

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

In re Consolidated Application of)
)
EchoStar Communications Corporation,)
General Motors Corporation,)
Hughes Electronics Corporation,)
)
Transferors,)
)
and)
)
EchoStar Communications Corporation,)
)
Transferee,)
)
For Authority to Transfer Control)
_____)

CS Docket No. 01-348

To: Cable Services Bureau

**COMMENTS OF PAPPAS TELECASTING COMPANIES IN
OPPOSITION TO APPLICATION**

SUMMARY

The proposed merger of EchoStar and DirecTV would create a virtual monopoly in the direct broadcast satellite (“DBS”) market, and would place almost all DBS frequencies available in the United States in the Ku-band that are capable of covering the entire continental United States in the hands of a single DBS provider. If approved, this merger would eradicate competition between the nation’s two primary DBS providers, creating a DBS monopoly in most areas. Even assuming, *arguendo*, that the relevant product line is multichannel video programming distribution (“MVPD”) – a position to which EchoStar has only recently converted after announcing its intention to acquire DirecTV – the merger would still create monopolies in many smaller markets where there is no cable provider, and would, at best, create a duopoly in all remaining markets between EchoStar and the local cable incumbent.

The vast majority of viewers – indeed over 86% of consumers nationwide – receive local broadcast stations today via cable or DBS. Since DBS first emerged as a competitor to cable in 1994, competition between DirecTV and EchoStar has not only given rise to a vibrant \$10 billion DBS business with over 17 million subscribers, but it has also provided much-needed competition to the local cable monopolies. Competition between DirecTV and EchoStar, as well as between DBS and cable, has benefited consumers in innovation, service, programming and pricing. Competition between the two primary DBS providers has also been critical to the growth of local-into-local broadcast television service, and has served the important government interest in “preserving a vibrant mix of local broadcast outlets for over-the-air viewers,” a

conclusion recently validated by the Fourth Circuit U.S. Court of Appeals in its decision upholding the constitutionality of satellite must-carry.

As an operator of 20 full-power television stations in 14 markets across the United States – most of which are in markets either currently served by EchoStar or DirecTV, or in which EchoStar has announced plans to provide local-into-local service upon consummation of the proposed merger -- Pappas believes that the clear anti-competitive effects of the proposed combination would threaten the continued viability of local broadcast television, and would have severe adverse consequences for local broadcasters and their viewers. First, viewers of local broadcast television would be at the mercy of a DBS monopoly or, at best, a cable-DBS duopoly in the broader MVPD market. Consumers' access to local broadcast stations, which is essential to the continued viability of local broadcast television, would as a consequence be controlled by one or two MVPD players in most markets -- and in rural markets, for example, by only one. Second, Pappas notes that the two primary DBS providers – and, in particular, EchoStar – have consistently engaged in a pattern of seeking to evade their statutory obligations under the Satellite Home Viewer Improvement Act of 1999 and the Commission's implementing regulations. As is more fully discussed, *infra*, EchoStar's pattern of conduct calls into question its commitment to fulfill its statutory and regulatory obligations, and therefore raises particularly grave doubts as to whether it should be entrusted with monopoly power in the DBS market. The transfer of control application should therefore be denied because its clear anti-competitive effects and other adverse consequences would be incompatible with the public interest.

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Pappas Telecasting Companies (“Pappas”), pursuant to Section 1.405 of the Commission’s Rules, hereby submits its Comments in Opposition to Application in the above-captioned proceeding.¹

EchoStar Communications Corporation (“EchoStar”) and Hughes Electronics Corporation (“Hughes”), a subsidiary of General Motors Corporation, (“GM”), have

¹ These Comments are submitted in response to the Commission’s *Public Notice* entitled “EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control,” CS Docket 01-348 (rel. Dec. 21, 2001).

announced an agreement whereby GM will spin off Hughes, including its Direct Broadcast Satellite (“DBS”) business, DirecTV, which will then merge with EchoStar. The parties to this transaction have filed a *Consolidated Application For Authority to Transfer Control*, (the “Consolidated Application”) seeking authority to transfer control of satellite, earth station, and other authorizations, including licenses to use orbital satellite positions for DBS services, into the new company.² As a provider of free over-the-air local television programming in 14 markets across the country, Pappas would be substantially harmed by the proposed merger of EchoStar and DirecTV. The proposed merger would create a DBS monopoly, eliminating the competition currently existing between these two DBS companies to offer local-into-local television service in more markets. The proposed merger would also enable the combined entity to exercise even greater market power in both the purchase and distribution of television programming, to the detriment of the stations operated by Pappas, and ultimately to the detriment of their viewers.

As an owner and/or operator of broadcast stations in many of the markets in which EchoStar and DirecTV either presently offer local-into-local service, or plan to offer such service in the near future, Pappas has a substantial interest in this proceeding. As set forth in greater detail in these Comments in Opposition to Application, a grant of the Consolidated Application would harm the public interest, and, therefore, Pappas opposes the Consolidated Application.

² See generally EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation and EchoStar Communications Corporation, Consolidated Application for Authority to Transfer Control (Dec. 3, 2001).

I. The Impact of the Proposed Merger on Pappas

Pappas, founded in 1971 and headquartered in Visalia, California, is one of the largest privately-held owners of television stations in the United States. Through its affiliated entities, Pappas currently is the licensee or permittee of 16 full-power television stations, and operates four additional full-power stations pursuant to local marketing agreements (collectively, the “Pappas Stations”).³ Pappas is presently the sole domestic affiliate of Azteca America Incorporated, an emerging Spanish-language broadcast television network, which commenced operations in the United States in July 2001. Pappas currently broadcasts Azteca America programming on its stations in the television markets of Los Angeles (KAZA-TV, licensed to Avalon, California), San Francisco-San Jose/Sacramento-Modesto (KTNC-TV, licensed to Concord, California), and Houston (KAZH (TV), licensed to Baytown, Texas) (these three stations are sometimes collectively referred to herein as the “Pappas Azteca Stations”).⁴

In addition to KAZA-TV, KTNC-TV, and KAZH (TV), other Pappas Stations operate in local markets where one of the DBS providers offers local-into-local service (*e.g.*, WTWB-TV, Lexington, North Carolina, currently carried on DirecTV’s system in that market). In addition, as EchoStar has publicly indicated an intent to offer local-into-

³ Pappas operates the following full-power stations in the following markets: WSWS-TV, Opelika, Alabama (Columbus, Georgia Designated Market Area or “DMA”); KPWB-TV, Ames, Iowa (Des Moines, Iowa DMA); KMPH-TV, Visalia, California, and KFRE-TV, Sanger, California (Fresno, California DMA); WTWB-TV, Lexington, North Carolina (Greensboro-Winston-Salem-High Point, North Carolina DMA); KAZH-TV, Baytown, Texas (Houston, Texas DMA); KTVG-TV, Grand Island, Nebraska, KHGI-TV, Kearney, Nebraska, KSNB-TV, Superior, Nebraska, and KWNB-TV, Hayes Center, Nebraska (Lincoln-Hastings-Kearney, Nebraska DMA); KAZA-TV, Avalon, California (Los Angeles, California DMA); WMMF-TV, Fond du Lac, Wisconsin (Green Bay, Wisconsin DMA); KPTM-TV and KXVO-TV, Omaha, Nebraska (Omaha, Nebraska DMA); KREN-TV, Reno, Nevada (Reno, Nevada DMA); KTNC-TV, Concord, California, and KFWU-TV, Fort Bragg, California (San Francisco, San Jose-Sacramento-Modesto, California DMA); KPTH-TV, Sioux City, Iowa (Sioux City, Iowa DMA); KSWT-TV, Yuma, Arizona (Yuma, Arizona/El Centro, California DMA); WASV-TV, Asheville, North Carolina (Greenville-Spartanburg-Anderson, South Carolina/Asheville, North Carolina DMA).

⁴ In addition to the named Pappas Azteca Stations, Pappas also owns and operates a class A television station, KUVR-LP, Reno, Nevada, which also airs Azteca America programming.

local service in up to 100 markets if the merger is approved,⁵ the Pappas Stations would be entitled to assert carriage rights on the DBS provider's systems in those markets. Pappas concurs with the other broadcasters, consumers, lawmakers, and public-interest groups in this proceeding who have opposed the Consolidated Application on the grounds that it would create a *de facto* monopoly in the DBS market, would have a clear harmful effect on local broadcast television and its viewers, and would thereby threaten the continued viability of local broadcast television.

II. The Statutory Carriage Mandates Under SHVIA Have Not Been Satisfied

In analyzing the Consolidated Application, the Commission should consider the proposed transferee's (*i.e.*, EchoStar's) record of non-compliance with its statutory and regulatory requirements. As the merger between DirecTV and EchoStar would result in a DBS monopoly, it is essential that the potential holder of such important Commission authorizations demonstrate that it is qualified and committed to fulfilling its statutory and regulatory mandates, and that the transaction serves the overall public interest. Pappas believes that these criteria have not been met. As set forth in greater detail below, EchoStar's conduct reflects a pattern of evading its Congressionally-mandated satellite carriage obligations. Therefore, the Consolidated Application should be denied.

A. The Satellite Must Carry Requirements Are Premised on the Need to Preserve the Vitality of Local Broadcast Television Stations

The Satellite Home Viewer Improvement Act of 1999 ("SHVIA") sets forth a stringent "carry one, carry all" rule that requires all DBS carriers who use SHVIA's compulsory copyright license to provide local-into-local retransmissions in a local market

⁵ Hearing on the Status of Competition in the Multi-Channel Video Programming Distribution Marketplace Before the U.S. House Subcommittee on Telecommunications and the Internet, 107th Cong. (Dec. 4, 2001) (statement of Charles Ergen, Chairman and CEO, EchoStar Communications Corporation).

to carry, upon request, the signals of all broadcast stations within that local market.⁶ The carry one, carry all rule is “meant to preserve the ability of independent broadcasters to reach their local audiences,” thereby “preserving a multiplicity of local broadcast outlets for over-the-air viewers.”⁷

Congress recognized that without a carry one, carry all requirement, viewers would risk “the loss of independent stations needed to provide those viewers with a rich mix of broadcast programming from multiple sources.”⁸ Carriage by EchoStar and DirecTV of the Pappas Azteca Stations,⁹ in particular, furthers the Congressional goals underlying SHVIA. As demonstrated herein, despite the strict Congressional carriage mandate, the DBS operators – especially EchoStar – have engaged in a pattern and practice of contravening SHVIA and the Commission’s regulations by improperly denying, or seeking to impede the exercise of, the carriage rights of qualified local broadcast stations throughout the country. A grant of the requested license transfers to a licensee which has repeatedly violated its statutory and regulatory mandates would clearly *not* serve the public interest.

⁶ 47 U.S.C. § 338(a)(1).

⁷ *Satellite Broadcasting and Communications Association v. FCC*, 2001 U.S. App. LEXIS 25120, *44 (2001).

⁸ *Id.* at *47.

⁹ The Pappas Azteca Stations currently include KAZA-TV, KTNC-TV, and KAZH-TV.

B. DBS Providers' Evasion of Carriage Requirements in Dealings with Broadcasters

The DBS providers, and in particular EchoStar, have endeavored to thwart carriage of many local broadcast stations. Notably, during the initial election notification period that concluded on July 1, 2001, EchoStar and DirecTV have both routinely sought to evade their carriage obligations by, among other tactics, responding to lawful mandatory carriage requests with form denial letters that were inconsistent with SHVIA's requirement that DBS providers have a "reasonable, good-faith basis for denying carriage,"¹⁰ and which improperly placed the burden upon the broadcasters to prove that they were eligible for carriage.¹¹ Consequently, the Commission ordered *sua sponte* that the DBS operators' carriage of local broadcast stations "is not to be avoided by denials where there exists no legitimate controversy as to the station's qualifications."¹²

EchoStar's pattern of noncompliance with statutory and regulatory requirements is clearly evidenced by its recent dealings with the Pappas Azteca Stations. The experience of one of the Pappas Azteca Stations, KAZA-TV in the Los Angeles Designated Market Area ("DMA"), is particularly illustrative of EchoStar's improper tactics. After KAZA-TV submitted its initial carriage request to EchoStar, the station received one of EchoStar's "form" denial letters which improperly sought to require the station to prove adequate signal strength and also claimed that the station was not in the

¹⁰ *Entravision Holdings, LLC v. EchoStar Communications Corporation*, 2001 FCC LEXIS 6692, ¶ 4 (CSR-5758-M, rel. Dec. 13, 2001).

¹¹ *See, e.g., Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Order on Reconsideration, 16 FCC Rcd. 16544, ¶ 57 (2001) ("SHVIA Reconsideration Order").

¹² *Id.* *See also The Long Family Partnership v. EchoStar Communications Corporation*, (CSR-5764-M, rel. Jan. 31, 2002); *Christian Television Corp. v. EchoStar Satellite Corporation* (CSR-5764-M, rel. Jan. 31, 2002) (challenging EchoStar's improper use of form letter denials in rejecting carriage requests).

DMA where EchoStar was providing local-into-local service. (EchoStar's letter is attached hereto as Exhibit A).

Then, EchoStar announced a date and location for testing broadcast stations' signals in the Los Angeles DMA. (See EchoStar's testing letter attached hereto as Exhibit B). However, once the broadcasters' engineers arrived at the designated location on the appointed date, EchoStar advised them that it would not allow access to the download cable from the TV receiving antennas installed near the top of a 120-foot tower – a decision clearly intended to thwart any resolution of signal quality issues. EchoStar informed approximately 18 broadcast stations assigned to the Los Angeles DMA that the stations should make the required signal strength measurements at street level, using the broadcasters' equipment. This arrangement did not allow for measurements of the receive carrier levels and also did not permit formal observation of EchoStar's received picture qualities.

After an independent engineering firm hired by one of the broadcasters convinced EchoStar to allow access to the roof of the building containing the receive equipment, almost all of the broadcast stations demonstrated an adequate signal, including KAZA-TV. Pappas believes that EchoStar's "testing" demonstrated a lack of good faith by EchoStar in complying with its SHVIA requirements, because it improperly placed the burden upon on the broadcasters, and the testing conditions were predisposed to yield inadequate signal results.

Subsequent to EchoStar's signal test demands, the Commission clarified in its *SHVIA Reconsideration Order* that EchoStar could not deny an initial carriage notice on the basis of requiring the broadcaster to prove adequate signal strength.¹³ EchoStar

¹³ See *SHVIA Reconsideration Order*, ¶¶ 56-57.

nevertheless then continued its pattern of delay, by persisting in making improper claims that KAZA-TV was not in EchoStar's local-into-local market for a period of several months.¹⁴

Despite these unsettling delay tactics, in furtherance of the Commission's policies that encourage informal resolution of carriage disputes,¹⁵ Pappas took the initiative of contacting EchoStar on several occasions to penetrate EchoStar's "red tape."¹⁶ Finally, on November 26, 2001, EchoStar responded and acknowledged that it would carry Pappas Azteca Stations KAZA-TV and KAZH-TV pursuant to must carry requirements.¹⁷ Other broadcasters have experienced similar SHVIA noncompliance by EchoStar, and have had to incur "considerable expenditures of time, money, and effort" to overcome EchoStar's "repeated, meritless objections" to broadcasters' carriage requests.¹⁸

C. DBS Providers' Hindering of Consumers' Ability to Receive Local Broadcasts

Within weeks of having finally, and seemingly reluctantly, agreed in principle to carry the Pappas Azteca Stations, EchoStar unveiled yet another scheme for evading its

¹⁴ See EchoStar letter to Pappas dated September 17, 2001 regarding KAZA-TV; *see also* similar letter to KAZH-TV (attached hereto as Exhibit C).

¹⁵ *SHVIA Reconsideration Order*, ¶ 60.

¹⁶ See correspondence from Pappas to EchoStar, attached hereto as Exhibit D.

¹⁷ See EchoStar letter to Pappas dated November 26, 2001 (attached hereto as Exhibit E). Pappas's Stations KAZA-TV (Los Angeles, California DMA) and WTWB-TV (Greensboro-Winston-Salem-High Point, North Carolina DMA) are presently carried by DirecTV. Pappas is working with DirecTV regarding signal issues relating to KAZH-TV (Houston, Texas DMA).

¹⁸ Comments of Telemundo Group, Inc., CS Docket No. 00-96 (filed Jan. 23, 2002), at 2; *see also* Written Testimony of Michael J. Fiorile, President and CEO, Dispatch Broadcast Group, before the Telecommunications and Internet Subcommittee, United States House of Representatives, on "The Status of Competition in the Multi-Channel Video Programming Distribution Marketplace," Dec. 4, 2001, at 17 ("Fiorile Testimony") (noting EchoStar's "Relentless Guerilla Warfare" against carriage elections by local

statutory carriage obligation under SHVIA. In December 2001, EchoStar announced that it would relegate certain local stations, including the Pappas Azteca Stations, to remote “wing slot” satellites that can not be accessed by current EchoStar subscribers using their existing satellite dish equipment, while placing more “popular” local stations, like the Big Four network affiliates, on its full CONUS satellites which can be readily accessed today without any additional equipment. Pappas’s efforts to attract viewers to the Pappas Azteca Stations has been significantly impeded by EchoStar’s discriminatory practice of relegating these stations to remote satellites which are accessible only to subscribers able and willing to assume the onerous burden of arranging, and perhaps paying for, the installation of additional receiving equipment.

As the Commission is aware, the so-called “second dish” issue is the subject of a separate pending proceeding before the Commission, and an Emergency Petition to modify or clarify the mandatory carriage rules was filed on January 4, 2002 by the National Association of Broadcasters (“NAB”) and Association of Local Television Stations (the “Emergency Petition”). Pappas notes that Univision Communications Inc. (“Univision”), the Telemundo Group (“Telemundo”), Entravision Holdings, LLC (“Entravision”), and Pappas, all operators of Spanish-language television stations, have filed comments in support of the Emergency Petition. Univision, Telemundo, and Entravision have each noted in their filings the disproportionate adverse impact upon on Spanish-language television of EchoStar’s second dish scheme, and the unique injury to Hispanic viewers resulting from EchoStar’s practice. With the notable exception of three Univision stations or affiliates, and Telemundo’s WSCV(TV), which happens to be the highest-rated television station in the Miami-Ft. Lauderdale, Florida DMA, it appears that

broadcasters and EchoStar’s “crude form letters offering nonsense reasons for rejecting most stations, such

virtually all Spanish-language broadcast television stations in the country have been relegated to EchoStar's inferior secondary satellites, which can only be accessed by viewers willing and able to install a second dish. This practice unquestionably restricts severely Hispanic viewers' access to local Spanish-language programming via satellite. Having placed virtually all Spanish-language broadcast stations in its second-dish "Siberia", EchoStar has ensured that local Spanish-language television is as a practical matter inaccessible to the vast majority of EchoStar subscribers.

This state of affairs presents particular challenges for the Pappas Azteca Stations which, having commenced broadcast operations as affiliates of the new Azteca America network only within the several months, are new entrants in the Spanish-language television market seeking to attract new viewers and gain market share. The reality is that many EchoStar subscribers are not even aware of the fact that there are local stations which they are entitled by law to receive – and which they have in essence paid EchoStar to provide – but which they can only receive if they are willing and able to have additional hardware installed and perhaps to incur additional expenses. Therefore, only the most knowledgeable and most determined subscriber is likely to bother, and as a consequence, the local stations relegated to the second dish will in actuality be viewed by only a small fraction of EchoStar subscribers. This reality was surely not lost on EchoStar in devising this scheme for evading the clear Congressional mandate of "carry one, carry all."

As the NAB noted in its comments to the Commission in conjunction with the Emergency Petition, "any scheme that forces consumers to undertake the burden of acquiring additional equipment to receive some – but not all – local stations is inherently

as absurd claims that the stations didn't list the city in which they are licensed").

and inevitably discriminatory.”¹⁹ Nevertheless, EchoStar has attempted to shield itself from criticism for this discriminatory practice by touting its ostensible commitment to pay at least part, and perhaps even all, of the cost of the required additional equipment and its installation until March 31, 2002.²⁰ In actuality, the sheer hassle, inconvenience, and aesthetic costs to consumers of a second dish act as a very strong disincentive. Moreover, the fact that EchoStar has made almost no effort to publicize this “time-limited offer” to its subscribers speaks volumes about EchoStar’s motives. After all, EchoStar has no business incentive to install large numbers of second dishes at its own expense; it therefore has no business incentive to advise or encourage its current customers to act on a “secret offer” – which in any event expires on March 31, 2002.²¹

Pappas further notes that EchoStar’s customer service representatives seem curiously ill-informed about the purported EchoStar offer. Representatives of Pappas have made numerous telephone calls to EchoStar, as well as to its local retailers, in the Pappas Azteca Stations’ respective markets, and have received a mixture of incomplete, erroneous, and conflicting information about the “offer” as regards the financial responsibility for the second dish. Without exception, EchoStar’s customer service representatives failed to volunteer any information about the “offer” to Pappas’s representatives who called to inquire about accessing the Pappas Azteca Stations, unless and until specifically pressed. When explicitly asked whether EchoStar would pay all

¹⁹ NAB Comments in CS Docket No. 00-96, at 2.

²⁰ *Id.*

²¹ Pappas notes that, at least as of February 4, 2002, EchoStar’s web site continues to make no mention whatsoever of its purported offer to pay all out-of-pocket costs associated with the additional dish. Moreover, EchoStar’s December 27, 2001 press release about its plans to offer additional local stations effective January 1, 2002 likewise makes no mention of the purported offer. Finally, as the Emergency Petition points out, the December 27, 2001 letter from EchoStar’s Chief Executive Officer to the President of the NAB refers only to EchoStar’s assuming the cost of the equipment, but not necessarily the installation of the second dish.

costs associated with the additional dish, some of the EchoStar customer service representatives indicated that EchoStar would bear the cost of the additional equipment and installation, but in most cases they also indicated that it was possible that there would be additional installation costs to be borne by the subscriber, depending upon the circumstances of the particular installation.²²

Thus, far from making any effort to educate its subscribers about EchoStar's time-limited second dish "offer" or to encourage subscribers to take advantage of it, the evidence suggests that EchoStar seeks to deter its customers from having an additional dish installed, thereby impeding its customers' ability to exercise their rights to receive all local stations. In so doing, EchoStar contravenes the clear intent, if not the letter, of SHVIA, and indeed makes a mockery of that Act's carry one, carry-all provisions.

Such patent discrimination against certain local stations, including the Pappas Azteca Stations, simply can not be reconciled with the clear intent of Congress in passing SHVIA, which includes a specific provision barring discriminatory treatment of some local stations. 47 U.S.C. § 338(d). As the NAB's Emergency Petition points out, Congress intended to "...ensure that satellite carriers position local stations in a way that is convenient and practically accessible for consumers."²³ Moreover, the Commission's rule addressing this issue – Section 76.66(i)(4) – seems clearly intended, when read in light of the relevant Commission Orders, to prevent satellite carriers from engaging in

²² When Pappas's representatives called local retailers to inquire about the second dish, they were told nothing about EchoStar's offer. Rather, they were advised in one case that a second dish would cost \$100 for equipment and \$69 for installation (Cooper Communications, Brentwood, California), and \$185 for the equipment with installation included in another case (Star Satellite, Danville, California). In both cases, the retailers indicated that they expected a change in EchoStar's policy in the next month, but they were unsure what the new policy would be.

²³ SHVIA Conference Report, 145 Cong. Rec. H11795 (daily ed. Nov. 9, 1999).

“cherry-picking” of local stations by forcing subscribers to acquire a second dish in order to obtain some local stations.

EchoStar’s second dish practice is but the latest in a long litany of practices intended to evade or thwart the law – a pattern that calls into question EchoStar’s fitness to become the nation’s sole DBS provider. If EchoStar is allowed to acquire DirecTV and thereby become the monopoly DBS provider, EchoStar will surely be even less constrained than it is today in engaging in the pattern of improper and unlawful practices outlined herein.

III. The Proposed EchoStar/DirecTV Merger Has Anticompetitive Implications for Local Television Broadcasters and Consumers

Today, the vast majority of consumers receive local broadcasting via a cable system or from DirecTV or EchoStar. Many rural consumers can only receive local broadcast stations by subscribing to DirecTV or EchoStar. The ability to provide their customers with local programming has substantially benefited the DBS providers, and contributed to the success of DBS.²⁴ Competition between EchoStar and DirecTV has proven beneficial to consumers in innovation, service, pricing, and the growth of local-into-local service, and also has benefited some local broadcasters (*i.e.*, affiliates the Big 4 networks).

The proposed merger would eliminate competition in the DBS industry and would reduce the competitive options in the broader MVPD market from three to two in most markets.²⁵ This is particularly disastrous for consumers in the many smaller markets in which the merged company will not offer local-into-local service. EchoStar’s CEO has

²⁴ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-389 (rel. Jan. 14, 2002) (“*Annual Cable Report*”), ¶¶ 7, 83.

²⁵ *Annual Cable Report*, ¶ 168 (noting that only one percent of cable community units have been certified by the Commission as having “effective competition.”).

publicly stated that the merged company will offer local signals in only 100 markets – virtually all of the top 100 markets.²⁶ That would leave 110 U.S. television markets without satellite-delivered local broadcast stations, and bereft of the diversity of programming that Congress deemed so essential when it enacted SHVIA. In areas unserved by cable, EchoStar’s announced intention would result in consumers being unable to receive local broadcast stations at all.²⁷

Some, including EchoStar, may argue that DBS competes in the broader MVPD distribution market, which includes cable, and consequently that the merger would only eliminate one competitor out of several in the market. EchoStar’s CEO Charles Ergen acknowledged that “If the market is satellite only, then I wouldn’t approve this deal.”²⁸ EchoStar chooses to define the relevant “market” based upon its needs of the day. In its antitrust lawsuit filed against DirecTV last year (and subsequently dismissed after the announcement of the merger), EchoStar defined the relevant market as the “high-power DBS market.”²⁹

Even assuming, *arguendo*, that DBS competes in the same relevant “market” as cable, the merger would lessen competition against cable, not increase it. In most U.S. households, television sets hooked up to cable or satellite are not equipped to receive over-the-air broadcast service. Thus, the cable or satellite provider is able to exercise “gatekeeper” control over the signals viewed on a connected television set. Reducing the

²⁶ See *supra* note 5.

²⁷ See Fiorile Testimony, at 23.

²⁸ “EchoStar’s Ergen Starts Campaign to Get Approval for DirecTV Deal,” *The Wall Street Journal*, B6, Oct. 31, 2001.

²⁹ *EchoStar Communications Corp. v. DirecTV*, Civ. No. 00-K-212 (D.C. Colo. filed Apr. 5, 2001) (Amended Complaint, ¶ 76).

number of gatekeepers from three to two does not serve the interests of broadcasters or consumers, and is not in the public interest. Antitrust authorities have rejected this type of merger.³⁰ As demonstrated herein and by other broadcasters' comments, EchoStar and DirecTV have already exhibited their inclination to abuse their gatekeeper roles.

It should also be noted that local broadcasters who bargain with cable systems and satellite carriers for retransmission consent rights will be at a significant competitive disadvantage when they are forced to deal with only two MVPD competitors in a market. This unfair bargaining power would be especially significant in markets unserved by cable, where DBS is the "only game in town."

IV. An EchoStar/DirecTV Combination Presents Special Harms to Rural Consumers

Pappas supports the positions advanced by several commenters in this proceeding, including Members of Congress, who have demonstrated that the Commission's grant of consent to the requested transfer of control at issue, and the merger between EchoStar and DirecTV, would have an especially harmful effect on rural consumers.³¹

Many rural areas remain unserved by cable television systems. The National Rural Telecommunications Cooperative ("NRTC") estimates that up to 20% of U.S. households may not have access to cable.³² These rural consumers are only able to obtain

³⁰ See *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001) (rejecting arguments that merger to create a duopoly would allow the #2 and #3 firms to compete better against the #1 firm).

³¹ See Comments of Sens. Hollings and Stevens, filed Oct. 26, 2001 (noting that the consolidation of the two largest domestic satellite providers "would leave consumers with few, if any choices – particularly in rural America where a significant percentage of consumers depend solely on satellite service"); Comments of Sen. Max Baucus, filed Nov. 19, 2001 (asserting the "troubling nature" of leaving rural consumers with a monopoly provider); Comments of Congressional Rural Caucus, filed Jan. 17, 2002 ("The rural consumers that presently have a choice between two fiercely competitive satellite providers will be subjected to an unchecked monopoly provider if the merger is approved without appropriate consumer protections.").

³² *Ex Parte* Filing in CS Docket No. 01-348 by the National Rural Telecommunications Cooperative, filed Jan. 31, 2002 ("*NRTC Ex Parte*").

local broadcast stations and video programming services by subscribing to DirecTV or EchoStar. In fact, DirecTV estimates that approximately half of its subscribers reside in small, rural counties.³³ Consequently, the merger between EchoStar and DirecTV would eliminate competition between the two DBS providers in those markets by creating a “DBS satellite monopoly.”³⁴ In those rural areas unserved by cable, consumers would be left with only one provider of local broadcast stations and video programming. The consumers would be subject to the merged company’s programming choices, pricing and billing package, and customer service (which the comments in these proceeding have demonstrated has at times been abysmal at EchoStar).³⁵

In addition, of special concern is the future of broadband Internet access on the part of rural America. As the NRTC has demonstrated, the proposed merger, if approved, “will leave one company controlling the availability, breadth and cost” of most satellite broadband Internet services to rural America, and create a monopoly “in a market that is still forming.”³⁶ The Commission has already recognized that consumers in rural areas, minorities, low-income individuals, and others face special challenges in overcoming the “digital divide” and obtaining broadband services.³⁷ A grant of the Consolidated

³³ See *Annual Cable Report*, ¶ 82.

³⁴ NRTC *Ex Parte*, at 1.

³⁵ While some have suggested that EchoStar’s rates in rural areas could be regulated or voluntarily “capped” to a national rate, the pricing issue is not the end of the problem. Rather, there are issues of innovation, customer service, and program offerings. As the American Antitrust Institute has aptly observed, “[e]ven if the price is right, to whom is the rural customer supposed to turn when he believes the monopolist’s service stinks?” Letter to the U.S. Department of Justice from the American Antitrust Institute (dated Nov. 5, 2001) (voicing strong opposition to EchoStar/DirecTV merger).

³⁶ Testimony of Bob Phillips, President and CEO of the National Rural Telecommunications Cooperative, Before the U.S. House of Representatives Committee on the Judiciary Regarding Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market, December 4, 2001 at 4.

³⁷ See *Deployment of Advanced Telecommunications Capability: Second Report* CC Docket No. 98-146, 15 FCC Rcd. 20913 (2000).

Application would undermine Congress's mandate in Section 706 of the Telecommunications Act of 1996 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," by creating a monopoly provider of these essential services.

V. Conclusion

Pappas believes that maintaining unfettered access to local broadcast stations on multiple distribution platforms is essential to the continued viability of local television broadcasting. As the U.S. Court of Appeals for the Fourth Circuit noted in its opinion confirming the constitutionality of satellite must-carry, mandatory carriage of local broadcast stations is essential to preserving free over-the-air television.³⁸ Pappas urges the Commission to protect the continued viability of local broadcast outlets for over-the-air viewers and continued competition in local markets for broadcast television advertising.

For the reasons set forth in these Comments, Pappas respectfully requests that the Commission deny its consent to the requested transfer of control, as the proposed transaction is incompatible with the public interest.

³⁸ See *Satellite Broadcasting and Communications Association v. Federal Communications Commission*, 2001 U.S. App. LEXIS 26120, *70 (4th Cir. 2001).

Respectfully submitted,

PAPPAS TELECASTING COMPANIES

By: _____

Peter C. Pappas
Executive Vice President
Government & Regulatory Affairs
1299 Pennsylvania Avenue, NW
Tenth Floor
Washington, DC 20004
Tel. (202) 508-9810

February 4, 2002

CERTIFICATE OF SERVICE

I, Nancy K. St. Hilaire, do hereby certify that I have on this 4th day of February, 2002, caused to be sent by, a copy of the foregoing Comments in Opposition of Pappas Telecasting Companies to be served electronically or by first-class United States mail, postage prepaid to the following:

Served Via First-Class Mail:

Commissioner Michael Powell
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A204
Washington, DC 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A204
Washington, DC 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A302
Washington, DC 20554

Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A204
Washington, DC 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 Twelfth Street, SW
Room 8-B115
Washington, DC 20554

Donald Ableson
Chief, International Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 6-C866
Washington, DC 20554

Kenneth Ferree
Chief, Cable Services Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Paul Gallant
Cable Services Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Thomas Tycz
Chief, Satellite Division
International Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A204
Washington, DC 20554

Cable Services Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554
(Served with electronic filing)

David Moskowitz, Esq.
Senior Vice President and General Counsel
EchoStar Communications Corporation
5701 S. Santa Fe Drive
Littleton, Colorado 80120

Henry L. Baumann
Benjamin F.P. Ivins
National Association of Broadcasters (NAB)
1771 N Street, NW
Washington, DC 20036-2891

Served Via Electronic Mail:

Linda Senecal
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
lsenecal@fcc.gov

Barbara Esbin
Cable Services Bureau
Federal Communications Commission
besbin@fcc.gov

James Bird
Office of General Counsel
Cable Services Bureau
Federal Communications Commission
jbird@fcc.gov

JoAnn Lucanik
International Bureau
Federal Communications Commission
jlucanik@fcc.gov

Royce Sherlock
Cable Services Bureau
Federal Communications Commission
rsherloc@fcc.gov

David Sappington
Office of Plans and Policy
Federal Communications Commission
dsapping@fcc.gov

Marcia Glauberman
Cable Services Bureau
Federal Communications Commission
mglauber@fcc.gov

Douglas Webbink
International Bureau
Federal Communications Commission
dwebbink@fcc.gov

Julius Knapp
Office of Engineering and Technology
Federal Communications Commission
jknapp@fcc.gov

Qualex International
qualexint@aol.com

Nancy K. St. Hilaire



ECHOSTAR COMMUNICATIONS CORPORATION

July 30, 2001

Howard H. Shrier
KAZA-TV
Pappas Telecasting Companies
4625 Farnam St.
Omaha, NE 68132

Re: KAZA-TV Mandatory Carriage Election

Dear Mr. Shrier:

The above-referenced election for mandatory carriage made pursuant to the Satellite Home Viewer Improvement Act is rejected for the reason(s) set forth below:

- Duplicate Network Affiliate in Designated Market Area ("DMA")
- Duplicate Non-Network Affiliate Located in State other than State of DMA
- Election Postmarked after July 1, 2001 Deadline
- Failure to Prove Signal Meets Legal Standard of Quality Necessary for Mandatory Carriage
- Failure to Provide Affirmative Carriage Election
- Failure to Provide Community of License
- Failure to Provide DMA Assignment
- Failure to Send Election via Certified Mail Return Receipt Requested
- Low Power & Class A Stations Not Entitled to Must Carry Election
- Must Carry Election Rescinded/Waived by Elector
- Nielsen DMA Assignment and Community of License not in DISH DMA
- Terms of Pre-existing Retransmission Consent Agreement

All inquiries may be directed to: must-carry@echostar.com.

Sincerely,

Eric Sahl
Director of Programming

/nr



ECHOSTAR COMMUNICATIONS CORPORATION

IMPORTANT NOTICE

ATTN: Station Manager and/or Chief Engineer

RE: Signal Testing – Must Carry Election

In order to achieve the best possible quality on the Dish Network, we recommend you deliver your programming via fiber to our local Point of Presence (POP). Should you choose not to deliver your signal via fiber, proof of signal strength and quality will be required.

This letter serves to advise you that an EchoStar representative will be at the local POP in the Los Angeles DMA on **Sept. 7, 2001** at the following location:

GLOBECAST

[Meet in lobby]

**10525 Washington Blvd.
Culver City, CA 90232**

to provide you an opportunity to test the quality and strength of your off-air signal.

You must bring a copy of proof of current general liability insurance covering your employees or agents who shall be conducting the test of your broadcast signal while at the local receive facility.

Please bring any equipment that you may need for the testing of your signal pursuant to FCC must carry guidelines.

Testing of broadcast signals in your DMA shall be conducted per the following schedule:

Friday, Sept. 7, 2001

**10:00AM KADY-TV, KAZA-TV, KCET, KDOC-TV, KHIZ-TV, KHSC,
KJLA, KLCS, KMEX**

**2:00PM KOCE, KRCA, KRPA, KSCI, KTBN, KVCR-TV, KVEA,
KVMD, KWHY-TV**

Concerns or questions regarding the testing of your signal will be addressed at the local receive facility during your test.



ECHOSTAR COMMUNICATIONS CORPORATION

September 17, 2001

Mr. Howard H. Shrier
KAZH
Pappas Telecasting Companies
4625 Farnam St.
Omaha, NE 68132

Dear Mr. Shrier:

Pursuant to the Order on Reconsideration, adopted by the FCC on September 4, 2001, the failure to prove your ability to deliver a good quality signal as a basis for rejection of your must-carry election for carriage is hereby rescinded. EchoStar will carry your signal pursuant to must carry regulations, assuming no grounds for rejecting your signal arise.

However, EchoStar reserves the right to reject your station's election based upon poor quality signal as defined under federal regulations when we have completed an initial survey of your station's signal.

Rejection on the basis of "Failure to Provide Community of License" is pending.

Rejection on the basis that "Nielsen DMA Assignment and Community of License not in DISH DMA" is pending.

Sincerely,

Eric Sahl
Director of Programming



ECHOSTAR COMMUNICATIONS CORPORATION

September 17, 2001

Mr. Howard H. Shrier
KAZA-TV
Pappas Telecasting Companies
4826 Farnam St.
Omaha, NE 68132

Dear Mr. Shrier:

Pursuant to the Order on Reconsideration, adopted by the FCC on September 4, 2001, the failure to prove your ability to deliver a good quality signal as a basis for rejection of your must-carry election for carriage is hereby rescinded. EchoStar will carry your signal pursuant to must carry regulations, assuming no grounds for rejecting your signal arise.

Although your off-air signal meets the minimum federal standards, your signal may experience intermittent impulse interference or ghosting which can be eliminated by your provision of your station's signal via fiber optic line to preserve signal quality comparable to other stations providing fiber delivery in your DMA.

Rejection on the basis of "Failure to Provide Community of License" is pending.

Rejection on the basis that "Nielsen DMA Assignment and Community of License not In DISH DMA" is pending.

Sincerely,

Eric Sahl
Director of Programming



**PAPPAS
TELECASTING
COMPANIES**

1299 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone (202) 508-9810
Fax (202) 508-9811

Peter C. Pappas
EXECUTIVE VICE PRESIDENT
GOVERNMENT AND REGULATORY AFFAIRS

November 14, 2001

VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Eric Sahl
Director of Programming
EchoStar Communications Corporation
5701 S. Santa Fe Drive
Littleton, CO 80120

Re: KAZA-TV and KAZH (TV) Mandatory Carriage Elections

Dear Mr. Sahl:

I am writing in response to your September 17, 2001 letters to Howard Shrier regarding our mandatory carriage elections for KAZA-TV and KAZH (TV), respectively. In these letters, you indicate that rejection of our mandatory carriage election on the bases of "failure to provide community of license" and "Nielsen DMA Assignment and Community of License not in DISH DMA" are pending.

First, with respect to KAZA-TV, you are in receipt of a letter dated August 3, 2001 from LeBon G. Abercrombie of Pappas Telecasting Companies which addressed the issues of community of license and Nielsen DMA assignment. As is set forth in Mr. Abercrombie's letter, a copy of which is attached hereto, the community of license for KAZA-TV, Channel 54, is Avalon, California. Avalon is part of the Los Angeles DMA, a DMA in which EchoStar is providing local-into-local service.

Moreover, signal testing for KAZA-TV indicating acceptable off-air signal verification was conducted by representatives of EchoStar on September 7, 2001. A copy of the signal test verification report is also attached hereto. That report clearly indicates that a signal of acceptable quality is provided to EchoStar's uplink facility by KAZA-TV.

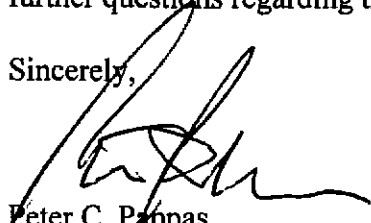
Second, regarding KAZH (TV), the community of license is Baytown, Texas. Baytown is part of the Houston DMA, in which EchoStar is providing local-into-local service.

Based upon the foregoing, KAZA-TV and KAZH (TV) are entitled to carriage pursuant to the Satellite Home Viewer Improvement Act and the Federal Communications

Commission's implementing regulations. Kindly confirm that EchoStar will be carrying KAZA-TV and KAZH (TV) in accordance with its statutory and regulatory obligations.

Please contact me or LeBon Abercrombie at your earliest convenience if you have any further questions regarding these matters.

Sincerely,



Peter C. Pappas
Executive Vice President

bcc: Harry J. Pappas
LeBon G. Abercrombie
Stuart Livingston
Mickey Swanson
Dale Kelly
Howard Shrier





PAPPAS
TELECASTING
COMPANIES

LeBon G. Abercrombie
SENIOR EXECUTIVE VICE-PRESIDENT
PLANNING AND DEVELOPMENT

August 3, 2001

Mr. Eric Sahl
Director of Programming
Echostar Communications Corporation
5701 S. Santa Fe Drive
Littleton, CO 80120

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: KAZA-TV Mandatory Carriage Election

Dear Mr. Sahl:

We thank you for your letter dated July 30, 2001, regarding our carriage election letter to you, dated June 28, 2001, which is incorporated by reference herein. We appreciate your pointing out the issues related to our letter, and each is addressed below.

First, we wish to correct the Community of License for KAZA-TV, Channel 54, to Avalon, California.

Second, Avalon is part of Los Angeles County, and is therefore clearly located within the Los Angeles DMA, a DMA where Echostar is providing local-into-local service.

Last, KAZA-TV, Channel 54, is a new station pursuant to the Satellite Home Viewer Improvement Act and Federal Communications Commission Rules, having gone on the air on July 9, 2001. Our measurements in the Los Angeles area indicate excellent signal strength. Please provide us with the location of your local receive facility for the Los Angeles local market, so that we can verify signal quality at that location. If we determine that the off-air signal quality is not sufficient to meet the requirements of Section 76.66(g)(2) of the FCC Rules, we will agree to be responsible for the costs of delivering a good quality signal to your receive facility.

KAZA-TV is broadcasting popular programming, which we believe you will want to carry. If you have any questions regarding this matter, please contact me at your earliest convenience.

Sincerely,

LeBon G. Abercrombie
Senior Executive Vice-President

bcc: Michelle Cohen
Mike Ruggiero, ATV
Stuart Livingston
✓ Mickey Swanson-Public File



Signal Test Verification

DMA _____

Station Call Letters KAZA-TV

Network AZA

Broadcast Channel 54 Broadcast Frequency (Visual) _____ MHz

Test Date 9/7/1 Time of Test: 12:00N

Test Performed By: Daniel Bissett
(Please Print - Name, Title)

KAZA-TV 818-241-5400
(Company Represented, Telephone Number)

EchoStar Representative: Kip Wilcoxson field engineer
(Please Print - Name, Title)

I. Signal Test Results

a) Signal Strength (Objective Findings):

dBmV +18.8 dBu _____ dBuV 207.5 dBm

b) Picture Quality (Subjective Findings: Indicate None, Slight, Moderate, Severe):

Ghosting ~~Abounding strong ghost~~ slight (slight)

Interference None

Noise NOT SEEN 47.1 C/N

Vertical/Horizontal Banding NONE

Other comments or issues noted with signal or picture: _____

II. Test Procedures

List of Equipment Used for Test:

Picture Monitor Used: Sony PVM 800Q Size: 9"

Signal Meter/Analyzer: RFM 151 Scout

Antenna Used: Radio Shack U75R Gain: 10. dB

Height of Antenna: 8 Above: Roof

Point of Measurement: Roof of Engineering Building

Other Equipment: JVC Super VHS VCR - Receiver

Descriptions of testing methodology:

III. Signal Verification

Acceptable Off-Air X

*Unacceptable Off-Air _____

Explanation (Indicate basis due to Objective and/or Subjective Findings):

*Unacceptable Off-Air finding will necessitate delivery of signal by fiber or other acceptable means, at the broadcaster's expense.

The undersigned hereby acknowledge the signal strength verification set forth above.

Daniel P. Bissett

Station Representative or Independent Testing Agent

Broadcaster Address to Remit Signal Test Verification:

Contact Name: Daniel Bissett 818-241-5400

Station Call Letters: KAZA-TV

Mailing Address: 230 N. Maryland Ave 300

City/State/Zip: Glendale Ca 91206

[Signature]
Echostar Representative



ECHOSTAR COMMUNICATIONS CORPORATION

November 26, 2001

Peter C. Pappas
Executive Vice President
Pappas Telecasting Companies
1299 Pennsylvania Ave, NW
Washington, DC 20004

RE: KAZA-TV and KAZH(TV) Carriage Affirmation

Dear Mr. Pappas:

Thank you for your letter dated November 14, 2001, confirming the community of license and DMA for the above stations. EchoStar will carry KAZA-TV and KAZH(TV) pursuant to must carry regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Sahi".

Eric Sahi
Director of Programming

/nr