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

Application of	)	
	)	
ECHOSTAR COMMUNICATIONS CORP,	)	
GENERAL MOTORS CORP.,	)	
HUGHES ELECTRONICS CORP.	)	
	)	
Transferors,	)	CS Docket No. 01-348
	)	
and	)	
	)	
ECHOSTAR COMMUNICATIONS CORP.	)	
	)	
Transferee,	)	
	)	
For authority to Transfer Control	)	

<u>COMMENTS OF PRIMETIME 24 JOINT VENTURE</u>

PrimeTime 24 Joint Venture ("PrimeTime 24") submits these comments in opposition to the application of EchoStar Communications Corp. ("EchoStar"), General Motors Corp., and Hughes Electronics Corp. ("Hughes") to transfer certain satellite and related licenses in connection with EchoStar's proposed acquisition of Hughes and its DirecTV unit, as described in the parties' Consolidated Application for Authority to Transfer Control ("Application").

PrimeTime 24 is a satellite carrier that currently provides network television programming to the C-band market. It is uniquely situated to comment on the EchoStar-DirecTV merger, as both EchoStar and DirecTV formerly distributed PrimeTime 24's network programming. As set forth below, EchoStar's acquisition of DirecTV would be anticompetitive and therefore not in the public interest. PrimeTime 24 does not here seek to provide a complete analysis of the anticompetitive effect of the merger, or of the claimed efficiencies, but principally will comment on issues relevant to the proposed merger to which it has particular knowledge or experience.[1] Specifically, in these comments PrimeTime 24 shows that the anticompetitive effect of the DBS merger in rural areas that do not have access to cable television would not be ameliorated by the presence of C-band multi-channel video program distributors (MVPDs). Moreover, in PrimeTime 24's experience, EchoStar's conduct demonstrates a proclivity not to comply with its legal obligations. Thus, even if EchoStar's "commitment" concerning pricing in rural markets were a legitimate potential solution to the problem of rural market power, which it is not, EchoStar could not be trusted to abide by such a commitment. Furthermore, PrimeTime 24's experience with both EchoStar and DirecTV confirms that that EchoStar and DirecTV competed with one another in the provision of television network programming, even before they began to offer widespread local-into-local network channels.

I. THE MERGER IS ANTICOMPETITIVE, PARTICULARLY IN RURAL AREAS.

PrimeTime 24 is the leading provider of network television programming to the C-band marketplace. Using the compulsory copyright license under 17 U.S.C. § 119, PrimeTime 24 offers a package of three east-coast network stations called "PrimeTime East" to retail C-band

[1] As to the major purported efficiency of the transaction, namely the increased availability of spectrum and transponder capacity to offer local-into-local programming in more markets, it is dubious that the merger is necessary to achieve these additional offerings and it may very well stifle them. Congress was aware of the DBS carriers' position that the imposition of must-carry obligations, which require a carrier to carry all television stations in any market if it utilizes the local-into-local compulsory license to carry one station, would limit the number of markets in which the carriers would make local signals available. Yet Congress nonetheless chose to impose must-carry. See Conference Report on H.R. 1554, Intellectual Property and Communications Omnibus Reform Act of 1999, H. Rept. 106-464 at 106 (1999) (conferees were "advised that major satellite carriers intended to provide local broadcast TV stations via satellite only in the largest markets rather than in more rural areas" because it is "not economically feasible to provide such services in rural areas at the present time"). Insofar as Congress accepted that certain markets would not receive local-into-local service because of must carry, it enacted the Launching Our Communities Access to Television Act of 2000 and appropriated $1.25 billion to provide loan guarantees to facilitate access to signals of local television stations for households in underserved areas. Pub. L. 106-553 (2000). It would be ironic indeed if the FCC responded to Congress's decision to impose must-carry requirements by permitting the DBS carriers to merge.

distributors such as Superstar, DSI Distributing, NRTC, and Satellite Receivers.[2] Previously, PrimeTime 24 also served the DBS market (EchoStar and DirecTV), and also provided ABC, CBS, and NBC west-coast network stations (called "PrimeTime West"), as well as a Fox network service, to both the C-band and DBS markets. At its height in 1998, PrimeTime 24 served over 2.5 million subscribers, including approximately 700,000 C-band subscribers. In early 1996, it served more than one million C-band subscribers. Today, PrimeTime 24 has approximately 100,000 subscribers, strictly in C-band.

The decline in C-band network programming subscriptions coincides with the steady decline in the number of C-band users nationwide and the growth of DBS. The number of C-band subscribers nationwide has fallen from approximately 2.3 million in October 1996 to fewer than 900,000 in November 2001. See Third Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, F.C.C. 96-496 (Jan. 2, 1997), App. C (for 1996 data); SkyReport, National DTH Counts, http://www.skyreport.com/dth_us.htm (for current data). As the Commission noted in its most recent video competition report, between June 2000 and June 2001 the number of C-band subscribers declined 32%, or an average of 1,306 subscribers per day. See Eighth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, F.C.C. 01-389 (Jan. 14, 2002) at 6, 34. The downward trend continues unabated; in the five months between June 2001 and November 2001, the number of C-band subscribers declined by another 13%. SkyReport, supra. The decline in the number of C-band subscribers has led to the reduction in programming services available to C-band dish owners. For example, as of February 28, 2001, PrimeTime 24 was forced to discontinue its Fox

[2] PrimeTime East includes WKRN, the ABC affiliate in Nashville, WNBC, the NBC network station in New York, and WSEE, the CBS affiliate in Erie, PA.

network service because that service was no longer economically viable given the shrinking number of C-band subscribers.

The anticompetitive effect of the proposed merger would be particularly acute in the many rural areas not served by cable television, where EchoStar would have a virtual monopoly on multi-channel video services.[3] EchoStar suggests that C-band providers would provide an effective check on EchoStar's monopoly in these areas. See Application at 41 (contending that that C-band offerings in rural areas "remain very attractive, particularly in areas where dish size is not a significant deterrent") and Declaration of Dr. Robert D. Willig ("Willig Dec."), ¶ 37 (stating that "many rural consumers not passed by cable would still enjoy some choice of MVPD providers"). However, EchoStar's position is flatly inconsistent with the position it took in its antitrust litigation against DirecTV. In its antitrust complaint against DirecTV filed in February 2000, EchoStar defined the relevant market as the high power DBS market, and stated: "For [the] millions of customers and potential customers [living in areas without access to cable], if there is no competition between DTV and DISH Network, there is no competition at all." EchoStar Communications Corp. v. DIRECTV Enterprises , Inc., Complaint, ¶ 129 (D. Col. Feb. 1, 2000).

EchoStar's position in February 2000 was correct. While a very small number of rural subscribers may prefer C-band to DBS, there is no evidence that the steady decline in C-band use is limited to non-rural areas. C-band is not an effective substitute for DBS in rural areas in large part because rural customers prefer small dishes even if they have the space for a big dish, and the upfront costs of a new C-band dish are so much greater than a DBS dish, as Dr. Willig attests. See Willig Dec. at 25 n.37 (noting that the average cost of a C-band dish is $2000);

[3] DirecTV has estimated that nearly 30% of its subscribers live in areas unable to receive cable television service. See Comments of DirecTV, Inc., In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Dkt. 01-129, at 13 (Aug. 3, 2001); see also Eighth Annual Report, supra, ¶ 17 (noting estimates of homes not passed by cable range up to 19 percent).

http://www.dishnetwork.com/content/getdish/FreeSatelliteSys/index.shtml (EchoStar dish valued at $199 offered for free with programming package). DBS also offers programming that C-band does not. For example, distant-network signal offerings are much more substantial on DBS than C-band. C-band subscribers may receive only PrimeTime 24's three east-coast stations or Superstar's "Denver 5" package of Denver network stations. In contrast, DBS offers distant network stations from every time zone, including the network stations in Los Angeles, Dallas-Fort Worth, Chicago, Denver, New York and Atlanta. See, e.g., http://www.dishnetwork.com/content/programming/locals/index.shtml. Moreover, C-band cannot be said to compete effectively with DBS in rural areas when EchoStar is paying Superstar, the leading C-band distributor, to convert C-band subscribers to DBS. See Seventh Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, F.C.C. 01-1, ¶ 83 (Jan. 8, 2001) (noting that in November 1999, Netlink Group sold its subscriber lists to EchoStar for $10 million plus a cash payment for each subscriber that converts to EchoStar); see also http://www.superstar.com (Superstar promoting "exciting DISH Network [that] offer allows you to replace your broken [C-band] equipment [with an EchoStar dish] for free.").

As an additional matter, "national pricing" of DBS programming is no solution to a DBS monopoly in rural areas. See Application at 42 ("New EchoStar is committed to pricing its DBS services on a uniform, nationwide basis."). In the first place, even if it could be enforced, national pricing would preclude the possibility of local-market program discounting in rural and other areas, which could exist in the future absent the merger.[4] Moreover, insofar as the parties

[4] Dr. Willig notes that the NRTC, which distributes DirecTV programming to approximately 20% of DirecTV's subscribers, independently sets the prices for certain DirecTV programming in rural areas reached by NRTC. Willig Dec. at 19 n.24. Thus, insofar as localized program pricing is not presently the norm, it is apparently not because of technological or practical constraints. The fact that, according to the parties, they do not currently engage in

use cable prices as a benchmark for setting their "national" prices, see Willig Dec., ¶ 29, that benchmark is itself largely a monopoly price. See Reply Comments of EchoStar Satellite Corp., In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, CS Dkt. 01-129, at 2 (Sep. 5, 2001) ("an observation of cable pricing shows that cable has not lost its ability to raise its prices above prevailing or competitive levels, which is . . . a hallmark of market power."). Moreover, DirecTV and EchoStar compete at a local level on hardware and installation prices, as well as in service, and this competition will be entirely lost as a result of the merger.[5] The new EchoStar could presumably take all of its monopoly profits in rural areas in the form of higher prices for hardware and installation and lower expenditures on service. Finally, different services will be presumably offered in rural areas, smaller urban markets, and large metropolitan markets. Thus, the new EchoStar could compete with cable by reducing prices for regional sports networks offered only in large metropolitan markets or by reducing prices for local-into-local service which does not reach rural markets, and still extract its monopoly profits through a higher "national" price for its remaining programming.

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localized program pricing competition hardly constitutes a reason for permitting the merger and thus ensuring that no such competition could ever exist.

[5] Dr. Willig contends that, while local promotions on equipment and installation have been offered in the past, those promotions have been offered as a reaction to cable firm activities, and not in response to activity by the other DBS provider. Willig Dec. at 19 n.25. Insofar as both DBS firms offered promotions in the same areas, it is implausible to suggest that DBS rivalry had nothing to do with the promotions. Furthermore, it is self evident that there is a greater likelihood of discounting against cable if there are two independent DBS firms responding to cable activities than if there is only one DBS firm.

II. ECHOSTAR'S CONDUCT DEMONSTRATES A PROCLIVITY NOT TO COMPLY WITH ITS LEGAL OBLIGATIONS.

There is a further difficulty with EchoStar's "commitment" to national pricing. EchoStar's conduct suggests that it cannot be trusted to abide by such a commitment. The Commission is well aware of the litigation surrounding the Satellite Home Viewer Act ("SHVA") and the provision of distant network signals offered by PrimeTime 24. See Report and Order, In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, F.C.C. 99-14 (Feb. 2, 1999) ("SHVA Report and Order"). Briefly, on July 10, 1998, U.S. District Court Judge Lenore Nesbitt, sitting in Miami, entered a preliminary injunction against PrimeTime 24 and its distributors, which then included EchoStar and DirecTV. The injunction prohibited them from delivering CBS or Fox television network programming to any new subscriber unless the subscriber resided at a location predicted to receive a signal of less than grade B intensity from the corresponding network affiliate, using the Longley-Rice propagation model (version 1.2.2) in the manner specified by the F.C.C., absent written consent of the network affiliate or a qualifying household signal strength measurement. CBS, Inc. v. Prime Time 24 Joint Venture, 9 F.Supp. 2d 1333, 1346 (S.D.Fla. 1998); Supplemental Order Granting Plaintiffs' Motion for Preliminary Injunction (July 10, 1998).[6] The preliminary injunction also required that existing ineligible Fox and CBS subscribers who had signed up after the preliminary injunction motion was filed be terminated by October 18, 1998, a date subsequently extended to February 28, 1999. Id. PrimeTime 24 promptly came into compliance with the preliminary injunction and complied in all respects with the similar subsequent permanent injunction entered in December 1998, which required all other

[6] The Commission subsequently endorsed the use of a version of Longley Rice 1.2.2, called "Individual Location Longley Rice," that it adapted for predicting signal strength at individual locations. SHVA Report and Order, ¶ 71.

ineligible subscribers to be terminated by April 1999. CBS, Inc. v. PrimeTime 24 Joint Venture, Final Judgment and Permanent Injunction (Dec. 30, 1999).[7]

EchoStar sought to avoid the injunction by terminating its agreement with PrimeTime 24 without advance notice, and by replacing the PrimeTime 24 programming with a package of nearly identical network programs called DISH NETS East and West, effective July 19, 1998. EchoStar admitted that it terminated the contract and transferred its PrimeTime 24 subscribers to its DISH NETS packages because "[t]he implications caused by the preliminary injunction against PrimeTime 24 forced DISH Network to find a new solution to broadcast national networks." Top 25 DISH Network General Questions, http://www.dishnetwork.com/service/questions/general.htm (Nov. 19, 1998).

PrimeTime 24 brought a breach of contract action against EchoStar in the U.S. District Court for the Southern District of New York, claiming that EchoStar's premature termination violated the terms of its agreement with PrimeTime 24. PrimeTime 24 Joint Venture v. EchoStar Communications Corp., 98 Civ. 6738 (S.D.N.Y. 1998). Among other things, PrimeTime 24 sought to recover over $2 million in past-due subscriber fees for programming provided by PrimeTime 24 to EchoStar before the termination, which EchoStar refused to pay even though it had been paid by its customers for the programming and even though a substantial part of the fees (approximately $1 million) was simply a pass through of copyright royalties that PrimeTime 24 was required to and did pay to the U.S. Copyright Office. PrimeTime 24 also sought damages resulting from the early termination of the agreement, which would otherwise have run until

[7] The April 30, 1999 deadline was also extended and modified, and the injunctions were made applicable to all four networks, not just CBS and NBC. While complying with the injunctions, PrimeTime 24 did participate in the Commission's SHVA proceeding, seeking to have the Commission adopt a separate grade B standard for SHVA purposes and a predictive methodology different from the one required in the injunctions. Ultimately, Congress enacted the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), which grandfathered C-band subscribers as of October 31, 1999 and those that had been terminated before then. See CBS, Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217 (11th Cir. 2001).

March 1999. The Court recently granted summary judgment to PrimeTime 24 on the issue of EchoStar's liability for past-due subscriber fees. <u>PrimeTime 24 Joint Venture v. EchoStar Communications Corp.</u>, 2002 U.S. Dist. LEXIS 351 (S.D.N.Y. Jan. 11, 2002).

EchoStar sought to justify the termination of its contract with PrimeTime 24 by arguing that the Miami preliminary injunction issued in July 1998 voided the contract. The district court had little difficulty rejecting this defense. <u>See</u> <u>id.</u> at *20 ("This contention seems to fly in the face of the Order issued in <u>CBS Broadcasting</u> which permitted PT24 to come into compliance with the SHVA by . . . February 28, 1999"). Indeed, while PrimeTime 24 and its other distributors (including DirecTV at the time) quickly came into full compliance with the requirements of the Miami court's injunction, EchoStar flouted that injunction and the grade B standard it adopted. The preliminary injunction initially required the termination of certain existing subscribers by October 18, 1998. However, EchoStar told its customers after the switch that, "[u]ntil further notice, current customers [would] not have to re-qualify to receive [EchoStar's] broadcast networks." http://www.dishnetwork.com/programming/lineup/pt24.htm (July 20, 1998). And while the preliminary injunction required new subscribers to be screened using the Longley Rice propagation model version 1.2.2 in the manner specified by the FCC, EchoStar claimed that, effective after July 19, 1998, it began using what it referred to as a "red light/green light" zip code system as a method of qualifying new subscribers to network programming.

EchoStar's conduct illustrates that it cannot be trusted to comply with the law or fulfill its commitments when its business interests dictate otherwise, a matter that should be of significant concern insofar as the Application is based on EchoStar's commitments about its future behavior.

III. ECHOSTAR AND DIRECTV HAVE COMPETED WITH RESPECT TO NETWORK PROGRAMMING.

DirecTV engaged in behavior similar to EchoStar's when, in February 1999, following EchoStar's successful efforts to evade the Miami court's injunction, DirecTV also prematurely terminated its agreement with PrimeTime 24 and replaced PrimeTime 24's network signals with its own east-coast and west-coast signals. DirecTV's termination occurred on the eve of the Miami court's February 28, 1999 deadline to terminate hundreds of thousands of ineligible subscribers. Two days after DirecTV repudiated its agreement with PrimeTime 24, the broadcasters sued DirecTV in Miami and filed an emergency motion for a temporary restraining order compelling DirecTV to comply with the February 28 disconnection deadline. At the hearing the next day, the court stated:

> So, DirecTV from the very beginning of this suit has wanted to be aligned with PrimeTime when it suited them. For example, for arguing that the injunction would adversely affect their customers and for obtaining a bond in their favor. And now, on the eve of the injunction to take effect, it now, DirecTV, wants to disassociate itself with this litigation. And it wants to, what I consider, take a position that's tantamount to circumventing, interfering and reinterpreting the effect of the injunction scheduled to take effect in just a few days, this Sunday, February 28th, 1999.

Transcript of Emergency Motion Proceedings Had Before the Hon. Lenore C. Nesbitt, Senior U.S. District Judge, at 48, CBS Broadcasting, Inc. v. DirecTV, Inc., C.A. No. 99-565, (Feb. 25, 1999). The court found DirecTV's "last minute" attempt "to evade" its orders "disingenuous," immediately granted the broadcasters' motion, and emphasized that "the date of February 28th for compliance with my order will be adhered to." Id. at 48-50. Subsequently, DirecTV settled the litigation with the broadcasters and entered into an agreed-upon permanent injunction that mirrored the PrimeTime 24 injunction. PrimeTime 24 brought suit against DirecTV for breach of contract, which eventually was resolved through a mutually satisfactory settlement.

The conduct of EchoStar and DirecTV in connection with the distribution of distant network signals, besides showing their willingness to evade both statutory requirements and contractual commitments, illustrates one of the ways that the two companies compete against each other. DirecTV, by breaching its agreement with PrimeTime 24, sought to evade the Miami court's injunction, as EchoStar had been able to do. EchoStar and DirecTV have also competed with respect to the introduction of local-into-local network programming. EchoStar began to provide local-into-local service in certain markets as early as January 1998. Initially, DirecTV offered only distant network signals and promoted the use of off-air antennas to obtain local network signals. DirecTV, however, mimicked EchoStar's strategy and began to offer local-into-local services when Congress authorized it in December 1999. Since then, local-into-local competition between the two DBS providers has continued unabated.

Conclusion

The proposed combination of EchoStar and DirecTV is anticompetitive and therefore not in public interest. Outside of rural areas, cable television providers may provide some constraint on the exercise of market power by a sole DBS provider, but that constraint is limited because cable operators themselves price their services above the competitive level. In rural areas where cable is unavailable, the loss of DBS competition would have a particularly acute anticompetitive effect, given the absence of any other effective competition. "National pricing" is no solution to the rural monopoly problem because EchoStar's past conduct indicates that it cannot be trusted to comply with a commitment to offer uniform prices. It did not comply with its contractual commitment to PrimeTime 24 and evaded the requirements of the Miami court order. Finally, even if non-discriminatory pricing were feasible, it forecloses the possibility of local discounting in program offerings and ignores the fact that localized DBS price competition in hardware and installation would be lost.

Respectfully submitted,

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