

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

)	
In the Matter of)	
)	
EchoStar Communications Corporation,)	CS Docket No. 01-348
General Motors Corporation, and)	
Hughes Electronics Corporation)	
)	
Application for Consent to Proposed)	
Transfer of Control)	
)	

To: Chief, Cable Services Bureau

PETITION TO DENY OR CONDITIONALLY GRANT

PAXSON COMMUNICATIONS CORPORATION

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Summary

In this proceeding, the Commission will receive ample evidence that EchoStar Communications Corporation (“EchoStar”) consistently and deliberately operates its Commission-licensed business in a manner that is flatly inconsistent with its legal obligations and the wider public interest. From selling television station signals to unqualified subscribers to evading must-carry obligations, it is clear that EchoStar cannot be expected to honor statutory mandates when doing so conflicts with its private interest. Consequently, the public interest compels the Commission to scrutinize very carefully whether the merger (the “Merger”) of EchoStar with Hughes Electronic Corporation, as proposed in EchoStar’s application (the “Application”), would serve the public interest.

In light of the issues raised in this Petition and the serious antitrust considerations already raised by a diverse group of other parties, the Commission can only approve the Application by imposing explicit, stringent conditions on the merged entity. **Among other things, these conditions must include the timely and faithful performance by EchoStar of its must-carry requirements.** Unfortunately, anything short of conditioning the Commission’s consent on full compliance with must-carry requirements will encourage and permit EchoStar to continue to threaten the viability of independent television stations, in contravention of the clear congressional intent underlying the Satellite Home Viewer Improvement Act of 1999.

If the Commission consents to the Merger, the public interest also compels the Commission to condition such consent on EchoStar’s prompt expansion of local-into-local service for all television markets. EchoStar already has admitted that it would shut rural consumers out of the benefits of local-into-local service if the Merger is approved. The Commission cannot allow that to happen because the Merger would consolidate into EchoStar’s hands ample satellite spectrum to deliver local-into-local into all markets. The Commission must

ensure that such consolidation of spectrum serves the interests of all Americans, rather than just the private interests of EchoStar.

Finally, the Commission in this case must back up its Merger conditions with a schedule of significant sanctions. EchoStar has proven itself adept at openly defying clear and explicit statutory and regulatory mandates. Without the threat of significant sanctions, EchoStar undoubtedly would continue its current practices to the detriment of the American public, which continues to rely on broadcast stations to provide local and diverse video programming.

The instant proceeding raises several serious issues that warrant the Commission's highest level of scrutiny. Without the precautionary measures described herein, however, the public will not be served by Commission consent to the proposed Merger and the Application must be denied.

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To: Chief, Cable Services Bureau

PETITION TO DENY OR CONDITIONALLY GRANT

Paxson Communications Corporation (“Paxson”) hereby submits, in triplicate, this Petition to Deny or Conditionally Grant the above-referenced application (the “Application”) for transfer of control of the licenses and authorizations held by Hughes Electronics Corporation (“Hughes”) to EchoStar Communications Corporation and its subsidiaries and affiliates (“EchoStar”).¹ The Application proposes the consolidation of the EchoStar DISH network with Hughes’ DirecTV network, as well as the consolidation of practically all high-power Direct Broadcast Satellite (“DBS”) spectrum (the “Merger”). As the owner of the largest broadcast television group in the United States and the creator of PAXTV, the nation’s seventh and newest over-the-air broadcast network, Paxson is extremely concerned about the effects of the Merger on the public’s ability to continue to rely on over-the-air broadcast television service.

¹ This Petition is timely filed pursuant to the deadlines established in *Public Notice*, DA 01-3005 (rel. Dec. 22, 2001).

Introduction

The Commission's primary mandate is to make decisions and support actions that best serve the public interest, convenience, and necessity.² This mandate is derived from the heart of the Communications Act and has long been supported by the courts.³ The Commission, therefore, cannot grant the Application unless it first determines that the proposed Merger would benefit the American public.

In this case, the facts compel exceptionally close scrutiny of the Application because the proposed Merger would place virtually all of the country's DBS service and spectrum in the hands of a party with a long history of flaunting its obligations, and because the Merger would disproportionately impact rural Americans who would lose access to a competitive market for multichannel video programming distribution. It is not surprising, then, that the proposed Merger has attracted vigorous and exceptionally diverse opposition.⁴

As part of its review of the Application, the Commission should examine EchoStar's record as a Commission licensee, especially with regard to its treatment of broadcast television stations. Local stations serve a vitally important role in our society, a role that has been threatened repeatedly by EchoStar's prior conduct. This conduct is highly relevant to the Commission's determination of how a grant of the Application would affect the public interest. Paxson respectfully submits that EchoStar's prior conduct compels the Commission to deny the

² See 47 U.S.C. § 309(a).

³ See, e.g., *FCC v. Pottsville Broadcasting Co.*, 308 U.S. 134, 137 – 38 (1940); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 473-74 (1940).

⁴ See, e.g., Andy Pasztor, *FCC, Justice Department Seek Information on Once-Secret Talks and Why They Ended*, THE WALL STREET JOURNAL, B3 (Feb. 4, 2002); Laura M. Holson, *Diverse Group Opposes EchoStar-DirecTV Deal*, THE NEW YORK TIMES, C1 (Jan. 30, 2002).

Application unless the Commission can craft sufficiently strict and explicit conditions that ensure that the Merger truly serves the public interest, convenience, and necessity.

I. Vigilant Enforcement of Must-Carry Rights Furthers the Public Interest Because All Consumers Rely on Broadcast Television Stations for Local and Diverse Programming.

Section 307(b) of the Communications Act of 1934, as amended (the “Communications Act”), requires the Commission to allocate television stations to local areas.⁵ By ensuring a localized broadcast service, the FCC has provided consumers with the ability to receive programming directed at the needs and interests of their community. As a result, local businesses and politicians can communicate with local audiences, who in turn benefit from the dissemination of local and diverse programming, including coverage of local news, events, political debates, weather, and emergency information, and local EAS warnings.

In an age when most households receive local television signals through multichannel video program distributors (“MVPDs”), there remain millions of consumers (particularly those in rural areas and those with lower incomes) who continue to rely on over-the-air broadcast television service for video programming.⁶ Regardless of the delivery mechanism, however, broadcast television stations remain an important – and sometimes the only – source of local and diverse video programming. Indeed, the Commission itself has recognized that cable systems “typically do not serve as *independent* sources of local information; most of any local programming they provide is originated” by broadcast stations, which “are the dominant source

⁵ 47 U.S.C. § 307(b).

⁶ Fall 2001 Home Technology Monitor Ownership Report prepared by Statistical Research, Inc.

of *local* news and information.”⁷ The same is true with satellite MVPDs. Consequently, it is clear that broadcasters serve an important, crucial role in providing local and diverse programming to all television households, regardless of the means by which their signals are delivered.

Cognizant of the important service provided by television broadcasters, Congress reinstated cable must-carry rights for broadcast television stations in 1992. In doing so, Congress enabled UHF stations to reach audiences comparable to those reached by their VHF competitors.⁸ Without cable must-carry rights, many UHF television stations simply would not have survived because they would have been denied access to the majority of the viewers residing within their markets. The importance of must-carry for these stations simply cannot be overstated: Mandatory carriage of these stations on cable and satellite systems is absolutely essential to their viability. In fact, the very success of PAXTV depends to a large extent on the ability of Paxson’s UHF television stations to obtain and maintain mandatory carriage rights on cable and satellite systems. The scores of UHF stations benefiting from cable must-carry now form the distribution platform for new television networks such as PAXTV, WB, UPN, Telemundo and Univision. These networks provide new competition and vitality to broadcast television, as well as additional programming choices for the American consumer.

As satellite operators increase their share of the multichannel video programming market, effective mandatory carriage rights in the satellite context are every bit as important to the health

⁷ Review of the Commission’s Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Memorandum Opinion and Second Order on Reconsideration*, 16 FCC Rcd 1067, ¶ 22 (2001) (emphasis in original).

⁸ *See generally*, 1998 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the

continued...

of the television industry as cable mandatory carriage rights were in 1992. DBS operators have seen significant gains in market share throughout the country, and satellite penetration already exceeds 15% in a significant number of markets and continues to increase throughout the country. As consumers continue to switch from cable and over-the-air television service to satellite service, local television stations that are not carried by DBS operators in accordance with the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”) will lose a significant portion of their audience (that is, 15% or more of their local market audience), and such audience losses will translate into significant revenue losses for these stations (that is, 15% or greater revenue loss). Such audience and revenue losses can have devastating effects on these stations’ operations and their ability to obtain high-quality programming. Congress was fully cognizant of the importance of satellite must-carry rights for local television stations (especially for UHF stations and those that are not affiliated with the Big Four networks), and, for this reason, Congress imposed must-carry rights on DBS operators in November 1999.⁹

It is critically important that DBS operators honor their must-carry obligations faithfully for the benefit of the American public. Unfortunately, EchoStar has repeatedly attempted to avoid its must-carry obligations while still availing itself of the royalty-free local-into-local license bestowed by SHVIA. Now, despite its lawless behavior, EchoStar seeks to acquire

...continued

Telecommunications Act of 1996, *Notice of Inquiry*, 13 FCC Rcd 11276, ¶¶ 26-27 (1998) (observing that UHF stations have benefited from effective cable must-carry rules).

⁹ Nevertheless, to avoid undue constitutional and technical burdens on these operators, Congress mandated must-carry rights only to the extent that DBS operators avail themselves of the local-into-local compulsory copyright license bestowed upon them by legislative grace. As a result, satellite operators can elect to avoid the must-carry requirements altogether by foregoing the compulsory license scheme. Indeed, DirecTV and EchoStar already avoid must-carry obligations in over three-fourths of the nation’s television markets because they do not offer local-into-local service in those areas.

Hughes' DirecTV, which serves as EchoStar's only remaining competitor in the "stand-alone . . . distinctly separate" "high-power DBS market."¹⁰ Because EchoStar has openly defied its obligations to carry qualified television signals, as well as other statutory or regulatory mandates, the Commission must apply the very highest level of scrutiny to the Application.

II. Consistently and Deliberately, EchoStar Has Failed to Treat Television Stations and Others Who Operate in the Public Interest Fairly and Equitably, Without Any Regard to the Harm Such Conduct Inflicts on the American Public.

Despite its status as a Commission licensee, EchoStar has operated its business in a manner that evidences a complete lack of regard for the vital role that television broadcast stations play in our society, even when doing so violated existing statutory and regulatory obligations to which it was subject. Because EchoStar's conduct with respect to local television stations has imposed enormous costs on broadcasters and the public, the Commission should consider these episodes carefully in evaluating the Application.

A. EchoStar versus SHVA and the Communications Act.

Since passage of the Satellite Home Viewer Act of 1989 ("SHVA"), Congress has permitted the satellite retransmission of the signals of out-of-market television stations affiliated with ABC, CBS, NBC, and Fox to households that are "unserved" by local affiliates – that is, to those subscribers residing in rural and mountainous areas who otherwise could not receive such programming through a conventional rooftop antenna.¹¹ In addition, since at least 1992, the

¹⁰ See Complaint at ¶ 26, *EchoStar Communications Corp. v. DirecTV Enters., Inc.*, Civ. No. 00-K-212 (D. Colo. 2000).

¹¹ See 17 U.S.C. § 119; *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, Report and Order*, 14 FCC Rcd 2654, ¶¶ 9, 17 (1999).

Communications Act and the Commission's rules have prohibited the retransmission of television broadcast signals without the (retransmission) consent of the originating station.¹²

EchoStar learned quickly, however, that consumers highly value broadcast signals, and that consumers are unlikely to purchase a DBS satellite system that does not offer such programming. In fact, EchoStar's General Counsel testified before Congress in 1999 that "most people who walk into a satellite dealer's showroom turn around and walk out because they can't get their local TV channels through DBS."¹³

EchoStar could have retransmitted local television signals into local markets ("local-into-local" service) if it obtained copyright licenses and retransmission consent from those who held such intellectual property rights. But EchoStar chose instead to flaunt the law. Thus, beginning in early 1999, EchoStar began offering local-into-local service in several DMAs without securing the copyright licenses and retransmission consent clearly required by law.¹⁴

Incredibly, EchoStar's open defiance of SHVA and the Communications Act was not isolated to the illegal retransmission of broadcasters' signals into local markets. EchoStar, through PrimeTime24 (a partnership consisting of EchoStar, DirecTV and other satellite companies) proceeded to sell out-of-market network signals indiscriminately – including to those subscribers who, despite the clear requirements of SHVA, lived well within the local service

¹² See 47 U.S.C. § 325(b); 47 C.F.R. § 76.64.

¹³ *Reauthorization of the Satellite Home Viewers Act: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, 106th Cong. 73 (1999).*

¹⁴ See, e.g., *EchoStar Chairman Wants Changes to Legislation*, SATELLITE TODAY, May 5, 1999 ("EchoStar currently offers local channels to a limited number of viewers in 13 major markets..."); *EchoStar Plans Launch of Spot Beams: Birds to Offer Local Signals*, SATELLITE NEWS, April 12, 1999 (noting that "[i]nsufficient satellite capacity currently prevents EchoStar from offering more than four local signals to people in the 13 urban areas where the company provides the service").

areas of in-market network affiliates. Broadcasters were forced to litigate across the country to seek an end to this brazen violation of SHVA. In one such case, a District Court concluded that PrimeTime24 knew of the applicable requirements, but instead had “simply ignored” them.¹⁵ In another case, the Fourth Circuit determined that “What PrimeTime may not do is pursue the course it followed -- signing up thousands of subscribers without making any attempt to ensure compliance with its statutory license.”¹⁶ When the courts began ordering satellite operators to discontinue retransmitting illegal distant signals – that is, when the courts ordered the operators to start complying with their statutory obligations – EchoStar publicly and vigorously blamed *broadcasters* for attempting to deprive its customers of the programming it had illegally sold them.

Thereafter, EchoStar and DirecTV “fired” PrimeTime24 and announced that they were not bound by the court injunctions entered against PrimeTime24. A District Court immediately ordered DirecTV to comply with its injunction, even charitably characterizing DirecTV’s scheme as “a little disingenuous.”¹⁷ DirecTV apparently has now complied with its legal obligations. In contrast, EchoStar continues to advance a series of surprisingly successful stalling tactics, and today, more than 30 months after the first decision against PrimeTime24, EchoStar continues to provide illegal network signals to thousands of subscribers.

¹⁵ *CBS, Inc. v. PrimeTime24 Joint Venture*, 9 F. Supp. 2d 1333, 1344 (S.D. Fla. 1998). The court also noted that “PrimeTime24 has simply ignored the grade B test even though it tried and failed to persuade Congress to adopt a test of eligibility based upon subscriber statements about over-the-air reception.” *Id.*

¹⁶ *ABC, Inc. v. PrimeTime24*, 184 F.3d 348, 355 (4th Cir. 1999).

¹⁷ *See CBS Broadcasting Inc. v. DirecTV*, No. 99-565-CIV-Nesbitt (S.D. Fla. Feb. 25, 1999).

B. EchoStar versus Congress.

Responding in part to a campaign against the court orders orchestrated in large part by EchoStar, Congress enacted the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”). SHVIA was carefully designed to protect economic competition among broadcasters and promote competition to cable by granting satellite operators, for the first time, the option of a royalty-free copyright license for local-into-local service. Congress understood, however, that if left unchecked, “satellite carriers would carry the major network affiliates and few other signals.”¹⁸ At the same time, Congress recognized that the public had benefited from the cable carriage requirements, “as attested by the appearance of several emerging networks, which often serve underserved market segments.”¹⁹

Consequently, with cable as a guide, Congress imposed mandatory carriage requirements on DBS satellite operators as the “price” they would pay the American public for the benefit of royalty-free local-into-local licenses.²⁰ These satellite carriage rules were “intended to . . . promote widespread dissemination of information from a multiplicity of sources.”²¹ In short, SHVIA’s local-into-local license and must-carry requirements together would promote alternative media voices and preserve a level economic playing field among broadcasters, including smaller stations not affiliated with the major networks.

¹⁸ 145 Cong. Rec. H11792, 11795 (daily ed. Nov. 9, 1999) (Joint Explanatory Statement of Conference Committee).

¹⁹ *Id.*

²⁰ *See* 145 Cong. Rec. S14708, 14711 (daily ed. Nov. 17, 1999) (Joint Explanatory Statement of Conference Committee) (“trading the benefits of the copyright license for the must carry requirement is a fair and reasonable way of helping viewers have access to all local programming ...”).

²¹ 145 Cong. Rec. H11792, 11795 (daily ed. Nov. 9, 1999) (Joint Explanatory Statement of Conference Committee).

Since the passage of SHVIA, EchoStar's subscribership has more than doubled. Even EchoStar's own trade association concedes that this stunning growth is primarily the result of its launch of local-into-local service in the largest television markets.²² Nevertheless, despite the obvious financial windfall that Congress has granted EchoStar (and DirecTV) through a royalty free compulsory license for local-into-local service, EchoStar, together with its trade association, responded by launching vigorous court challenges to Congress' decision to charge the "price" of must-carry for the benefit of the compulsory license. In essence, those lawsuits charged that the First Amendment required Congress to grant the local-into-local license without any price or condition. The courts, of course, have soundly rejected these challenges.²³ Indeed, the U.S. Court of Appeals for the Fourth Circuit noted that DBS satellite operators' carriage patterns since SHVIA (but before the commencement of the must-carry rules) confirmed exactly what Congress feared would happen if DBS operators had a royalty-free local-into-local license: both EchoStar and DirecTV "cherry picked" the major network affiliates for carriage, to the exclusion of all other broadcast stations.²⁴

The plaintiffs even petitioned the Fourth Circuit for a stay of SHVIA's must-carry provisions pending resolution of the case by the U.S. Supreme Court. This brazen attempt to further avoid the *voluntary* satellite must-carry requirements was frivolous because as they surely knew, the U.S. Supreme Court denied the cable industry's request for a stay of the *mandatory*

²² See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventh Annual Report*, 2001 FCC LEXIS 98, ¶ 69 (rel. Jan. 8, 2001). See also Comments of Satellite Broadcasting and Communications Association, CS Docket No. 00-132, at 10 (filed Sept. 8, 2000) (*citing* Merrill Lynch, "The DBS Story Has Shifted from One of Subscriber Growth to EBITDA," July 31, 2000).

²³ See *SBCA v. FCC*, Nos. 01-1151, 01-1271, 01-1272 and 01-1818, 2001 U.S. App. LEXIS 26120 (4th Cir. Dec. 7, 2001); *SBCA v. FCC*, 146 F. Supp. 2d 803 (E.D. Va. June 24, 2001).

²⁴ See *SBCA*, 2001 U.S. App. LEXIS 26120, at *52.

cable must-carry requirements in the *Turner* litigation several years earlier. Not surprisingly, the Fourth Circuit summarily rejected this offensive request to further delay carriage of the nation's independent television stations.²⁵

C. EchoStar versus Must-Carry Elections.

In addition to attacking must-carry head-on in the courts, EchoStar also has implemented a campaign to evade its obligations. This is most evident in the manner in which EchoStar responds to carriage elections and demands. Last summer, when over two hundred commercial and noncommercial television stations sent EchoStar the first round of election letters, EchoStar denied virtually every election statement.²⁶ Those denials were nothing more than crude form letters with various boxes checked for items such as failure to identify a station's community of license and failure to "prove" signal quality. EchoStar had no factual basis for the great majority of these denials, as it apparently ignored the text of election statements and declined to undertake any investigation whatsoever into individual stations' qualifications. The denials were also inconsistent with the explicit requirements of SHVIA, the Commission's implementing orders, and nearly a decade of must-carry case law.²⁷

Moreover, as the Commission observed shortly thereafter, stations were unable to resolve these issues with EchoStar despite sending EchoStar detailed, written refutations. In September

²⁵ *Id.* at *88, n.12.

²⁶ *See, e.g., EchoStar, DirecTV Turn Down Dozens of Requests for Carriage*, COMMUNICATIONS DAILY, October 19, 2001 ("EchoStar had turned down all but 2 of 122 requests for carriage by PTV stations.").

²⁷ It is noteworthy that DirecTV generally seems to have responded to the election statements of other broadcasters (not including Paxson) with responses that appear to have been supported by actual investigation into each station's qualifications.

2001, EchoStar's conduct led the Commission, on its motion, to order EchoStar to begin complying with its statutory and regulatory obligations.²⁸

Still, EchoStar has continued to openly defy the law. Numerous television stations have been forced to file must-carry complaints against EchoStar, which inevitably impose significant and unnecessary costs on these stations and result in several months of lost carriage.²⁹ In short, EchoStar continues to demonstrate that it cannot be trusted to comply with explicit statutory and regulatory mandates until specifically ordered (sometimes on multiple occasions) to do so.

D. EchoStar versus “Disfavored” Stations.

Within the last few weeks, EchoStar has displayed yet another tactic designed to evade its must-carry obligations. When must-carry requirements commenced on January 1, 2002, it began retransmitting the signals of certain television stations on the same full-CONUS satellites that carry the rest of its program line-up (*i.e.*, CNN, ESPN, Nickelodeon, and affiliates of the Big Four networks). Certain other stations – “disfavored” stations – were not afforded comparable treatment. Rather, EchoStar placed these stations' signals on semi-CONUS satellites that cannot be received by its subscribers until they obtain and install a second satellite receiving dish, associated cabling, and new set-top-boxes. EchoStar's subscribers cannot even see the programming offered by these stations on their on-screen program guides. Clearly, this two-dish

²⁸ See Implementation of the Satellite Home Viewer Improvement Act of 1999 – Broadcast Signal Carriage Rules, *Order on Reconsideration*, 16 FCC Rcd 16544 ¶ 61 (2001).

²⁹ See *e.g.* Christian Television Corporation v. EchoStar Satellite Corporation, CSR-5746-M, DA 02-231 (rel. Jan. 31, 2002); The Long Family Partnership v. EchoStar Communications Corporation, CSR-5764-M, DA 02-231 (rel. Jan. 31, 2002).

carriage scheme flaunts Congress' explicit desire to avoid having the local-into-local licenses used in a manner that benefited some broadcasters over others.³⁰

EchoStar has attempted to justify this discriminatory treatment of certain must-carry stations on bandwidth limitations caused by the failure of certain satellite contractors to deliver new satellites in a timely manner.³¹ However, as detailed in Paxson's Reply Comments in a separate proceeding the Commission has launched into EchoStar's conduct, there appears to be no legal or policy connection between EchoStar's two-tier carriage regime and satellite construction delays.

EchoStar has argued that broadcasters – or, more precisely, certain broadcasters – should suffer the loss of viewers and advertising revenue that result from carriage on semi-CONUS satellites, even though EchoStar could mitigate those losses by migrating other channels to the semi-CONUS satellites. After all, Congress did not award statutory carriage rights to EchoStar's dozens of pay-per-view and *a la carte* adult channels. Moreover, shifting the costs of EchoStar's decision to fight must-carry rather than plan for it is entirely inappropriate in light of the fact that EchoStar will receive “millions of dollars in penalties” under its contracts with the satellite contractors for their failure to deliver the satellites on time, money that most assuredly will not be used to compensate the “disfavored” stations.³² In short, if EchoStar succeeds in discriminating against certain must-carry stations by isolating them from local viewers, EchoStar simultaneously will reap a financial windfall and it will prevent these stations from enjoying the

³⁰ 145 Cong. Rec. H11811, 11818 (daily ed. Nov. 9, 1999) (statement of Rep. Jackson-Lee) (Congress enacted SHVIA “in order to erase inequities, not further them.”).

³¹ Press Release, EchoStar Statement on NAB Petition (Jan. 7, 2002).

³² See Letter from Charles W. Ergen to Edward O. Fritts, dated Dec. 27, 2001, at unnumbered paragraph 5, attached to Emergency Petition.

access to local consumers that Congress required as part of the “price” for the local-into-local license.³³

E. EchoStar versus Rural Americans.

In recent years, the Commission’s licensing of Ka-band spectrum and technological advances such as digital compression and spot beam satellites have expanded tremendously the ability to retransmit local broadcast signals into their local markets. Not too long ago, many industry observers expected that EchoStar, DirecTV, and other parties would capitalize on these new tools in a race to provide local-into-local service to all 210 television markets.

EchoStar, however, has no interest in providing those living in more than half of the nation’s markets with local and diverse programming for in-market television stations. Specifically, EchoStar has admitted that, following the Merger, it will eventually expand local-into-local service to only about 100 markets, thereby abandoning for all time those consumers

³³ It is also clear that EchoStar is eager to exploit and abuse the Commission’s procedures for commercial advantage. The Commission’s records reflect the fact that EchoStar has filed several complaints against broadcasters alleging bad faith negotiation of retransmission consent. Those complaints that EchoStar did not withdraw voluntarily have been rejected by the Commission. In one case, EchoStar refused to accept an extension of retransmission consent from a licensee, filed a complaint against it at the Commission, and then launched a public relations war against the licensee that included publishing station personnel’s telephone numbers and home email addresses on EchoStar’s website and in Nashville’s daily newspaper. *See EchoStar Satellite Corporation v. Landmark Communications, Inc., et al.*, Answer to EchoStar’s Verified Retransmission Complaint, CSR-5554-C, at 5, 17 (June 19, 2000). (EchoStar subsequently dismissed the complaint. *See EchoStar Satellite Corporation v. Landmark Communications, Inc.*, 15 FCC Rcd 17368 (2000)). In another case, EchoStar requested confidentiality for key documents at the same time that it was publicly disclosing selected portions of those documents; the Commission found such conduct to be “an abuse of the Commission’s processes.” *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070, ¶ 12 (2001).

who live in the remaining 110 television markets.³⁴ EchoStar admits that it will turn its back on small markets despite the fact that, if approved, the Application would allow it to consolidate its DISH network with the DirecTV network, which together already offer local-into-local service in 77 DMAs. Following the Merger, EchoStar ultimately would control *all* high-power DBS full-CONUS Ku-band satellite spectrum, plus five semi-CONUS Ku-band, five full-CONUS Ka-band, and eight semi-CONUS Ka-band orbital slots.³⁵ This level of concentration makes it highly unlikely that any party will have the technical and financial resources to compete against EchoStar to deliver local-into-local service throughout the country, especially because no one can expect EchoStar to provide a third-party with the necessary access to its subscribers' set-top boxes.

In short, a grant of the Application will give EchoStar the ability to ensure that small markets never benefit from the dedicated efforts of Congress and the Commission to bring about universal local-into-local service and a truly effective competitor to cable. Paxson submits that this result is inconsistent with EchoStar's basic obligation as a Commission licensee to operate in the public interest.

F. EchoStar versus Noncommercial Programmers.

EchoStar's flagrant disregard of its statutory and regulatory obligations is not limited to its dealings with television broadcast stations. To take just one example, EchoStar repeatedly sought to evade its explicit public interest programming obligation under Section 335(b) of the

³⁴ See, e.g., Paige Albiniak, *Ergen: Let DBS Bird Deal Fly*, BROADCASTING & CABLE, at 33 (Dec. 10, 2001); John M. Higgins, *It Could Have Been Worse*, BROADCASTING & CABLE, at 19-20 (Nov. 5, 2001).

³⁵ See, e.g., Michael Grotticelli, *How Much Is Too Much?*, BROADCASTING & CABLE, at 29 (Nov. 19, 2001).

Act and Section 100.5 of the Commission's rules.³⁶ Section 335(b), which was added to the Communications Act in 1992, mandates that DBS licensees, as an explicit condition on their use of satellite spectrum, carry noncommercial educational programming equal to four to seven percent of their total video programming channel capacity.

EchoStar managed to escape complying with this public interest obligation while the mandate was challenged in court.³⁷ After that challenge failed in 1996, the Commission resumed a proceeding to implement Section 335(b).³⁸ In November 1998, the Commission concluded that DBS licensees like EchoStar could satisfy Section 335(b) by setting aside just four percent of their channel capacity for noncommercial educational programming.³⁹ The Commission at that time gave DBS licensees more than one year to come into compliance.⁴⁰ Nevertheless, EchoStar missed this deadline, which, it bears repeating, became effective seven years after Congress first imposed the public interest obligation on DBS licensees. Indeed, EchoStar went so far as to file a waiver request that the Commission characterized as "disingenuous."⁴¹ Thereafter, EchoStar

³⁶ 47 U.S.C. § 335(b); 74 C.F.R. § 100.5.

³⁷ See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations, *Report and Order*, 13 FCC Rcd 23254, ¶ 9 (1998) ("DBS Public Interest Obligations Order").

³⁸ See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations, *Public Notice*, 12 FCC Rcd. 2251 (1997).

³⁹ See *DBS Public Interest Obligations Order* at ¶ 74.

⁴⁰ See *id.* at ¶ 136 (requiring DBS providers to make available satellite capacity for public interest programming as soon as the rules became effective (*i.e.*, June 15, 1999) and providing an additional six months (*i.e.*, until Dec. 15, 1999) for providers to enter into arrangements with interested programmers).

⁴¹ Petition for Waiver of Direct Broadcast Satellite Public Interest Obligation Implementation Date, 15 FCC Rcd 1814, ¶ 7 (1999). The Commission subsequently issued a Notice of Apparent Liability against EchoStar for its noncompliance. See *EchoStar Satellite*

continued...

further attempted to flaunt the clear and explicit obligation by proposing to place all of its public interest programming on a satellite that could only be received by a portion of its subscribers. Thus, once again, EchoStar's opponents were forced to seek another order directing EchoStar to honor its obligations.⁴²

EchoStar's repeated attempts to avoid its public interest programming obligation provide further evidence that EchoStar, despite its role as a Commission licensee, simply will not act in the public interest when doing so does not serve its private interests. The Commission must not turn a blind eye to such violations of the public trust when it evaluates whether the Merger would serve the public interest.

III. If the Commission Chooses to Grant the Application, It Must Impose Explicit, Stringent Conditions to Protect the Public Interest.

EchoStar may be unique among all Commission licensees in the consistency and thoroughness with which it has so blatantly disregarded its statutory and regulatory obligations. This unfortunate history of noncompliance makes it unlikely that EchoStar would comply fully with any conditions that the Commission might impose on the Merger. Consequently, if the Commission decides to grant the Application despite the serious issues raised by the Application and EchoStar's prior conduct, the public interest compels the Commission to condition its consent on EchoStar's timely and faithful performance of explicit, stringent covenants. Furthermore, because EchoStar cannot be trusted to comply with the spirit or the letter of even explicit conditions, the Commission also must adopt a detailed schedule of significant sanctions for violations of these conditions.

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Corporation, *Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 5557, ¶ 6 (2000) (EchoStar was carrying just 4 of the 13 required channels at the deadline).

Indeed, this Merger may not be unlike the well-publicized government antitrust litigation against Microsoft. There, several organizations, including those represented by former Solicitors General Walter Dellinger, Kenneth Starr, and Robert Bork, have argued “that Microsoft does not take legal obligations seriously and cannot be trusted to comply with them.”⁴³ As a result, these esteemed legal scholars warn weak conditions in a consent decree would simply require Microsoft’s opponents to return to court to force Microsoft to cease illegal conduct.⁴⁴ As detailed herein, the same concerns counsel against weak Merger conditions on EchoStar’s future conduct.

As the Commission is well aware, EchoStar’s conduct makes it evident that it has no intention to honor the must-carry rights of independent television stations or to use its proposed consolidation of virtually all DBS spectrum to expand local-into-local service to all 210 television markets. Because EchoStar cannot be expected or trusted to act in the public interest as opposed to its own private interest, any stringent Merger conditions must sufficiently address these issues.

- **Full Compliance with Must-Carry Obligations.**

In light of EchoStar’s demonstrated propensity to evade its must-carry obligations, any consent to the Merger should include an explicit condition compelling full compliance with EchoStar’s must-carry obligations. This condition, at a minimum, must require the following:

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⁴² See *American Distance Education Consortium*, 15 FCC Rcd 15448, ¶ 11 (2000).

⁴³ Brief of Amici Curiae by Dellinger, Starr, and Bork at 19, *Microsoft Corporation v. United States of America*, 2001 U.S. App. LEXIS 18715 (2001).

⁴⁴ Jonathan Krim, *Interested Parties Weigh In On Proposed Microsoft Settlement*, WASHINGTON POST, at E04 (Jan. 31, 2002) (quoting advocates as warning, “the proposed decree
continued...”

Timely and faithful compliance with all notice, carriage, and election procedures and requirements set forth in SHVIA and the Commission's implementing orders, including (i) the non-discriminatory carriage of all local broadcast signals *viz a viz* other stations in the same DMA with respect to subscriber cost, necessary receiving equipment, signal quality, digital and multicast signals, interactive capabilities, and program-related information; and (ii) the cessation of all tactics that delay the launch of qualified must-carry signals;

- **Use of the Expanded Spectrum for All Americans.**

In light of EchoStar's admission that it will use *all* of the nation's high-power full-CONUS Ku-band satellite spectrum and numerous other orbital slots in a manner that leaves rural Americans behind, the Commission should condition the Merger on the rapid expansion of local-into-local service, according to a schedule similar to the following:

Within ninety days of the consummation the Merger, launch local-into-local service (including the nondiscriminatory carriage of all qualified signals) in the Top 75 DMAs;⁴⁵

Within six months of the consummation of the Merger, launch local-into-local service (including the nondiscriminatory carriage of all qualified signals) in DMAs ranked 76 through 150; and

Within twelve months of the consummation of the Merger, launch local-into-local service (including the nondiscriminatory carriage of all qualified signals) in DMAs ranked 151 through 210.

- **Substantial Sanctions for Noncompliance.**

Regardless of how explicit the Commission drafts its Merger conditions, it cannot be ensured that EchoStar will comply with such conditions any more than it has complied with

...continued

simply creates another hoop through which third-part complainants, and the government itself, must pass in order to enforce violations of the decree by the defendant").

⁴⁵ Today, EchoStar and DirecTV together provide local-into-local service in 77 television markets.

applicable statutory and regulatory mandates. Consequently, if the Commission decides to approve the Merger, it must include in its grant a schedule of significant forfeitures that would be imposed for any violation of a Merger condition.

In this regard, the Commission need not start with a blank page. Rather, the Commission can and should look to the penalties that Congress deemed to be appropriate for violations of certain aspects of SHVIA. Under that statute, a DBS operator that engages in a willful or repeated pattern or practice of delivering a network station to a “served” household is subject to a court-ordered permanent injunction, statutory damages up to \$250,000 for each six-month period of the violation, and reimbursement of attorney fees and costs.⁴⁶

Violation of a Merger condition should result in similar sanctions. Assume, for example, that EchoStar continues, after the Merger, its current practice of forcing a “disfavored” television station to respond to baseless carriage denials, retain counsel, prosecute a formal complaint with the Commission, and wait up six months or more for the carriage to which is entitled under SHVIA and the Commission’s rules. In that case, EchoStar should be required to reimburse the station’s attorneys fees and other demonstrable losses, and it should be liable for a forfeiture up to \$250,000 for each six-month delay in carrying the qualified station.

* * *

While the proposed conditions and sanctions are significant, they are entirely justified in these unique circumstances. The Application proposes the unprecedented concentration of the nation’s only two DBS operators, all of the country’s high-powered DBS satellite capacity. As demonstrated by the numerous materials already filed in this proceeding, EchoStar will have a

⁴⁶ 17 U.S.C. § 119(a)(5)(B)(i) – (ii).

powerful incentive to discriminate against independent television stations (by continuing to evade must-carry rights) and rural consumers (by refusing to use its spectrum to bring local-into-local service to all markets). Furthermore, the fact that EchoStar has a long and infamous record of open defiance of its statutory and regulatory obligations requires the Commission to impose extraordinary conditions and to undertake exceptional efforts to ensure compliance with those conditions. Without a doubt, the public interest, necessity, and convenience require nothing less.

Conclusion

The proposed Merger raises a number of substantial issues that warrant denial of the Application. If, however, the Commission elects to grant the Application, it must condition its consent on EchoStar's faithful performance of strict conditions that ensures that the public benefits from EchoStar's consolidation of virtually all DBS service and spectrum. Paxson respectfully submits that any such conditions, at a minimum, must ensure that EchoStar ends its open defiance of the letter and spirit of SHVIA and that EchoStar uses the substantial amount of satellite spectrum it would control to deliver the benefits of local-into-local service to all Americans.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

/s/ John R. Feore, Jr.

By: _____

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February 4, 2002

CERTIFICATE OF SERVICE

I, Kevin P. Latek, hereby certify that I caused a true and correct copy of the foregoing Petition to Deny or Conditionally Grant to be sent on this 4th day of February 2002 to the following, via first class U.S. Mail, postage prepaid:

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