**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>ECHOSTAR COMMUNICATIONS CORP., et al.,<br><br>Defendants. | ECF<br><br>Case No. 1:02CV02138 (ESH) |

**DEFENDANTS' MOTION AND NOTICE OF MOTION FOR EXPEDITED TRIAL**

PLEASE TAKE NOTICE THAT Defendants EchoStar Communications Corp., Hughes Electronics Corp., General Motors Corp., and DIRECTV Enterprises, Inc. ("Defendants") will move this Court on November 5, 2002, at 1:00 p.m., for a Rule 16 scheduling order that provides for discovery and trial on an expedited basis. The reasons for this motion are set forth in the accompanying memorandum and attached exhibits. Pursuant to Local Rule 7.1(m), Defendants have conferred with Plaintiffs and requested their consent to the entry of a scheduling order that will allow for an expedited resolution of this case. As explained in the accompanying Supplemental Declaration of Robert Silver, Plaintiffs have not agreed to an expedited schedule. Plaintiffs have agreed to shortened notice on this Motion and a hearing before this Court on the above date.

This the 4th day of November, 2002.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR EXPEDITED TRIAL**

Introduction

Defendants EchoStar Communications Corp. ("EchoStar"), Hughes Electronics Corp. ("Hughes"), General Motors Corp. ("GM"), and DIRECTV Enterprises, Inc., ("DIRECTV") respectfully move this Court for the entry of a scheduling order setting trial of this challenge to the proposed merger between EchoStar and Hughes on an expedited basis. (A proposed order is attached as Exhibit A.) An expedited trial is necessary to obtain effective judicial resolution of the Plaintiffs' allegations and to prevent serious and irreparable public and private harm should the transaction be frustrated. Moreover, an expedited trial will not prejudice Plaintiffs because they have already obtained in their pre-complaint investigation all of the relevant information and evidence they need to prosecute their claims.

Pursuant to Fed. R. Civ. Pro. 26(f) and Local Rules 7.1(m) and 16.3, Defendants have met and conferred with Plaintiffs to seek their consent to entry of a schedule that will allow for resolution of this case on an expedited basis. As explained in the accompanying Supplemental Declaration of Robert B. Silver (attached as Exhibit D), Plaintiffs do not agree to the Defendants' proposed schedule.

## ARGUMENT

Contrary to the allegations in the Plaintiffs' complaint, the proposed merger between EchoStar and Hughes would increase competition in the provision of video services. In particular, the merger would increase competition with the dominant cable operators that exploit their position by consistently raising prices at a rate significantly above inflation in the absence of effective competition. The merger would allow DBS to provide consumers with an alternative to cable firms for a broad range of important services. Blocking the merger, in turn, would leave millions of consumers with only one option, the local cable company, for that same range of services. In some instances, blocking the merger would leave consumers with no options at all.

Plaintiffs have proposed a trial date in June 2003, a date that would insulate their decision to challenge this merger from any judicial scrutiny. This memorandum demonstrates that (1) an expedited trial is necessary to obtain meaningful judicial resolution, (2) the expedited schedule will not prejudice the Plaintiffs, who have conducted an extensive pre-complaint investigation and have obtained more than enough information and discovery to prosecute their claims, and (3) extensive public harm will result if the Plaintiffs' allegations are not subject to effective judicial resolution.

I. An Expedited Hearing Is Practicable and Justified.

Unlike civil cases brought by private parties, a government challenge to a transaction under Section 7 of the Clayton Act is preceded by substantial pre-complaint formal discovery that enables the government to proceed immediately upon filing of the complaint with a preliminary or final trial on the merits, including on an expedited basis. Here, over the course of 12 months, the parties to the transaction have (1) produced more than 3.17 million pages of responsive documents, 456 pages of interrogatory responses accompanied by over 200 illustrative exhibits, and eighteen submissions (seven of which were presented in person); and (2) provided seventeen interviews and a like number of depositions. In addition, the Defendants' economists have met with Plaintiffs' economists in person or by teleconference on at least nine separate occasions, made at least six principal presentations, provided at least eight additional written submissions, and turned over any and all data Plaintiffs' requested, including at least two databases with more than one million observations.[1] In short, the Defendants have provided far more discovery than is necessary for the Plaintiffs to proceed immediately to trial, if they have a case to try. By contrast, the Defendants have had no discovery, but because of the practical business exigencies facing them have no choice but to press for an immediate hearing on the merits.

The Court is well aware that expedited trials under Section 7 of the Clayton Act are the rule, not the exception.[2] This is clearly what Congress intended when it enacted

[1] *See* Declaration of Robert B. Silver (attached as Exhibit B); Declaration of Alan R. Kusinitz (attached as Exhibit C).

[2] *See, e.g., United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 179-80 (D.D.C. 2001) (expedited hearing; request for consolidated preliminary and permanent injunction denied within one month of Department of Justice filing lawsuit to block acquisition in computer data disaster recovery industry); *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025, 1026 (W.D. Wis.

the Hart-Scott-Rodino Act.[3] As with almost all mergers, as a matter of business necessity, the Defendants simply cannot afford to put their plans on hold for the lengthy, effectively indefinite period of time that an unexpedited trial schedule would require.

Of particular importance in this instance, the Defendants' contractual agreements establish the need for expedition. The Agreement and Plan of Merger between EchoStar and Hughes contains several termination provisions, including, among other things, provisions that permit Hughes to terminate the transaction – if FCC approval is not received on or before January 6, 2003, or if the merger is not consummated by January 21, 2003.[4] In addition to allowing Hughes to terminate the transaction, the provisions may also, under certain circumstances, trigger a termination fee obligation, which would entail, among other things, the payment of $600 million dollars from EchoStar to Hughes.[5] Accordingly, the parties urgently need judicial resolution before the effective termination dates; only an expedited trial schedule can secure meaningful relief for the parties, and for consumers, should it be determined that the Plaintiffs are in error. Indeed, when faced with contractual termination provisions, courts have consistently

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2000) (expedited review of Department of Justice request for permanent injunction to block joint venture; period from complaint to final decision less than three months); *United States v. Gillette Co.*, 828 F. Supp. 78, 80 (D.D.C. 1993) (expedited hearing; request for preliminary injunction denied approximately one and a half months after Department of Justice filed lawsuit to block merger).

[3] *See* H.R. Rep. No. 94-1373, at 10 (1976) ("[T]he chief virtue of this bill is that its provisions will help to eliminate endless post-merger proceedings . . . and replace them with far more expeditious and effective premerger proceedings."); *id.* at 11 ("And it will advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion.").

[4] *See Agreement and Plan of Merger By and Between EchoStar Communications Corp. and Hughes Electronics Corp.*, § 7.1 (b), (c) (Oct. 28, 2001).

[5] *See id.* § 7.2 (b).

expedited their consideration of merger matters to ensure that a decision could be rendered in time to be meaningful.[6]

Plaintiffs have not requested a preliminary injunction, presumably because the Federal Communications Commission (FCC) has ordered that the Defendants' license transfer request, which is necessary for the merger to close, be heard by an administrative law judge.[7] The FCC made a preliminary determination that under the DOJ guidelines the transaction appeared to offend Section 7 principles. Based on that preliminary determination, the FCC set the case down for an evidentiary hearing before an ALJ. The FCC Order further provided that the parties could instead file by November 27, 2002, an amended application ameliorating the FCC's concerns, and a petition to suspend the ALJ hearing and allow review of the amended application by the FCC itself.[8] Since that time the Defendants have proposed to amend their transaction to sell certain frequencies and to sell and lease certain satellites to R/L DBS, a DBS licensee that is currently constructing its own satellite to provide DBS service in the United States. Defendants will be filing expeditiously with the FCC a proposed plan to sell and lease assets to R/L DBS and a

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[6] *See, e.g., Gillette,* 828 F. Supp. at 80 (expediting review of DOJ's request for PI in two months "in order to resolve the case before ... Gillette's Offer Arrangements Agreement with Parker terminates"); *FTC v. Occidental Petroleum Corp.,* No. 86-900, 1986 WL 952 (D.D.C. Apr. 29, 1986) (decision on PI within one month of complaint; likelihood that one party would exercise its termination right factor in denying injunction).

[7] *See* Hearing Designation Order, *In the Matter of Application of EchoStar Communications Corp. et al.*, FCC 02-284 (released Oct. 18, 2002).

[8] *See id.* ¶ 295 ("[T]he parties may file an amended application with the Commission to ameliorate the competition concerns identified in this Order and may also file a petition to suspend the hearing pending review of the amended application."); *see also* Press Statement of Commissioner Kevin J. Martin on Proposed Merger of EchoStar and DIRECTV, at 1 (Oct. 10, 2002) ("[S]ome parties have suggested that the applicants could divest some of their spectrum in a manner that would enable a new DBS provider with more efficient technology to compete nationally against a merged EchoStar/DirecTV. . . . If the applicants were to request such a structural remedy, it could merit further review as to its technical and economic feasibility. Failing to fully explore such options could be a missed opportunity to bring more competitive choices to consumers.").

petition to suspend the ALJ hearing process in order to allow the Commission to consider the R/L DBS proposal directly, and in the alternative, a petition for an expedited hearing.

If this Court determines that application of the Merger Guidelines and Section 7 principles do not support blocking this transaction, we believe that the FCC would accord that determination great weight in assessing its overall conclusion. (The FCC decision relied extensively on application of the DOJ Merger Guidelines, and cited those guidelines approximately 65 times in its Order.) We also believe that FCC would accord that determination great weight in assessing the Defendants' proposed sale and lease of assets to R/L DBS, which the FCC has not yet reviewed. Finally, we believe that, confronted with the exigency created by the Defendants' above-described business circumstances and contractual termination dates, the FCC will act expeditiously to ensure that its assessment of the remedy and this Court's decision will not be mooted and will remain meaningful. However, for that process to be possible, trial must be expedited, as the proposed Scheduling Order provides, to allow time for this Court to render a decision that the FCC can in turn assess and incorporate into its assessment of the proposed remedy during December and before January 6, 2003.

Given that the Plaintiffs are opposing the merger, they should be required to try their claims immediately to ensure that the public interest is protected. Plaintiffs' proposal that the trial be set for June 2003 would have the consequence of insulating Plaintiffs' analyses and conclusions from any judicial scrutiny, and would never have been made if Plaintiffs were required, as they customarily are, to seek a preliminary injunction. The fact that there is review by both the Department and the FCC should not excuse a refusal by the government to act with the speed it usually requests. Here, the

only chance the Defendants have to obtain meaningful relief is to for the Court to act immediately.[9]

As described above, there has already been an extensive governmental investigation in this matter, and the government has already had the benefit of exceptionally broad and detailed discovery from the parties. The extensive record in this matter is described in more detail in the accompanying declarations of Robert Silver and Alan R. Kusinitz (attached as Exhibits B and C, respectively). As those declarations make evident, the governments' investigation here was far more extensive than usual, encompassing a full year of continuous work by the parties, including a great many written and oral submissions that the parties were not obliged to provide but which the

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[9] The fact that Plaintiffs do not currently need to obtain a temporary restraining order or preliminary injunction because of the FCC's simultaneous review of the merger is not a reason to deviate from the practice of expediting review of challenges to time-sensitive mergers. Rather, unexpedited review in cases such as this threatens to preclude altogether the possibility of judicial resolution in matters that require FCC approval, as one groups of commentators recently observed:

> Most merging parties have an important legal mechanism at their disposal to ensure that the power of U.S. competition authorities is kept in balance – timely review by a federal court of the enforcement agency's decision to block a merger. While only a handful of cases have been litigated to conclusion in the past several years, the ability of merging parties to test the agency's contentions in court has an important disciplining influence on the resolution of nearly all serious merger investigations by the Department of Justice and Federal Trade Commission. As a DOJ official recently put it, "[i]t cannot be overstated how much knowing we may have to prove our case to an independent fact-finder disciplines our decisionmaking at the Antitrust Division." For telecom mergers, however, this vital check against DOJ's enforcement power is rendered meaningless by the overlapping merger review of the Federal Communications Commission and the resulting inability of the parties to force DOJ to seek a preliminary injunction to block the merger.

Kevin R. Sullivan, et al., *Prosecutors as Judge and Jury: The Antitrust Review of Telecom Mergers*, International Bar Association/American Bar Association Communications and Competition: Developments at the Crossroads (May 2002) (available at http://www.kslaw.com/library/pdf/Todaro_prosecutorsasjudge.pdf) (quoting Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, GE-Honeywell: The U.S. Decision, Remarks Before the Antitrust Law Section of State of Georgia (Nov. 29, 2001) (available at http://www.usdoj.gov/str/public/speeches/9893.htm)).

parties did provide to the plaintiffs. As those declarations also make clear, much of the material provided to Plaintiffs is material that Plaintiffs would not have obtained at all in an ordinary litigation. As a result of this extensive discovery, and the Defendants' equally extensive voluntary disclosures, Plaintiffs have all the information they need to try this case.

Because of the ample discovery that Plaintiffs have already obtained, expedited review will favor Plaintiffs, not Defendants. While the Defendants have taken extensive time out of their limited contractual period to provide the Plaintiffs all of the discovery material described above, Plaintiffs have given Defendants nothing more than the Complaint itself. Nevertheless, because expeditious review of this transaction is necessary to the survival of the transaction, to the Defendants' respective businesses, to their ability to compete with the cable firms, and to the welfare and protection of the consumers they serve, Defendants are willing to take the case to trial even without extensive discovery of the Plaintiffs or third parties.[10]

In light of the impending termination dates and of the need for judicial resolution, the Defendants have proposed a schedule that would allow the Court to reach a decision by mid-December. As the Court is well aware, the key to any schedule is the trial date. Once that is established, interim deadlines can be set to accomplish the tasks necessary to present the case to the Court. By way of illustration, assuming a November 18 trial date

[10] Pursuant to Federal Rule of Civil Procedure 26(f) and Local Civil Rules 7.1m and 16.3, Defendants have met and conferred with Plaintiffs to seek their consent to entry of a schedule that will allow for resolution of this case on an expedited basis. As explained in the accompanying Supplemental Declaration of Robert B. Silver (attached as Exhibit D), Defendants requested a trial date of November 18, or as soon thereafter as the Court's schedule would accommodate. Plaintiffs insisted upon a trial date of June 3, 2002, a trial date that they know would be months too late to be meaningful.

is consistent with the Court's schedule, the following dates would cover the major tasks needed to meet this deadline:

- November 6 – answer filed
- November 7-8 – trial witness lists exchanged
- November 8-17 – expert discovery
- November 12 – depositions completed of fact witnesses not previously deposed
- November 11-13 – trial exhibits exchanged
- November 16 – proposed findings of fact and conclusions of law
- November 18 – trial commences
- November 27 – post-trial argument
- November 29 – post-trial briefs, proposed findings, and conclusions of law submitted.

This schedule is well within the demonstrated capabilities of the Plaintiffs, including because it is consistent with the schedule employed in other expedited merger trials.[11]

## II. An Expedited Trial Is Necessary to Prevent Serious and Irreparable Public and Private Harm

Today, cable companies dominate the provision of video service. In addition, there are broad ranges of new advanced services, such as high definition television, interactive television, video-on-demand, and broadband, that only the cable companies have the capacity to offer broadly. Meanwhile, much of the limited amount of spectrum allocated to DBS is being wasted, because each firm uses separate frequencies to broadcast hundreds of channels of identical programming. By consolidating the current wasteful uses of scarce spectrum, the merger will dramatically increase the combined firm's total output of programming and other services and increase its ability to offer alternatives to consumers and thereby compete with the cable operators, who have

[11] *See, e.g., SunGard*, 172 F. Supp. 2d at 179-80.

consistently raised prices to consumers in the absence of any effective competitive constraint.[12] For example, the rationalization of spectrum usage will enable the merged firm to offer subscribers their local broadcast television stations via satellite in all 210 Designated Market Areas ("DMAs") of the United States. Today, the two firms can provide those local channels to only a limited number of the more populous DMAs. Consumers in the less populous DMAs have no option but their cable company and over-the-air antennae for these local broadcast stations. The inability to offer local channels in the less populous DMAs is one of the most important impediments to DBS competing effectively with the cable companies in those areas, as the Department acknowledged in prior filings with the Federal Communications Commission.[13]

The savings in spectrum and increases in scale will also enable the merged firm to offer greatly expanded high-definition television ("HDTV") programming, near-video-on-demand ("NVOD") and video-on-demand ("VOD") services, specialty and foreign language programming, and other new and improved product offerings, including interactive television services.[14] Without these offerings, consumers will be dependent on one option – cable firms – for provision of these services.

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[12] The Department of Justice has acknowledged that DBS service presented "the first real challenge to cable's dominance and the best hope for consumers who seek alternatives to their local cable company." Complaint at ¶ 5, *United States v. Primestar, Inc.*, No. 1:98CV01193 (D.D.C. May 12, 1998). The merger is designed to insure that DBS has the tools needed to continue that pro-consumer role.

[13] *See* Comments of the United States Department of Justice, *In the Matter of the Application of MCI Telecommunications Corp. and EchoStar 110 Corp.*, FCC File No. SAT-ASG-19981202-00093 (1999) (DBS firms have a "competitive disadvantage" to the extent that they are unable to offer local channels).

[14] The fact that the merger will not reduce competition but rather will have significant pro-competitive effects is amply demonstrated by the large number of national, regional and local retailers that support it. These include sixty-five retailers that have provided sworn declarations of support of the merger, *see* Exs. 8.1-8.65 of the Consolidated Exhibits to October 21, 2002 Submissions to the Department of Justice, and more than three hundred retailers that have written

Finally, the new company will have enhanced scale to compete more effectively in providing high-speed Internet access to consumers via satellite at a competitive price. Without this offering, consumers in some areas of the country will have no effective option for access to Internet broadband services. In the rest of the country, cable firms will continue to exploit their dominance in the provision of broadband services. The merger will also result in substantial costs savings and revenue enhancements that will increase the new firm's incentive and ability to compete aggressively for customers on a price, service and quality basis.

The public harm from blocking this merger is particularly unnecessary because Defendants have proposed a concurrent transaction that would ensure that another viable DBS competitor would be available. The Defendants have proposed a divestiture of DBS licenses and existing satellites that would allow a new entrant, R/L DBS, to provide an offering at least as competitive as EchoStar or DIRECTV has today. R/L DBS holds a DBS license and has its first satellite currently under construction and scheduled to launch in March 2003. R/L DBS is a subsidiary of one of the major cable operators, Cablevision, and has the spectrum and, with through its partnership with a major consumer electronics manufacturer, the marketing and technical capabilities that it needs to compete in the MVPD market. The capital markets' support of the project would readily demonstrate this proposition.

All of these benefits from both the merger and the divestiture will be lost, and consumers will suffer great and irreparable harm, if the merger does not take place. If the merger does not go forward, the DBS firms will have lost their chance to constrain the

letters of support to the FCC, *see* Short Letter Comments/Petitions filed with the FCC concerning EchoStar/Hughes Merger, at http://www.fcc.gov/transaction/echostar-directv-shortcomment.html.

cable companies' efforts to extend their market power to the new and advanced services that the DBS firms otherwise will not be able to offer.[15] The loss of that opportunity is particularly serious for consumers, given the cable companies' consistent history of raising prices (above inflation) in the absence of effective competition.

Conclusion

Timely judicial resolution of the Plaintiffs' challenge is critical because this merger, if it is allowed to go forward, will result in profound benefits for consumers. The Plaintiffs' decision to forfeit this opportunity for imposing effective competition on the cable operators for the range of new and emerging video services, and to leave millions of consumers entirely dependent on these dominant firms for these increasingly important services, is a decision of profound importance for the future of the telecommunications industry. It is a decision that should not be made unilaterally by one side on bases that have not been subject to the discipline of any external scrutiny. It is a decision that should not be made without the opportunity for effective judicial resolution.

For the foregoing reasons, Defendants respectfully request that the Court enter the attached Proposed Scheduling Order setting this matter for a trial to begin as close to November 18, 2002, as the Court's schedule permits.

Dated: November 4, 2002 Respectfully submitted,

[15] Shortly before Plaintiffs filed their complaint, the General Accounting Office released a study showing that the two firms do not have enough spectrum "to offer local channels in all markets," and that at least 30% of all consumers were more likely to buy cable because it also offers broadband. United States General Accounting Office, Report to the Subcommittee on Antitrust, *Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate:* Telecommunications: Issues in Providing Cable and Satellite Television Services, GAO-03-130 (October 2002).

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