plus" package programming line-up also included Outdoor Channel, a cable network unaffiliated with Speedvision, and Angel One which is another unaffiliated channel available to all EchoStar subscribers and included in all other Echostar packages.

FN33. Id. at 11; Networks Answer at 11.

FN34. Complaint at 11. The Networks state that they lack knowledge or information sufficient to form a belief as to the number of EchoStar subscribers that subscribed to the "Action Plus" package and therefore deny those allegations. Networks Answer at 10.

FN35. Complaint at 14-15, Exhibit 11 (Letter from Burt A. Braverman to Michael S. Schwimmer, December 7, 1998); Networks Answer at 11.

FN36. Id. The Networks allege that EchoStar offered "any or all" of the services comprising the "Action Plus" package, in violation of the a la carte prohibition of the agreement. Complaint, Exhibit 11 (Letter from Burt A. Braverman to Michael S. Schwimmer at p. 2, December 7, 1998).

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FN37. Complaint at 12; Networks Answer at 11-12. See Outdoor Life Network, L.L.C. and Speedvision Network, L.L.C. v. EchoStar Satellite Corporation and EchoStar Communications Corporation, No. 3:98CV2378(AHN).

FN38. Complaint at 14, Exhibit 13 (Letter from Michael S. Schwimmer to E. Roger Williams, December 9, 1998).

FN39. Id. at 14, Exhibit 14 (Letter from Burt A. Braverman to David K. Moskowitz, December 11, 1998).

FN40. See 47 C.F.R. s 76.1003(a).

FN41. 47 U.S.C. s548(c)(2)(B).

FN42. Complaint at 17; 47 C.F.R. s 76.1002(b).

FN43. Complaint at 17; see also Program Access Order, 8 FCC Rcd at 3364.

FN44. Complaint at 19.

FN45. Id.

FN46. Id.

FN47. Id. at 20-21; EchoStar Reply 2-5.

FN48. Complaint at 20.

FN49. 47 U.S.C. s 548(b); 47 C.F.R. s 76.1001.

FN50. Complaint at 21-22; EchoStar Reply at 31-33.

FN51. Complaint at 22, citing Program Access Order at 3374.

FN52. Complaint at 22.

FN53. Id. at 23.

FN54. Id. at 22-23.

FN55. Id. at 23. EchoStar cites several articles attesting to the popularity of NASCAR races: Steve Goldberg, Time, (June 15, 1998); Bob McClellan, The Florida Times-Union, (June 5, 1998); and, Hilary Kraus, The Spokesman-Review, (July 26, 1998).

FN56. Id.

FN57. Id.

FN58. EchoStar notes that the Commission recently affirmed its authority to impose damages in program access cases for violations of Section 628 where it is necessary to remedy the harm stemming from a programmer's anti-competitive

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conduct. Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc., 13 FCC Rcd 15822, 15829 (1998).

FN59. Complaint at 26.

FN60. Id.

FN61. Id.

FN62. Id. EchoStar states that it is still in the process of calculating and assessing some categories of claimed damages. However, in accordance with 47 C.F.R. s 76.1003(c)(5), EchoStar has provided the Commission with computations and documentation with respect to certain damage categories that EchoStar states were easy to ascertain. EchoStar requests that its claim for damages to the Commission be without prejudice to its ability to claim these damages in court and/or to request any other additional damages in the future before this Commission or in court. Id. at 26-27.

FN63. Networks Answer at 19.

FN64. Id.

FN65. Id.

FN66. Id. at 2, 20.

FN67. Id. at 49.

FN68. Id.; see Program Access Order, 8 FCC Rcd at 3412.

FN69. Id.

FN70. Id. at 50.

FN71. Id., citing *Rokalor, Inc. v. Connecticut Eating Enterprises, Inc., Inc.*, 18 Conn. App. 384, 391-92, 558 A.2d 265 (1989); *Aleysayi Beverage Corp. v. Canada Dry Corp.*, 947 F.Supp. 658, 667 (S.D.N.Y. 1996); *Jafari v. Wally Findlay Galleries*, 741 F.Supp. 64, 68 (S.D.N.Y. 1990); *Crown Life Ins. Co. v. American National Bank and Trust Co.*, 830 F.Supp. 1097 (N.D.Ill 1993); and, *U.S. v. Bedwell*, 506 F.Supp. 1324, 1327 (E.D.Pa. 1981).

FN72. Networks Answer at 51.

FN73. Id.; see *New York v. Primestar Partners, L.P.*, 1993 U.S. Dist. LEXIS 21122, \*18 (S.D.N.Y. 1993) (finding that the Primestar partners could refuse to deal with DBS or MMDS providers where such "prospective provider is in breach of any contract" with the Primestar programming entity) (emphasis added). The Primestar Consent Decree settled an antitrust case between the Primestar Partners and 40 states' attorneys general. The Networks note that some of their owners are Primestar Partners and were bound by the consent decree until it expired. The Networks argue that while the Commission expressed concern over

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that portion of the Consent Decree that permitted certain exclusive distribution agreements, the Consent Decree is still persuasive authority concerning what constitutes a reasonable refusal to deal under antitrust law. *Id.*, n. 35. EchoStar argues that the Commission has never recognized allegations of contractual breach as justification for refusal to deal. EchoStar Reply at 12. Moreover, EchoStar contends that the consent decree at issue permitted Primestar to refuse to deal in circumstances where a programming vendor would be prohibited from doing so under the program access laws. *Id.*, n. 22. In addition, EchoStar argues that a negotiated consent agreement has no more precedential value than any agreement in settlement of litigation. *Id.*; see *Beatrice Foods Co. v. Federal Trade Commission*, 540 F.2d 303, 312 (7th Cir. 1976).

FN74. Networks Answer at 51; see, e.g., *Byars v. Bluff City News Co.*, 609 F.2d 843, 863 (6th Cir. 1979) ("A finding of antitrust liability in a case of a refusal to deal should not be made without examining business reasons which might justify the refusal to deal."). The Networks also cite several cases where the courts have found valid business justifications to exist in refusal to deal cases. See, e.g., *Arthur S. Langenderfer v. S.E. Johnson Co.*, 917 F.2d 1414, 1427 (6th Cir. 1990) (claim for refusal to deal is inextricably bound with commercial disputes and contract disputes); *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441, 443 (1st Cir. 1980) (not unreasonable for a newspaper to refuse misleading advertising that offends its readers).

FN75. Networks Answer at 58.

FN76. *Id.*

FN77. *Id.*

FN78. *Id.* at 58-59 citing *American Cable Co. and Jay Copeland v. TeleCable of Columbus, Inc.*, 11 FCC Rcd 10090 (1996).

FN79. *Id.* at 59.

FN80. *Id.* The Networks also note that while EchoStar primarily alleges that the Networks engaged in an unreasonable refusal to deal, allegations raised in the complaint could also be construed as an attempt to assert a price discrimination complaint. Networks Answer at 59, referring to Complaint at 6, 18 and P 11, P 33 and Exhibit 5. The Networks argue that EchoStar has not demonstrated that the Networks are offering more favorable packaging terms to cable operators or other MVPDs. The Networks argue that the Commission should not permit EchoStar to turn this proceeding into a price discrimination matter forcing the Networks to expose all of the price, terms and conditions contained in agreements with distributors similarly situated to EchoStar. The Networks assert that EchoStar has not alleged facts or circumstances in its complaint to warrant such an intrusion into the Networks' proprietary operations. We agree with the Networks that EchoStar has not alleged sufficient facts or circumstances to make a price discrimination complaint.

FN81. 47 U.S.C. s 548(c).

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FN82. Program Access Order, 8 FCC Rcd at 3412.

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FN83. Complaint at 7-9 and Reply 14-15; Networks Answer 2, 9 and 20. Both EchoStar and the Networks argue extensively with regard to the fairness of the negotiations between the parties, whether the Networks provided Echostar with non-discriminatory rates and terms compared to other distributors, and on whose terms the parties ultimately reached agreement on November 18, 1998. For our purposes in this matter, our interest is limited to the fact that the parties actually reached an agreement regarding carriage of the Networks' programming by EchoStar.

FN84. The Bureau recently requested that both EchoStar and the Networks provide a report as to the status of the breach of contract suit and related litigation that is pending in federal court between the parties. The Networks report that under the "Case Management Plan" agreed to by the parties, which has been submitted to the Court for approval, discovery must be completed by September 8, 1999; dispositive motions, if any, must be filed by October 8, 1999; and the parties are required to have the matter ready for trial no later than December 7, 1999. April 14, 1999 Letter from Burt A. Braverman, Esq. In its response, EchoStar does not dispute this schedule, but argues that the case will not go to trial for many months after the trial readiness date due to what EchoStar refers to as a substantial backlog in the Court's docket. April 19, 1999 Letter from Pantelis Michalopoulos, Esq. The Networks respond by arguing that apart from being unsubstantiated, EchoStar's assertion regarding the actual trial date did not comport with the information that the Networks received regarding the calendar of the Senior Judge assigned to the case. April 20, 1999 Letter from Burt A. Braverman, Esq.

FN85. 47 C.F.R. s 0.321.  
1999 WL 381800 (F.C.C.)  
END OF DOCUMENT

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**EXHIBIT KK**

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**EXHIBIT KK**

PrimeTime 24 Joint Venture, Complaint, *PrimeTime 24 Joint Venture v. EchoStar Communications Corp.*, 98 Civ. 6738 (S.D.N.Y. September 23, 1998), produced by EchoStar [ECC0072761-72907].

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**Exhibit KK**

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Attorneys For Plaintiff  
PrimeTime 24 Joint Venture



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

\_\_\_\_\_)  
\_\_\_\_\_)  
PrimeTime 24 Joint Venture, )  
\_\_\_\_\_)  
Plaintiff, )  
\_\_\_\_\_)  
v. )  
\_\_\_\_\_)  
EchoStar Communications Corporation )  
and EchoStar Satellite Corporation, )  
\_\_\_\_\_)  
Defendants. )  
\_\_\_\_\_)

**98 CIV. 6738**

98 Civ.

COMPLAINT

Plaintiff PrimeTime 24 Joint Venture ("PrimeTime 24"), through its undersigned attorneys, for its Complaint against defendants EchoStar Communications Corporation ("EchoStar") and EchoStar Satellite Corporation ("EchoStar Satellite") herein alleges as follows:

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Exhibit KK

ECC0072761

**FACTS**

9. As of March 19, 1996, PrimeTime 24 and EchoStar Satellite entered into a TVRO Affiliation Agreement, a copy of which is attached hereto as Exhibit A, and a TVRO Affiliation Agreement Amendment ("the Amendment"), a copy of which is attached as Exhibit B.

10. Pursuant to the Agreement and Amendment, PrimeTime 24 granted EchoStar Satellite a non-exclusive license to distribute certain network television services ("the Services") offered by PrimeTime 24 to satellite television subscribers. The Services consisted of one East Coast affiliate each from ABC, CBS and NBC, which were grouped together into a package promoted by PrimeTime 24 as "PrimeTime 24 East" or "PT East", one West Coast affiliate from each of those networks, grouped together and promoted by PrimeTime 24 as "PrimeTime 24 West" or "PT West", and the national FoxNet service featuring programming of the Fox network.

11. The ability to offer network programming by satellite is important to companies such as EchoStar which also distribute a variety of other programming options to satellite dish owners, because many dish owners cannot receive network programming through the use of a conventional outdoor rooftop receiving antenna, and therefore must look to another source for those programs. If the programs are not available by satellite, the homeowner may, if it is available, choose to subscribe to cable television, which is the major competitor to the satellite industry.

12. PrimeTime 24 is the owner of several trademark and service mark registrations on the Principal Register of the United States Patent and Trademark Office, including the following registrations for marks that PrimeTime 24 uses in connection with its satellite network programming Services: (i) Registration No. 2,138,672, registered on February 24,

**EXHIBIT LL**

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**EXHIBIT LL**

EchoStar Communications Corporation et al., Defendants' Original Answer, Affirmative Defenses and Counterclaims, PrimeTime 24 Joint Venture v. EchoStar Communications Corp., 98 Civ. 6738 (S.D.N.Y. February 22, 1999), produced by EchoStar [ECC0073093-73163].

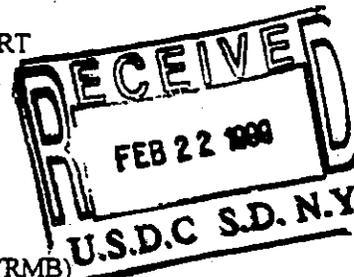
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Exhibit LL

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FOR PUBLIC INSPECTION

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



\_\_\_\_\_  
PrimeTime 24 Joint Venture,  
Plaintiff,  
v.  
EchoStar Communications Corporation  
and EchoStar Satellite Corporation,  
Defendants.  
\_\_\_\_\_

98 Civ. 6738 (RMB)  
DEFENDANTS' ORIGINAL ANSWER,  
AFFIRMATIVE DEFENSES AND  
COUNTERCLAIMS  
JURY TRIAL DEMANDED

EchoStar Communications Corporation ("EchoStar") and EchoStar Satellite Corporation ("EchoStar Satellite"), collectively referred to as Defendants, by and through their attorney of record, file Defendants' Original Answer, Affirmative Defenses and Counterclaims in response to Plaintiff's Complaint and state as follows:

**I. Answer**

Nature of This Action

1. Defendants admit only that EchoStar Satellite and PrimeTime 24 ("Plaintiff") executed a TVRO Affiliation Agreement of March 19, 1996. Defendants deny the remainder of the material allegations contained in Paragraph 1 of Plaintiff's Complaint.

The Parties

2. Upon information and belief, Defendants admit the allegations contained in Paragraph 2 of Plaintiff's Complaint and therefore deny those allegations.

Facts

9. Defendants admit only that on March 19, 1996, PrimeTime 24 and EchoStar Satellite executed a TVRO Affiliation Agreement and a TVRO Affiliation Agreement Amendment. Defendants deny the remainder of the allegations contained in Paragraph 9 of Plaintiff's Complaint.

10. Defendants admit only that the TVRO Affiliation Agreement and a TVRO Affiliation Agreement Amendment purport to specify the relationship between PrimeTime 24 and EchoStar Satellite and that these written documents speak for themselves. Defendants deny the remainder of the allegations contained in Paragraph 10 of Plaintiff's Complaint.

11. Defendants admit the allegations contained in Paragraph 11 of Plaintiff's Complaint.

12. Defendants are without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 12 of Plaintiff's Complaint and therefore deny those allegations.

13. Defendants are without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 13 of Plaintiff's Complaint and therefore deny those allegations.

14. Defendants admit only that the TVRO Affiliation Agreement speaks for itself. Defendants deny the remainder of the allegations contained in Paragraph 14.

15. Defendants admit only that the TVRO Affiliation Agreement speaks for itself. Except as so admitted, Defendants deny the remainder of the allegations contained in Paragraph 15 of Plaintiff's Complaint.

16. Defendants admit only that the TVRO Affiliation Agreement speaks for itself. Defendants deny the remainder of the allegations contained in Paragraph 16.

17. Defendants admit only that the TVRO Affiliation Agreement speaks for itself. Defendants deny the remainder of the allegations contained in Paragraph 17.

**EXHIBIT MM**

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**EXHIBIT MM**

Federal Communications Commission, Order and Authorization, *In re Application of MCI Telecommunications Corp. and EchoStar 110 Corp.*, FCC File No. SAT-ASG-19981202-0093 (rel. May 19, 1999), available on Westlaw (1999 WL 313932) and Lexis (1999 FCC LEXIS 3698).

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**Exhibit MM**

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Federal Communications Commission (F.C.C.)

Order and Authorization

RE APPLICATION OF MCI TELECOMMUNICATIONS CORPORATION, ASSIGNOR

AND

EHOSTAR 110 CORPORATION, ASSIGNEE

ent to Assignment of Authorization to Construct, Launch, and Operate a  
roadcast Satellite System Using 28 Frequency Channels at the 110 <<  
degrees>>> W.L. Orbital Location.

File No. SAT-ASG-19981202-0093

Call Sign S2232

N RE APPLICATION OF AMERICAN SKY BROADCASTING, LLC, ASSIGNOR

AND

EHOSTAR NORTH AMERICA CORPORATION, ASSIGNEE

ent to Assignment of Transmit-Receive Earth Station Authorizations.

File No. SES-ASG-19981204-01829(4)

Call Signs E980180, E980174, E980178, E970394

FCC 99-109

Adopted: May 19, 1999

Released: May 19, 1999

ission: Commissioner Ness issuing a separate statement.

ITION

As Order we grant the application of MCI Telecommunications  
("MCI") and EchoStar 110 Corporation ("EchoStar") for consent to the  
from MCI to EchoStar of MCI's authorization to construct, launch and  
Direct Broadcast Satellite ("DBS") system using 28 frequency channels  
<<degrees>> W.L. orbital location. We also grant the related  
of EchoStar's affiliate EchoStar North America Corporation ("ENA")  
in Sky Broadcasting, L.L.C. ("ASkyB") for consent to the assignment  
to ENA of ASkyB's authorizations associated with earth station  
constructed by ASkyB in Gilbert, Arizona. [FN1] Grant of these  
as will serve the public interest because they will allow the 28  
DBS spectrum at the 110 <<degrees>> W.L. orbital location to be used  
manner and will likely allow EchoStar to provide consumers with a  
itive alternative to cable offerings and thereby increase competition  
i-Channel Video Programming Distribution ("MVPD") market, which  
l to additional service offerings and/or lower prices.

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## II. BACKGROUND

2. Since its introduction in 1994, DBS has emerged as one of the fastest growing major consumer video programming services in the United States. [FN2] Today there are only three orbital locations from which DBS operators can provide service to customers across the entire United States. [FN3] They are 101 <<degrees>> W.L., 110 <<degrees>> W.L., and 119 <<degrees>> W.L., each consisting of 32 channels. The 110 <<degrees>> W.L. location is the only one that remains completely unused. MCI acquired its authorization to use 28 channels at 110 <<degrees>> W.L. by bidding \$682.5 million at a spectrum auction conducted by the Commission on January 24 and 25, 1996. [FN4] MCI planned to develop its DBS business in a joint venture with ASkyB, a wholly-owned subsidiary of The News Corporation Limited ("News Corp."). [FN5] In pursuit of this plan, MCI has proceeded in constructing its authorized system, and ASkyB constructed an earth station in Gilbert, Arizona for communications with that system. MCI, however, has since concluded that it is not feasible for it to proceed with the launch of a stand-alone DBS system, and has instead entered into a purchase agreement with EchoStar. [FN6]

3. EchoStar's parent, EchoStar Communications Corporation ("ECC") has been authorized to provide DBS service since 1989. [FN7] ECC, through subsidiaries, is currently authorized to provide service from the 119 <<degrees>> W.L., 148 <<degrees>> W.L., 61.5 <<degrees>> W.L., and 175 <<degrees>> W.L. [FN8] ECC, MCI and ASkyB have executed a Purchase Agreement whereby, subject to certain approvals, MCI will assign to EchoStar its authorization for a DBS system at 110 <<degrees>> W.L. and ASkyB will assign to EchoStar its Gilbert earth station complex and associated authorizations. Among other assets, EchoStar will also acquire MCI's two, partially constructed satellites that MCI had intended to use in its DBS system. [FN9] In return, MCI and a News Corp. subsidiary will receive non-controlling, equity holdings in ECC of approximately eight percent and thirty-two percent respectively. [FN10] Both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) did not object to the proposed transaction and granted early termination of their antitrust review process. [FN11]

4. Applicants assert that this transaction will provide consumers several far-reaching benefits. They first assert that it will give EchoStar the capacity to offer consumers national programming, local programming, high definition television ("HDTV"), data-enriched video entertainment, high-speed access to the Internet and other broadband services through the use of a single, customer provided, earth satellite antenna, thereby promoting effective competition in the MVPD market. [FN12] Applicants claim that, in order to truly compete with dominant cable operators in the MVPD market, they must be able to offer local signals (including HDTV) to a substantial percentage of American households as well as to offer other HDTV programming, data-enriched video entertainment, high-speed Internet access [FN13] and various other data services. [FN14] Applicants also submit that EchoStar's acquisition of 110 <<degrees>> W.L. would allow EchoStar to provide seamless offerings to consumers through a single earth station antenna. They assert that because the 110 <<degrees>> W.L. slot is located in the middle of the three U.S. high-power DBS slots, it can be used to send signals to DBS receiving antennas already pointed to satellites in either the 101 <<degrees>> W.L. or 119 <<degrees>> W.L. orbital location. [FN15] As a result, they claim, all current DBS subscribers in the country could receive signals from a satellite in the 110 <<degrees>> W.L. slot without having to purchase and install a second separate earth station receive antenna. [FN16]

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Applicants cite additional benefits, including allowing EchoStar to expedite DBS service to customers in Alaska, Hawaii and Puerto Rico, and enabling EchoStar to put promptly to use the one-channel assignment of its affiliate Directsat Corporation at 110 <<degrees>> W.L. [FN17]

5. Several parties filed petitions to deny, comments in support, or requested imposition of conditions. The Small Cable Business Association (SCBA), the United Church of Christ et al. (UCC), and PrimeTime 24 Joint Venture (PrimeTime 24) contend, for separate reasons, that the Joint Application should be denied. SCBA opposes the applications on several grounds, alleging that grant of the applications would harm cable operators and local broadcast stations. [FN18] UCC contends that Applicants have failed to satisfy the Commission's qualification requirements. [FN19] PrimeTime 24 urges denial of the Joint Application on the grounds that EchoStar is contractually barred from providing certain of the services it proposes. [FN20] Finally, while not directly addressing the merits of the Joint Application, Time Warner Cable (Time Warner) asserts that the Joint Application contains unfounded attacks on the cable industry. [FN21]

6. In contrast, the DOJ urges expeditious grant of the Joint Application, asserting that grant would increase competition in the MVPD market. [FN22] In addition, while not opposing the Joint Application, the State of Hawaii (Hawaii) and CoreComm Limited (CoreComm) ask that a grant be conditional. Hawaii requests assurances that consumers in Hawaii will be able to use small, 18-24 inch receiving dishes and that EchoStar continue to be obligated to serve Hawaii from its authorization at 148 <<degrees>> W.L., even if it serves Hawaii from the 110 <<degrees>> W.L. orbital location. CoreComm seeks assurances that EchoStar and News Corp. will not enter into any exclusive programming arrangements, and that other MVPDs continue to have access to News Corp.'s programming. For the reasons discussed below, we conclude that it is in the public interest to grant the Joint Application without conditions and do so today.

### III. DISCUSSION

#### A. Legal Standard

7. Under Section 310(d) of the Communications Act, we must find that the proposed assignment serves the public interest, convenience, and necessity before we can approve the assignment of authorizations or licenses. [FN23] To make this finding, we must weigh any potential public interest harms against any potential public interest benefits, considering competitive effects and other public interest factors such as rapid delivery of service to the public. [FN24] As we explained earlier this year in the TCI/AT&T case:

"[O]ur public interest analysis is not, however, limited by traditional antitrust principles.... It also encompasses the broad aims of the Communications Act.... To apply our public interest test, then, we must determine whether the merger violates our rules, or would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy. That policy is, of course, shaped by Congress and deeply rooted in a preference for competitive processes and outcomes." [FN25]

8. Consistent with this precedent, we begin our analysis by identifying the relevant product markets that are affected by the proposed transaction. [FN26] Then we consider the competitive effects of the proposed transaction in these markets. Finally, we consider a number of other issues raised by parties that factor into a public interest determination.

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## B. Effects on competition

### 1. Relevant Product Markets

9. In our annual assessment of the video marketplace, we have found that DBS operators compete in two product markets. [FN27] First, DBS operators compete with each other and other distributors of video programming for the acquisition of programming. [FN28] We shall call this market the "programming market". Second, DBS operators compete with each other and other distributors in the distribution of multiple channels of video programming to consumers. We shall call this market the multichannel video program distribution or "MVPD" market. [FN29]

10. We have found the "programming market" to be national or regional in geographic scope, depending upon whom the programmer wishes to reach and to whom the distributor plans to transmit the programming. [FN30] We have also found that the relevant geographic market for assessing MVPD competition is a local area. The extent of the local area is defined by the overlap of the "footprints" of the various service providers in that area. [FN31]

11. EchoStar currently distributes by satellite multiple channels of video programming directly to consumers across the United States. [FN32] Thus, EchoStar competes in the MVPD market as a DBS distributor. Because EchoStar distributes programming directly to consumers across the United States, it competes in many local MVPD markets. Because EchoStar serves consumers across the United States, it has an incentive to acquire programming primarily intended for national distribution. Consequently, EchoStar primarily competes with other companies for the acquisition of programming in the national programming market. [FN33]

12. In the present transaction, EchoStar proposes to acquire the assets of a joint venture of MCI and ASkyB, which was poised to enter the DBS industry. MCI had purchased the authorization to construct, launch, and operate a DBS system using 28 frequency channels at the 110 <<degrees>> W.L orbital location. ASkyB has a license for a earth station to serve MCI's orbital location. Thus EchoStar, a current DBS distributor, proposes to acquire the assets of a potential DBS distributor, ASkyB, by acquiring the DBS related assets of both the joint venture and its participants. Consequently, this transaction potentially affects the programming market and the MVPD market. [FN34]

### 2. Competition in the Affected Product Markets

13. We focus first on aspects of the current state of competition in these markets that are relevant to our evaluation of the proposed transaction's effect on competition in these markets. [FN35] This discussion reaches conclusions that are relevant to our analysis of various issues raised by comments on this transaction.

14. The programming market. DBS operators compete with other distributors of video programming, including terrestrial broadcast television networks, to obtain programming to distribute. While we do not have data on the individual purchases of video programming by each of these competitors, we can draw inferences from the following information. As of June 1998, there were approximately 98 million households with a television set ("TV households") in the United States. Of these TV households, approximately 76.6 million subscribed to the services of some MVPD, and approximately 7.2 million subscribed to some

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DBS service. [FN36] As of June 1998, EchoStar had approximately 1.4 million subscribers. [FN17] These data strongly suggest that DBS operators generally, and EchoStar particularly, do not have enough subscribers to give them market power in the acquisition of video programming. [FN38] Such a conclusion is consistent with the fact that many, if not all, of the program access complaints discussed in the recent 1998 Cable Competition Report concerned DBS distributors trying to obtain access to programming available to cable distributors at competitive terms or prices. [FN39]

15. The MVPD market. DBS distributors compete with a number of other MVPDs using different transmission media. [FN40] As of June 1998, of the roughly 76.6 million TV households that purchased the services of some MVPD, cable distributors had 65.4 million subscribers (or 85.3% of the MVPD total), while DBS distributors had 7.2 million subscribers (or 9.40% of the MVPD total). [FN41] Consequently cable distributors, rather than DBS distributors, dominate the national MVPD market.

16. The degree to which cable distributors dominate local MVPD markets varies across different regions of the United States. There are consumers, such as those living in sparsely populated rural areas, who may only be able to purchase the offerings of DBS distributors because their homes are not served by any other MVPD. We do not have available more geographically delineated data to ascertain the market position of DBS operators in different local MVPD markets. Nevertheless, we note that 96.6% of U.S. TV households are passed by a cable system. [FN42] This estimate suggests that most U.S. TV households have a choice between at least one cable operator and two DBS competitors. Further, based on the national MVPD market estimates, cable operators have far more subscribers on average than do DBS operators, as a group. Thus we conclude, as does the 1998 Cable Competition Report, that cable operators continue to be the dominant distributors in most local MVPD markets. [FN43]

### 3. The 1995 DBS Auction Rule

17. Although the above assessment of the current state of competition in the programming and MVPD markets concludes that EchoStar does not currently dominate these markets, the question remains whether or not the proposed transaction, if approved, would enable EchoStar to reduce future competition in the affected markets. After considering the issues raised by petitioners and commenters, we conclude below that on balance the proposed transaction, if approved, would benefit competition in the affected markets more than harm it.

18. In the 1995 Auction Order, in which we established rules for the first (and to date only) DBS auction, we sought to encourage the emergence of new DBS entrants by limiting the capacity that an incumbent could acquire in the auction. [FN44] To this end, we adopted one-time spectrum limitations applicable only to that auction. Those rules required that any entity with an attributable interest in DBS channels at one full-CONUS location divest this interest within 12 months of acquiring an attributable interest in the other full-CONUS channels then available at auction. [FN45] The proposed transaction will allow EchoStar, an entity with an attributable interest in DBS channels at one full-CONUS location, to acquire an attributable interest in another full-CONUS location.

19. DOJ, in its comments supporting this current transaction, argues that market conditions have changed since the Commission issued its 1995 Auction Order and thus the concerns that motivated its spectrum limitation no longer apply. DOJ states that DBS and cable offerings have become closer substitutes

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for each other and, as a result, these operators engage in increasingly rivalrous behavior. [FN46] In support of this contention, DOJ makes two points. First, cable operators are spending an increasing amount of money monitoring and countering DBS operators' marketing plans. [FN47] Second, cable operators are spending an increasing amount of money upgrading their systems to provide more programming and better picture quality. [FN48] DOJ argues that we should approve this transaction as it will improve EchoStar's ability to match cable offerings and thus compete with cable operators. [FN49] We agree with DOJ that DBS operators and cable operators have engaged in increasingly rivalrous behavior, and that grant of these applications will likely increase the degree of that competition.

20. Further, DBS operators must obtain Commission approval for their acquisition of additional capacity to increase their product offerings because such acquisitions require assignment of spectrum and orbital locations. Cable operators, in contrast, can invest in either new (e.g., fiber optic) or additional cable to add the capacity necessary to increase their product offerings without Commission approval. Thus, it is important for the Commission to take cognizance of the investment plans of EchoStar's competitors when judging whether or not EchoStar should be allowed to acquire more DBS capacity because these plans will likely effect EchoStar's ability to compete with cable operators in the future. In this regard, we note that EchoStar's competitors are also acquiring additional capacity in order to expand their product offerings. [FN50] As the 1998 Cable Competition Report notes, cable operators generally are investing in fiber optical cabling, converting to digital transmission of programming, and entering new markets by providing Internet access and Internet Protocol ("IP") telephony. [FN51] As a consequence, we find that EchoStar's acquisition of the additional DBS capacity at issue is not likely to confer on it the ability to dominate the markets in which it competes.

21. We recognize that if we allow EchoStar to acquire MCI's authorization to operate 28 DBS channels at the 110 <<degrees>> W.L. orbital location, another firm with the intent of competing with cable operators is unlikely to enter the U.S. DBS industry. [FN52] This likelihood arises from the fact that there will be few unused full-CONUS DBS channels left after this transaction, and those that are left, represent an amount of capacity that is likely to be insufficient to offer a competitive substitute to cable offerings. [FN53] Nevertheless, we view the potential competitive benefits of allowing EchoStar to become a stronger competitor in MVPD markets as outweighing the potential competitive costs of reduced entry into the DBS industry. These potential competitive costs are mitigated by other entry possibilities. DBS operators compete in a number of MVPD markets where there are a number of alternative transmission media new entrants might use. [FN54] For example, the 1998 Cable Competition Report noted the potential that utilities (e.g., electric service companies) have to become major competitors in different local MVPD markets. [FN55] As a result of these changed circumstances, we do not believe that the reasoning behind the 1995 DBS channel limitation rule should be applied to the particular transactions. [FN56] Further, we agree with DOJ's conclusion that approval of the proposed transaction "could play a critical role in expanding consumers' choices in MVPD services, leading to better service, quality and lower prices for both DBS and cable." [FN57]

#### 4. Program Access Issues

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22. CoreComm and, to a limited extent, SCBA raise concerns about the effect of the proposed assignments on the availability of News Corp. programming. CoreComm points out that News Corp. controls access to Fox network, cable entertainment programming networks, and a large share of national and local sports programming in the United States. [FN58] It submits that News Corp. has a record of affording favorable treatment to cable multiple system operators (MSOs) in which it holds interests. [FN59] CoreComm, therefore, concludes that, if left unchecked, there is a substantial threat that News Corp. would also favorably treat EchoStar as well as News Corp.'s MSO partners. [FN60] Consequently, CoreComm requests that the Commission condition its approval of the proposed transaction upon: (1) News Corp.'s and EchoStar's commitments to refrain from any exclusive contracts that would preclude terrestrial MVPDs from obtaining News Corp. programming; and (2) News Corp.'s obligation to make its programming available to terrestrial MVPDs on nondiscriminatory terms and conditions no less favorable than those afforded to EchoStar or the Fox/Liberty cable partners. [FN61] SCBA concurs with imposing the second obligation by urging that we condition the grant on the continued availability of Fox broadcast programming to other MVPDs. [FN62]

23. In support of its request for conditions, CoreComm refers to the experience of its British affiliate, NTL, Inc. (NTL), in dealing with News Corp.'s British affiliate, British Sky Broadcasting ("BSkyB"), in the United Kingdom. CoreComm alleges that BSkyB has systematically prevented NTL and other providers of multichannel video services from gaining access to certain programming in the United Kingdom. [FN63] CoreComm is concerned that News Corp.'s entry into the DBS market via EchoStar could have similar anti-competitive consequences for MVPDs in the U.S. [FN64]

24. In reply, News Corp. questions the relevancy of what it views as a series of commercial disputes between CoreComm's U.K. affiliate and BSkyB, a publicly held company in which News Corp. holds a minority interest. News Corp. notes that the Commission historically does not become involved in private contractual disputes, especially those governed by the law of another country. [FN65] News Corp. also takes issue with CoreComm's characterization of OFT's findings. In addition, News Corp. argues that even if CoreComm's allegations about BSkyB's actions were true, they are irrelevant. [FN66] News Corp. points out that it lacks control of BSkyB and that BSkyB, rather than News Corp., holds all the programming rights at issue. Thus, BSkyB's actions cannot be attributed to News Corp. [FN67] EchoStar also questions the relevancy of CoreComm's concern because it has not entered into any exclusive contracts with News Corp. and asserts that it does not have the market power to force News Corp. into such arrangements. [FN68]

25. We are unpersuaded by CoreComm and SCBA's arguments for several reasons. First, the statutory provisions for program access conditions were enacted by Congress after extensive hearings and findings that horizontal concentration in the cable industry combined with extensive integration (i.e., combined ownership of cable systems and programming suppliers), created an imbalance of power, both between cable operators and programming vendors and between cable operators and their MVPD competitors. [FN69] The current record does not reflect a similar imbalance of power here: between EchoStar and programming vendors or between EchoStar and its MVPD competitors.

26. Second, CoreComm has mentioned that News Corp. holds attributable interests in a number of satellite-delivered programming services. As such, CoreComm is concerned that the proposed assignment might result in News Corp.

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giving EchoStar exclusivity to News Corp.'s attributable programming services or, at a minimum, giving EchoStar preferable treatment with regard to such programming. However, according to News Corp.'s unchallenged assertion, nearly all of its attributable programming services are covered by the Commission's program access rules, [FN70] which prohibits unfair or discriminatory practices in the sale of programming by, among others, a satellite cable programming vendor in which a cable operator has an attributable interest. [FN71] Therefore, as News Corp. correctly notes, the Commission's rules provide MVPDs an avenue for redress if they believe a New Corp. programming arrangement involves price discrimination or unfair practices. [FN72] Consequently, we will not impose the conditions that CoreComm requests. Although a few programming services may not be covered by the program access rules, we will not apply program access conditions in the instant proceeding to address these few services.

27. Finally, in addition to subscription programming, News Corp. also has an interest in the broadcast programming distributed by the Fox television network. SCBA surmises that Fox owned and affiliated television stations might withhold retransmission consent from other MVPDs competing with EchoStar. [FN73] We find no basis for SCBA's concern. The Commission's rules prohibit exclusive retransmission consent agreements between a television station and any MVPD. [FN74] Therefore, should a situation arise whereby it appears that News Corp. has violated the Commission's exclusive retransmission prohibition, interested parties are always free to bring their concerns to our attention via the Commission's complaint process.

#### 5. Pending Litigation

28. PrimeTime 24 opposes the Joint Application, alleging that EchoStar has breached its exclusive network programming contract to offer only PrimeTime 24's retransmitted broadcast television programming to EchoStar's subscribers. PrimeTime 24 claims that EchoStar, in breach of this contract, substituted its own retransmitted broadcast network programming. PrimeTime 24 further claims that EchoStar has also refused to pay PrimeTime 24 programming fees that were accrued prior to the breach. PrimeTime 24 contends that it will prevail in a suit it has filed against EchoStar, seeking both damages and specific performance of the contract. Thus, according to PrimeTime 24, "it would be futile for the Commission to approve the Assignment of the 110 <<degrees>> W.L. orbital slot as EchoStar 110 requests; EchoStar 110 ultimately will not be able to use the slot as it now asserts it plans to use it." [FN75] Notwithstanding its pending suit, PrimeTime 24 argues that until its litigation is concluded, granting the Joint Application will enable EchoStar to greatly expand its network capacity, albeit temporarily, and thus increase EchoStar's injury to PrimeTime 24 as result of EchoStar's breach of contract. [FN76] Because of this increased risk, PrimeTime 24 argues that it has standing to petition the Commission to deny the EchoStar/MCI Application. [FN77]

29. Applicants respond that PrimeTime 24 lacks standing in this proceeding because it is not a "party in interest" under Section 309(d)(1) of the Communications Act, [FN78] and cite our longstanding policy of refusing to adjudicate private contract issues of the kind raised by PrimeTime 24. [FN79] We find both arguments advanced by Applicants persuasive.

30. PrimeTime 24 fails to meet the threshold requirements for standing. It does not allege personal injury that is "fairly traceable" to our granting the applications and that there is a substantial likelihood that our denial of the

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applications will redress the injury claimed. [FN80] PrimeTime 24 has failed to specify how it believes it would be harmed by the proposed assignment. It has simply alleged that denial of the applications would inhibit EchoStar from engaging in certain conduct alleged to breach a programming contract. [FN81] Nor has PrimeTime 24 submitted any documented proof that its success in the pending litigation would, aside from possibly curbing to some degree local-into-local service, prohibit EchoStar from using additional spectrum for purposes PrimeTime 24 does not challenge, such as providing EchoStar's subscribers the many other services EchoStar proposes, such as HDTV programming and high-speed internet access. In any event, even if PrimeTime 24 had standing, we would find that its assertions, if proven true, would not raise public interest concerns sufficient to deny the application. PrimeTime 24 raises a private contractual dispute that is currently pending before a federal court, and we will not adjudicate private contractual matters where an alternative forum exists to resolve the matter and the contractual dispute does not bear on the public interest. [FN82] Nor do we consider such matters a persuasive reason to deny the joint application.

6. Potential harm to Terrestrial Broadcasters and Small Cable Operators

31. SCBA, in its petition to deny, contends that the proposed acquisition threatens the financial viability of the nation's 1,150 local broadcasters. Further, it states that because the primary source of small cable operators' service offerings is programming produced by local broadcasters, any reduction in programming resulting from a diminution in local broadcasters' revenues will harm SCBA's members. [FN83] SCBA claims that the harm will result in two ways: through the selective carriage of broadcast stations and through the illegal importation of television signals. [FN84]

32. SCBA argues that local broadcasters in larger markets will suffer from the fact that EchoStar's acquisition of an additional 28 frequency channels will enable it to retransmit only the signals of affiliates of the nation's four most popular networks, ABC, CBS, NBC, and Fox, in the top 100 markets. Consequently, SCBA reasons that this capacity limitation threatens the financial viability of broadcasters in these markets that are not carried by EchoStar, namely emerging networks, local PBS, and independent stations, which tend to offer programming oriented toward unique local community needs. [FN85]

33. SCBA also contends that granting the joint application will cause harm to local broadcasters serving smaller markets. SCBA contends that satellite carriers, including EchoStar, have demonstrated a pervasive disregard for the distant signal importation limit of the Satellite Home Viewer Act (SHVA), which restricts delivery of network television programming to "unserved households." [FN86] According to SCBA, these violations cause nominal harm to broadcasters in small markets because their viewers have little interest in local programming in retransmitted from distant major markets. In other words, signals from cities in other parts of the nation are not good substitutes for programming produced locally. However, adds SCBA, EchoStar's additional capacity will enable it to carry the signals of many more major markets. Consequently, says SCBA, there will be a large number of instances in which consumers will be able to receive signals from a major market that is close to their homes. In those cases, asserts SCBA, DBS would be sufficiently appealing to persuade viewers to look to DBS, rather than their local broadcasters, for local programming. [FN87] SCBA also asserts that EchoStar already has demonstrated readiness to violate SHVA, and allowing EchoStar to acquire an additional 28 channels will provide it with

the capacity to commit even more violations. Moreover, SCBA asserts that economic necessity will compel EchoStar to resort to widespread local-into-local dissemination of selected broadcast signals in order to recover the \$1.25 billion that it will need to spend in order to utilize the 28 channels. This activity, they argue, will surely result in numerous SHVA violations. [FN88]

34. We find that SCBA's petition to deny fails to meet the criteria of Section 309(d)(1) of the Communications Act. [FN89] That provision of the Act states that when a petition to deny is filed it must contain specific allegations of fact sufficient to show that a grant of the application would be prima facie inconsistent with the public interest. [FN90] SCBA fails to meet this obligation for several reasons.

35. First, SCBA has failed to establish a link between the perceived harms of selective local-into-local carriage and the public interest. Cable operators and DBS operators compete in the same markets and at present, cable operators rather than DBS operators tend to dominate those markets. [FN91] Thus, if our grant of EchoStar's request allows it to offer a closer substitute to cable operator's offerings, then, by implication, some cable operators may suffer adverse economic impacts because of the increased competition. The public interest, however, is in insuring robust competition and not in protecting the financial interests of particular firms. In this particular instance, consumers will benefit from the increased competition.

36. Second, terrestrial broadcasters supply programming that is sufficiently important to consumers that DBS operators seek to retransmit their programming in order to better compete with cable operators. Recent data suggest that the prime time viewing share of broadcast television is on average 64 percent. [FN92] Consequently, terrestrial broadcasters are supplying programming that consumers like enough that DBS operators would find it advantageous to retransmit terrestrial broadcast television signals. In fact, surveys show that a significant number of consumers would subscribe to the services of a DBS operator rather than a cable operator if the DBS operator carried local broadcast television signals. [FN93] Consequently, DBS operators have a strong incentive to carry local broadcast television signals in order to compete with cable operators. A major constraint on DBS operators from supplying such programming is the capacity limitations of existing DBS assignments. Grant of EchoStar's application for 28 additional DBS channels will ease this constraint for EchoStar and permit it to provide such service to consumers.

37. Third, SCBA's allegations concerning its perceived harm to broadcasters in smaller markets are based on the supposition that EchoStar has violated SHVA and will continue to do so. EchoStar denies it has violated or that it has any intention of violating SHVA. Moreover, Applicants submit that this Commission is not the proper forum for determining whether or not an entity is in compliance with SHVA. [FN94] We agree. We are, nonetheless, aware of the fact that EchoStar is involved in pending litigation concerning its compliance with SHVA. [FN95] We do not, however, consider these lawsuits to be sufficient basis for us to conclude that EchoStar will intentionally violate SHVA to the detriment of local broadcasters. In any event, speculation about future violations of SHVA does not provide a basis for denying the Joint Application.

38. Finally, we note that no broadcaster sought to deny the Joint Application at issue because of the harms SCBA alleges will accrue to them by our grant of the Joint Application. While SCBA asserts that this is because FOX, a party with interest in the proposed transaction, is a member of the National Association of Broadcasters (NAB), this argument is not persuasive. As evidenced by many

proceedings, broadcasters will comment on proceedings of interest with a wide variety of views even when NAB has commented on the same proceeding. Thus, if some broadcasters were to be harmed by the proposed Joint Application as asserted by SCBA, then we would expect that they would have commented in the proceeding to that effect. Consequently, broadcasters' apparent lack of interest in this proceeding undermines SCBA's allegation of harms to them from our granting the Joint Application.

### C. Other Issues

#### 1. Service to Hawaii

39. The State of Hawaii supports the proposed assignment provided two conditions are met. First, Hawaii asks that Applicants assure that reliable, small, 18-24 inches, customer furnished, earth station receiving antenna ("dish") DBS service will be provided to its consumers. [FN96] The State is concerned that MCI's design for the satellites may not have sufficient power to adequately serve all of its citizens. Hawaii explains that a high number of its citizens live in multi-family housing units that can only accommodate small receiving dishes. [FN97] Hawaii also points out that without DBS, there is no alternative to cable service in the State. [FN98] Second, Hawaii requests that the Commission affirm that granting the applications does not obviate EchoStar's separate, previously incurred, obligation to provide DBS service to Hawaii from EchoStar's channel assignments at 148 <<degrees>> W.L. Hawaii asserts that if EchoStar is permitted to combine its regulatory obligations and only offer service from the 110 <<degrees>> W.L. orbital location, it is likely that Hawaiians will not be provided the same level of DBS programming that is available in the continental United States. [FN99]

40. Applicants oppose Hawaii's request for conditions, arguing that the State's demand for assurance of service through 18-24 inch receive dishes is untimely, and that this is not the proper proceeding for a determination concerning EchoStar's service obligations from its 148 <<degrees>> orbital location. [FN100] Applicants point out that when MCI applied for the authorization it now seeks to assign to EchoStar, Hawaii was well aware of what the Commission's service requirements to Hawaii and Alaska were because Hawaii had participated in the rulemaking proceeding that established these requirements. Nevertheless, Applicants point out that Hawaii did not object to MCI's service proposal, request any conditions, or seek reconsideration of the authorization. Based on that authorization, Applicants point out that hundreds of millions of dollars have now been spent constructing MCI's satellite system in accordance with the proposed specifications. [FN101] In view of Hawaii's prior acquiescence, Applicants submit that it is estopped from requesting the modification of an authorization that has long been finalized. As for EchoStar's obligations at the 148 <<degrees>> W.L. orbital location, Applicants point out that EchoStar previously filed an application to modify its authorization for the 148 <<degrees>> W.L. location, and that Hawaii should raise any concerns in relation to that application.

41. In the 1995 DBS auction Report and Order, which modified the DBS rules, the Commission revised geographic service obligations for DBS licensees. [FN102] The Commission recognized that due to various technical limitations not all DBS orbital positions necessarily will be capable of serving all areas of the United States with the same size receive antenna dishes. [FN103] Accordingly, the

Commission explained that DBS service must be provided to Alaska and Hawaii where "technically feasible," recognizing that it was unclear whether it is possible to provide service from some orbital locations. [FN104] It was pursuant to these obligations that the Commission granted MCI's application for the subject authorization. Our grant of the Joint Application does not change the terms and conditions of this authorization. In other words, EchoStar will be in the same shoes as MCI -- nothing more or less. Therefore, EchoStar's authorization for the 28 channels at 110 <<degrees>> W.L. will be subject to the same terms and conditions as MCI's authorization for these same channels.

42. Despite our concern that Hawaii, as well as Alaska, be provided DBS service, it would be inappropriate to require that the MCI satellites be redesigned at this late stage of development. Applicants expect the first satellite to be placed into orbit shortly after grant. [FN105] Any change in design at this time would surely foreclose the launch and cause further delay of service from 110 <<degrees>> W.L. to not only Hawaii, but the entire continental United States, as well as Alaska and Puerto Rico. In addition, modifying the nearly completed satellites and rescheduling their launch would impose a substantial financial burden upon Applicants, amounting to millions of dollars, which would ultimately be passed on to EchoStar's subscribers. As such, it would not be appropriate or fair to condition the assignment of MCI's DBS license on the requirement of a maximum dish size for service to Hawaii. The appropriate time for Hawaii to have objected to MCI's DBS service proposal was when MCI's original application for the 110 <<degrees>> W.L. authorization was under consideration or by filing a timely petition for reconsideration after grant of that authorization. Hawaii did neither. Therefore, the assignment of MCI's DBS license will not be conditioned on providing a specific antenna size for Hawaiian consumers.

43. In addition, we will not condition the proposed transfer upon EchoStar's performance of its obligations at 148 <<degrees>> W.L. [FN106] The separate DBS license conditions on EchoStar's 148 <<degrees>> W.L. license will continue without regard to the action taken in this proceeding. EchoStar has not requested modification of its other DBS licenses in this proceeding and, as Hawaii notes in its reply comments, EchoStar does not challenge Hawaii's assertion of EchoStar's obligation. [FN107].

## 2. Qualification Requirements

44. In its petition to deny, UCC contends that the Applicants have not established their character or citizenship as required by the Communications Act and the Commission's rules. [FN108] According to UCC, Applicants seek to avoid these obligations on the mistaken assumption that because the applications are for authorizations to provide subscription service, they should be held to lesser standard than other broadcast applicants. UCC argues that the International Bureau misinterpreted the Commission's Subscription Video decision [FN109] in granting MCI the authorization it now seeks to assign to EchoStar. [FN110] UCC asserts that the mere fact that the applications concern subscription DBS service, rather than terrestrial television service, does not relieve Applicants from demonstrating that they are in compliance with all of the requirements imposed on broadcasters by the Communications Act. UCC argues that to provide subscription DBS service, an entity must first obtain a broadcast license, which necessarily entails complying with a full panoply of requirements, including those concerning citizenship and character. UCC contends

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that once a license is obtained, the newly created licensee may then self-elect to provide service on a subscription basis and, if it so elects, at that time, it would no longer be subject to broadcast content-related obligations. [FN111] UCC claims that if DBS applicants were allowed to avoid these broadcast application qualification requirements, there would be no way to prevent licenses from being granted to international terrorists or convicted felons. [FN112] In addition, UCC contends this precedent could be applied to terrestrial broadcast licenses and further compound the problem. UCC notes that it has sought Commission review of the International Bureau's holding in the MCI DBS Order, which it asserts will confirm the correctness of UCC's assertion that applicants for DBS licenses must comply with the obligation set forth in Section 310(b) of the Act. UCC contends that as long as an Application for Review is pending, MCI has no authorizations to assign, and EchoStar has no basis for its failure to comply with the mandates of Section 310(b) of the Act, which restricts foreign ownership of broadcast licensees. [FN113]

45. This issue is being addressed by us in another proceeding. Consequently, we will not address it here. [FN114]

#### IV. CONCLUSION

46. In view of the forgoing, we find that granting the applications will serve the public interest, convenience, and necessity by increasing competition in the MVPD markets to the benefit of U.S. consumers. For this reason and the reasons described in the Order and Authorization, we grant the application of MCI Telecommunications Corporation ("MCI") and EchoStar 110 Corporation ("EchoStar") for consent to the assignment from MCI to EchoStar of MCI's authorization to construct, launch and operate a Direct Broadcast Satellite ("DBS") system using 28 frequency channels at the 110 <<degrees>> W.L. orbital location. We also grant the related application of EchoStar's affiliate EchoStar North America Corporation ("ENA") and American Sky Broadcasting, L.L.C. ("ASkyB") for consent to the assignment from ASkyB to ENA of ASkyB's authorizations associated with earth station facilities constructed by ASkyB in Gilbert, Arizona.

#### V. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED that the Application of MCI Telecommunications Corporation and EchoStar 100 Corporation for Assignment of Authorization to Construct, Launch, and Operate a Direct Broadcast Satellite System Using 28 Frequency Channels at the 110 <<degrees>> W.L. Orbital Location, File No. SAT-ASG-19981202-0093, from MCI Telecommunications Corporation to EchoStar 110 Corporation IS GRANTED.

48. IT IS FURTHER ORDERED that the Application of American Sky Broadcasting, LLC and EchoStar North America Corporation for Assignment of Transmit-Receive Earth Station Authorizations, File No. SES-ASG-19981204-01829(4), from American Sky Broadcasting, LLC to EchoStar North America Corporation IS GRANTED.

49. IT IS FURTHER ORDERED that the petitions to deny filed by Small Cable Business Association, PrimeTime 24 Joint Venture, and the request for imposition of conditions filed by CoreComm Limited ARE DENIED.

50. IT IS FURTHER ORDERED that the assignments shall be completed within 60 days from the release of this order and that the Commission shall be notified by letter within 30 days of consummation.

51. This Order is effective upon release. Petitions for reconsideration under

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Section 1.106 of the Commission's rules, 47 C.F.R. s 1.106, may be filed within thirty days of the public notice of this Order (see 47 C.F.R. s 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

FN1. We will refer to the applications collectively as the "Joint Application" and individually as "EchoStar/MCI Application" and "ENA/ASkyB Application." On November 30, EchoStar signed agreements to acquire certain assets from News Corp. and MCI Worldcom Inc. EchoStar proposes to acquire the MCI/News Corp license to operate high-powered DBS service on 28 frequency channels at 110 << degrees>>>. EchoStar would acquire from ASkyB a satellite uplink center in Gilbert, Arizona, and contracts related to two Loral-built satellites. News Corp. will pay costs of building, launching and insuring these satellites, scheduled for launch in 1999. EchoStar also would receive a worldwide license agreement to manufacture and distribute set-top boxes internationally and a three-year retransmission consent agreement for EchoStar's DISH Network to rebroadcast Fox Network local station signals to their respective markets. In addition, EchoStar would carry the Fox News Channel on the DISH Network, and MCI would receive the non-exclusive right to bundle EchoStar's DBS service with MCI Worldcom's telephone service. EchoStar and News Corp. agree, upon consummation of the transaction, to withdraw any pending lawsuits regarding their prior attempt at merger.

FN2. Counting Primestar, as of June 1998, there were just under nine million DBS subscribers. Currently, two out of every three new multichannel subscribers chooses to subscribe to DBS. February 1999 DBS Investor.

FN3. The northern portion of Alaska is the only part of the Nation where service is not technically feasible from these orbital locations.

FN4. MCI Telecommunications Corp., 11 FCC Rcd. 16275 (Int'l Bur. 1996) ("MCI Authorization Order"), aff'd, Memorandum Opinion and Order, FCC 99- 110 (released contemporaneously with this Order).

FN5. MCI Authorization Order, 11 FCC Rcd. at 16277.

FN6. EchoStar/MCI Application at 2-3.

FN7. Continental Satellite Corp., 4 FCC Rcd. 6292 (1989).

FN8. EchoStar Satellite Corp., 7 FCC Rcd. 1765, 1770 (1992); Directsat Corp., 8 FCC Rcd. 7962, 7964 (1993).

FN9. EchoStar/MCI Application at 3-5; ENA/ASkyB Application at Exhibit 3 p. 1.

FN10. EchoStar/MCI Application at 4-5.

FN11. See <<http://www.ftc.gov/bc/earlyterm/1998/9812/et981216.htm>> (early termination of review granted Dec. 16, 1998).

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FN12. EchoStar/MCI Application at 5-6. The parties assert that recent technological developments will allow a consumer to receive two DBS signals from a single earth station antenna, thus allowing EchoStar to transmit DBS signals from both its existing authorizations at 101 <<degrees>> W.L. and its proposed authorizations at 110 <<degrees>> W.L. to its existing customers.

FN13. As to prospective Internet services, the parties also note, however, that because of the one-way nature of DBS transmission, it will be necessary to have an alternative return channel to achieve inter-activity, which will require additional capacity. EchoStar/MCI Application at 16, n.35.

FN14. EchoStar/MCI Application at 16-17.

FN15. EchoStar/MCI Application at 17 and n.37 citing United States v. Primestar, Inc., et al., Complaint in Civil File No. 1:98CV01193 (JLG) at P 83 (D.D.C. May 12, 1998).

FN16. Id.

FN17. See Directsat Corp. 10 FCC Rcd. 88 (1995) (granting application for transfer of control of Directsat Corporation from SSE Telecom, Inc. to EchoStar Communications Corp.).

FN18. SCBA Petition at 3.

FN19. UCC Petition at 2-3.

FN20. PrimeTime 24 Petition at 2-3.

FN21. TimeWarner Comments at 2.

FN22. DOJ Comments at 1.

FN23. 47 U.S.C. s 310(d).

FN24. Southern New England Telecommunications Corp., Inc. 13 FCC Rcd. 21292, 21298 (1998) (granting application for transfer control of Southern New England Telecommunications Corp. to SBC Communications, Inc.); MCI Communications Corp., 13 FCC Rcd. 18025, 18030 (1998) (granting application for transfer control of MCI Communications Corp. to WorldCom Inc.).

FN25. Tele-Communications, Inc., Memorandum Opinion and Order, CS Docket No. 98-178, FCC 99-24 at P 14 (released February 18, 1999) (granting application for transfer of control of Tele-Communications, Inc. to AT&T Corp.). See also United States Satellite Broadcasting Co., Inc. Order and Authorization, DA.98- 225 (released April 1, 1999).

FN26. See, e.g., NYNEX Corp., 12 FCC Rcd. 19985, 20008 (1997) (granting application for transfer of control of NYNEX Corp. to Bell Atlantic Corp.); Teleport Communications Group, Inc., 13 FCC Rcd. 15236, 15245 (1998) (granting application for transfer of control of Teleport Communications Group, Inc. to AT&T Corp.). Each product market is defined by a geographic component.

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FN27. In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 13 FCC Rcd 1034 at Section III (1998) (1997 Cable Competition Report).

FN28. In the Matter Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Report, 13 FCC Rcd. 24284, 24362 (1998) (1998 Cable Competition Report).

FN29. 1998 Cable Competition Report, 13 FCC Rcd. at 24287. DOJ concurs with the Commission's analysis that the relevant product market is the provision of MVPD services. DOJ comments at 3.

FN30. 1998 Cable Competition Report, 13 FCC Rcd. at 24362. Most programmers produce video programming with the intent of distributing it to a national audience. However, there is some video programming, such as regional sports programming, that is intended for distribution to a regional audience only and so is sold to distributors for that purpose.

FN31. The "footprint" of a service provider is determined by the geographic reach of the provider. For example, the geographic footprint of a cable franchise operator is determined by the location of the homes within a franchise that an operator passes with its cable and thus can serve. See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 12 FCC 4358 at P 115 (1997) (1996 Cable Competition Report).

FN32. See <http://www.dishnetwork.com/> for a description of EchoStar's current offerings and coverage.

FN33. However, as we discuss further below, EchoStar has indicated that it plans to use some of the additional channels at 110 <<degrees>> W.L. to obtain and retransmit the signals of local terrestrial TV stations to better compete with cable TV systems. If EchoStar chooses to retransmit such programming, it may improve its ability to acquire subscribers and thereby acquire programming, but these changes are unlikely to confer on it any market power in the acquisition of programming, as they would be simply matching the competitive offerings of cable operators.

FN34. We recognize that as a result of this transaction, News Corp will have an equity interest in EchoStar. We further recognize that one cable operator (AT&T) has an indirect interest in News Corp. While there are no attribution rules for DBS service, under either broadcast or cable attribution rules, no cable operator would have an attributable interest in EchoStar. Consequently, we do not believe this transaction will lessen EchoStar's efforts to compete with cable operators for subscribers.

FN35. See 1998 Cable Competition Report, 13 FCC Rcd. 24284, for a recent and more complete assessment of the status of competition in the markets for the delivery of video programming.

FN36. These estimates are from the 1998 Cable Competition Report, 13 FCC Rcd. 24284 at C-1.

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FN37. This estimate is from SkyTrend, "DTH Subscribers: December 1997 - December 1998," [http://www.skyreport.com/skyreport/dth\\_us.htm](http://www.skyreport.com/skyreport/dth_us.htm).

FN38. This analysis is consistent with the Commission's emphasis in its annual assessments of the video marketplace on whether or not distributors of video programming possess sufficient market power in the distribution market so as to confer on them the ability to exercise market power in the programming market. See, e.g. 1997 Cable Competition Report, 13 FCC Rcd. at 1108. See also Tele-Communications, Inc., FCC 99-24 at PP 31-42 (similar analysis in the context of an acquisition of a MVPD).

FN39. See 1998 Cable Competition Report, 13 FCC Rcd. 24284, Appendix E. The Commission's program access rules, 47 C.F.R. ss 76.1000-.1003, derive from Section 628 of the Communications Act, 47 U.S.C. s 548, which prohibits unfair or discriminatory practices in the sale of programming intended for cable and satellite broadcasting. Section 628 is intended to increase competition in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by making it "unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." Id. s 548(b). Section 628(d) provides parties aggrieved by conduct alleged to violate the program access provisions the right to commence an adjudicatory proceeding before the Commission. Id. s 548(d).

FN40. Competitors in the MVPD market include cable operators, DBS operators, wireless cable operators (Multichannel Multipoint Distribution Services, Local Multipoint Distribution Services, etc.), Satellite Master Antenna Television Systems, and Local Exchange Carriers. See 1998 Cable Competition Report, 13 FCC Rcd. 24284 at Section II for a fuller description and evaluation of the different competitors in the MVPD market.

FN41. See 1998 Cable Competition Report, 13 FCC Rcd. 24284, Table C-1. As of November, 1998, there were approximately 65.81 million TV households that subscribed to cable TV and 8.34 million TV households that subscribed to DBS (DIRECTV, Primestar, EchoStar). Thus cable operators had approximately 8 times as many subscribers as did DBS operators. Sources: [http://www.ncta.com/dir\\_current.html](http://www.ncta.com/dir_current.html), [http://www.skyreport.com/skyreport/dth\\_us.htm](http://www.skyreport.com/skyreport/dth_us.htm).

FN42. The National Cable Television Association reports in its Cable Television Developments: Fall 1998/Winter 1999 at 1, that of a total of 98,920,000 television households, 95,520,000 or 96.6% of these households are passed by a cable system. These estimates were taken from Paul Kagan Associates, Inc., Marketing New Media (November 16, 1998). A household is "passed" if cable service is sufficiently available to it that it might subscribe to cable service if it chooses.

FN43. 1998 Cable Competition Report, 13 FCC Rcd. at 24362-63.

FN44. Revision of Rules and Policies for the Direct Broadcast Satellite Service,

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11 FCC Rcd. 9712, 9733 (1995) (1995 Auction Order).

FN45. 1995 Auction Order, 11 FCC Rcd. at 9736, 9810. Full-CONUS refers to fact that DBS satellites at 101 <<degrees>> W.L., 110 <<degrees>> W.L. and 119 <<degrees>> W.L., have footprints that cover the continental United States.

FN46. DOJ Comments at 9. See F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, 3rd edition (1990), at 16, for a discussion of the importance of rivalrous behavior amongst firms that do not offer perfect substitutes for each others' product.

FN47. DOJ Comments at 5.

FN48. DOJ Comments at 5.

FN49. DOJ states that "the deconcentration of the MVPD market and promotion of price competition between DBS and cable -- will best be served by allowing EchoStar to acquire the 28 channels at 110 <<degrees>> slot while retaining its current 21 channels at 119 <<degrees>>." DOJ Comments at 9.

FN50. *Tele-Communications, Inc.*, FCC 99-24 at 9.

FN51. 1998 Cable Competition Report, 13 FCC Rcd. at 24360.

FN52. However, we also note that in order to facilitate the opening of international DBS markets, the United States has reached agreement with Mexico to permit DBS satellites licensed by either country to provide service into each other's territory. Thus, at some time in the future, a company licensed in Mexico may be able to provide DBS service to U.S. consumers. See Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 28, 1996.

FN53. Eleven DBS channels at 119 <<degrees>> W.L., which are currently licensed to TEMPO Satellite, Inc. (TEMPO) are not yet operational. On January 27, 1999, an application to assign TEMPO's license to DIRECTV was filed with the Commission. See, Public Notice, Report No. SPB-147 (February 1, 1999).

FN54. For example, new entrants can enter through wireline transmission systems (e.g., cable overbuilds, open video systems), wireless transmission systems (e.g., Multichannel Multipoint Distribution Service, etc.), or combinations of these systems (e.g., Satellite Master Antenna Television Systems).

FN55. 1998 Cable Competition Report, 13 FCC Rcd. at 24360.

FN56. Our NPRM to revise Part 100 of our rules requests comment on whether the reasoning behind the one-time rule limiting DBS operators to one CONUS location would lead us to deny subsequent transfer applications. See Policies and Rules for the Direct Broadcast Satellite Service, IB Docket No. 98-21, Notice of Proposed Rulemaking, 13 FCC Rcd. 6907, 6937-47 PP 54-65 (1998). There we stated at P 62, that "[i]f DBS is considered part of a broader MVPD market, ... is

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there a reason to be additionally concerned if any one DBS system control more than a certain aggregate number of channel or more than a single DBS orbital position, especially a full-CONUS orbital position?" Although that Rulemaking is still outstanding, we do not believe it necessary to impose the one full-CONUS restriction in this case.

FN57. DOJ Comments at 10.

FN58. CoreComm Request at 14.

FN59. CoreComm Request at 14-15.

FN60. CoreComm Request at 17-19.

FN61. CoreComm Request at 21.

FN62. SCBA Reply at 21-22.

FN63. CoreComm Request at 11-12 (citing Director General's Review of BSKyB's Position in the Wholesale Pay TV Market (December 1996)).

FN64. In support of its factual allegations, CoreComm cites portions of a 1996 report issued by the Director General of the Office of Fair Trading ("OFT"), an U.K. antitrust authority. In its reply comments, CoreComm also attaches a more recent decision in which the U.K.'s Independent Television Commission ("ITC") announced a general prohibition on minimum carriage requirements or "tiering" for subscription television channels. CoreComm Reply at 12-13.

FN65. News Corp. Opposition at 11-12.

FN66. News Corp. Opposition at 12-13.

FN67. News Corp. Opposition at 12.

FN68. EchoStar Opposition at 20.

FN69. See, e.g., Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 3359, 3366 (1993).

FN70. In Exhibit B of its Opposition, News Corp. lists cable programming entities in which it has attributable ownership. These are the following: Fox/Liberty Networks cable entities, Fox Sports Net, Rainbow Media Holdings, Home Team Sports, Sunshine Network, FIT TV, Fox Sports International, and FX, in addition to The Golf Channel and Fox Kids Worldwide, including The Family Channel. According to News Corp., all of these entities are deemed to be "vertically integrated" for purposes of the Commission's program access rules. Also listed in Exhibit B are Fox News Channel and "fXM: Movies from Fox," cable programming services that News Corp. also has attributable interest, but according to News Corp., are not deemed to be vertically integrated and thus not subject to the program access rules. Following the merger of TCI with AT&T, AT&T will own all the common stock of Liberty Media Corporation and all the equity interest of New Liberty Media Group. See AT&T proxy to its shareholders, <http://>

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www.att.com/ir/ep/tci\_merger/pr\_proposed\_transactions.html. As a result of the proposed transaction, Liberty Media Corporation will acquire 8% of News Corp.'s diluted outstanding shares. Consequently News Corp. submits that the two programming services that are not currently vertically integrated - Fox News Channel and fXM: Movies from Fox - will become vertically integrated and thus subject to our program access rules. See News Corp. Ex Parte Filing (April 22, 1999).

FN71. See supra note 39.

FN72. 47 C.F.R. ss 76.1000-.1003.

FN73. SCBA Reply at 21-22.

FN74. 47 C.F.R. s 76.64(m).

FN75. PrimeTime 24 Petition at 2-3.

FN76. PrimeTime 24 Reply at 2-3.

FN77. PrimeTime 24 Reply at 2-3.

FN78. The Communications Act provides that "[a]ny party in interest may file with the Commission a petition to deny an application .... The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest ...." 47 U.S.C. s 309(d)(1).

FN79. Listeners' Guild, Inc. v. FCC, 813 F.2d 465, 469 (D.C. Cir. 1987); see also Stockholders of Renaissance Communications Corporation, 12 FCC Rcd. 11866, 11869 (1997); Northwest Broadcasting, Inc., 12 FCC Rcd. 3289, 3293 (1997); WHOA-TV, Inc., 11 FCC Rcd. 20041, 20042 (1996).

FN80. MCI Telecommunications Corp., 12 FCC Rcd. 7790, 7793 (1997).

FN81. PrimeTime 24 Response at 3. Not being a member of the consuming public, PrimeTime 24 cannot avail itself of the expansion of standing to the consuming public under Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1002-1006 (D.C. Cir. 1966), see, e.g., FCC v. Sanders Bros Radio Station, 309 U.S. 470 (1940); FCC v. National Broadcasting Co., 319 U.S. 239 (1943) (progenitors of the Communications Act's standing rules); see also The Evening Star Broadcasting Co., 68 FCC 2d 129, 136 (1978), vacated on other grounds, 67 FCC 2d 1503 (1978) (no standing where party met neither "consuming public" status under United Church of Christ nor the established grounds of electrical interference or economic injury).

FN82. Listeners' Guild, 813 F.2d at 469. Both cases cited by PrimeTime 24 in its Response, Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42 (D.C. Cir. 1994), and Granik v. FCC, 234 F.2d 682 (D.C. Cir. 1956), are inapposite. In those cases, third parties with contractual interests in licensees were found to have standing. Here, PrimeTime 24 has no interest in EchoStar, but merely has an unrelated contractual dispute with EchoStar. Moreover, unlike the claims raised in Telephone and Data Systems, Inc. and Granik, the contractual dispute raised

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by PrimeTime 24 is not relevant to the Commission's determination whether the public interest, convenience and necessity would be served by grant of the application and the alleged injury is not traceable to the Commission's action here.

FN83. SCBA Petition at 3.

FN84. SCBA Petition at 6.

FN85. SCBA Petition at 7.

FN86. The term "unserved household" is defined by SHVA as a household that cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity of a primary network station affiliated with that network. 17 U.S.C. s 119(d)(10)(A).

FN87. SCBA Petition at 8.

FN88. SCBA Petition at 15.

FN89. 47 U.S.C. s 309(d)(1).

FN90. 47 U.S.C. s 309(d)(1).

FN91. See earlier discussion on the current status of competition in the affected markets.

FN92. This figure represents the season to date (March 15-21, 1999) average of network prime time viewing share, and is taken from figures reported in Broadcasting & Cable magazine (March 29, 1999) on page 40.

FN93. EchoStar/MCI Application at 12, and 1997 Cable Competition Report, 13 FCC Rcd. at 1041.

FN94. EchoStar/MCI Joint Opposition at 8.

FN95. See, e.g., CBS Broadcasting, Inc. et. al. v. EchoStar Communications Corp., Civil Action No. 98-2651-CIV-MIDDLEBROOKS (S.D. Fla., Dec. 2, 1998).

FN96. Hawaii Comments at 3.

FN97. Hawaii Comments at 4. Hawaii seeks detailed technical disclosure of MCI and EchoStar's satellites capabilities, including the quality of service that will be offered, the rate of service interruptions, and the diameter of dishes that will be used by Hawaiian subscribers. Id.

FN98. Hawaii Comments at 1-2.

FN99. Hawaii Comments at 3.

FN100. EchoStar/MCI Joint Opposition at 10-12.

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01. EchoStar/MCI Joint Opposition at 11.
02. 1995 Auction Order, 11 FCC Rcd. 9712.
03. Preemption of Local Zoning Regulation of Satellite Earth Stations, 11 FCC . 19276, 19295 (1996).
04. 1995 Auction Order, 11 FCC Rcd at 9762.
05. Echostar/MCI Application at 6.
06. Hawaii Comments at 3. EchoStar is also assigned channels at the 61.5 <<rees>>> W.L., 119 <<degrees>> W.L., 148 <<degrees>> W.L., and 175 <<rees>> W.L. orbital locations. The Commission has not determined whether DBS vice can be provided to Hawaii from the 61.5 <<degrees>> W.L. location.
07. Hawaii Comments at 4.
08. UCC Petition at 3.
09. Subscription Video Services, 2 FCC Rcd. 1001 (1987), aff'd sub nom., NABB FCC, 84 F.2d 665 (D.C. Cir. 1988).
10. UCC Petition at 3-4 (citing MCI Authorization Order, 11 FCC Rcd. 16275).
11. UCC Petition at 3-5.
12. UCC Petition at 5 n.5.
13. UCC Petition at 6.
14. MCI Telecommunications Corp., FCC 99-110 (released May 19, 1999).

Separate Statement of Commissioner Susan Ness

Application of MCI Telecommunications Corporation and EchoStar 110  
Application for Consent to Assignment of Authorization to Construct, Launch, and  
Operate a Direct Broadcast Satellite System Using 28 Frequency Channels at the  
> W.L. Orbital Location

DBS provides a valuable service to the American public, and its benefits  
should extend to all geographic areas of our country.  
When the Commission licensed EchoStar in 1996, it required EchoStar to provide  
service to Hawaii and Alaska from 148oW.L. As the Commission stated then, "[W]e  
expect Echostar to provide DBS service to Hawaii and Alaska in accordance  
with Commission rules and policies." Although EchoStar's original plans to serve  
Hawaii and Alaska have been somewhat delayed due to technical problems with its  
satellite, Echostar has made interim arrangements, and is now providing  
service to both states. Nothing in the order we adopt today will  
relieve Echostar of this continuing geographic service requirement.  
In addition, in 1996, when we authorized MCI to provide service at 110oW.L.,  
the Commission also required MCI to comply with our geographic service rules. In

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acquiring MCI's DBS license, EchoStar assumes this obligation for this additional orbital location and is subject to the Commission's rules. I expect EchoStar to fulfill its commitment to serve these non-contiguous areas.

Thus, I reiterate my commitment to making DBS service available to all geographic areas throughout the United States, including Hawaii and Alaska.  
1999 WL 313932 (F.C.C.), 15 Communications Reg. (P&F) 1038  
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