

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

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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

RESPONSE TO PETITIONS AND COMMENTS

Paxson Communications Corporation (“Paxson”) hereby submits, electronically, this Response to the Petitions and Comments filed with the Federal Communications Commission concerning 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 (“EchoStar”) and the resulting merger of EchoStar’s DISH network with Hughes’ DirecTV network (the “Merger”).¹

The record before the Commission contains numerous, specific allegations of fact demonstrating that a grant of the Application would be *prima facie* inconsistent with the public interest. Moreover, it is clear that, at a minimum, a substantial and material question of fact exists as to whether a grant of the Application would serve the public interest. Consequently, Paxson submits that the Commission must deny the Application or designate it for a hearing.

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

In the instant proceeding, the Commission is asked to grant a licensee with a history of blatantly disregarding its obligations the ability to monopolize the \$10 billion DBS industry. The brazenness of this request is just as remarkable as its timing. Only two days after the filing deadline for Petitions to Deny and Comments on the Application, the Commission commenced a hearing proceeding to determine whether the broadcast licenses held by Peninsula Communications, Inc. should be revoked.² In that case, the Commission concluded that the licensee's repeated violations of statutory and regulatory requirements and its "blatant disregard" of a Commission order "call[] into question Peninsula's fitness to remain a Commission licensee."³ Paxson submits that it would be arbitrary and capricious for the Commission to designate Peninsula's licenses for a hearing while simultaneously condoning EchoStar's conduct by granting the Application without conditions.

I. The Public Interest Does Not Permit A Grant of the Application.

The applicants must prove by a preponderance of the evidence that the Merger will serve the public interest and enhance competition.⁴ They have not met their burden. The only assertions favoring the Merger can be found in largely unsupported and generally self-serving statements in the Application and in a few Comments submitted at the apparent behest of EchoStar. Such filings completely ignore the costs that would be imposed on the public by permitting truly unprecedented concentration of DBS service into the hands of a party that, time and again, has demonstrated its unwillingness to be bound by statutory and regulatory obligations.

Indeed, the Commission has deemed the Application so utterly devoid of relevant information that it already has ordered the applicants to supplement the Application. It is absolutely essential that the Commission receive from the applicants full, detailed information concerning the

² *Peninsula Communications, Inc.*, Order to Show Cause, FCC 02-32 (rel. Feb. 6, 2002).

³ *Id.* at ¶ 2.

⁴ *See, e.g., Applications of Tele-Communications, Inc. and AT&T Corp.*, 14 FCC Rcd. 3160, 3169-70 (1999).

channels and manner and extent of service that will be devoted by the merged entity to local-into-local service. Such information is critical to determining the effect of the Merger on rural consumers and on the broadcast television industry, both of which already have been harmed by EchoStar's past conduct.

In contrast to the superficial Comments favoring the Merger, roughly two dozen other parties filed Petitions to Deny and Comments collectively documenting, through well over a thousand pages of arguments and documentary evidence, how the Merger would harm, rather than benefit, the public. Taken as a whole, the filings in this proceeding unequivocally demonstrate that the Commission's public interest mandate cannot be reconciled with a grant of the Application.

It is essentially undisputed that the Merger would allow EchoStar to assert bottleneck control over satellite programming distribution.⁵ 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.⁶ This level of concentration would erect virtually insurmountable barriers to entry, thus making 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.⁷ Undoubtedly, EchoStar would maintain these barriers steadfastly after the merger by continuing its aggressive efforts to prevent third-parties from obtaining the access to spectrum and to subscribers' set-top boxes that is necessary to offer competing services.⁸

EchoStar cannot be heard to claim now that the Merger would not be anti-competitive. Previously, when EchoStar's goal was competing against DirecTV, it asserted strenuously before the

⁵ Compare Comments of Vivendi Universal, S.A. ("Vivendi Comments") at 6, *with* Petition to Deny filed by American Cable Association ("ACA Petition") at 16.

⁶ See, e.g., Petition to Deny filed by Pegasus Communication Corporation at 8; Petition to Deny filed by National Rural Telecommunications Cooperative at vi.

⁷ See, e.g., Petition to Deny filed by National Association of Broadcasters ("NAB Petition") at 32-34.

federal courts and the press that the “high-power DBS market” constitutes a “stand-alone . . . distinctly separate” market from that of cable.⁹ Indeed, EchoStar asserted, “For millions of customers and potential customers [without access to cable], if there is no competition between [DirecTV] and DISH Network, there is no competition at all.”¹⁰ If EchoStar’s assertions from just two years ago can be believed, then the Merger proposes the consolidation of the DBS market from two players to one player, a move that is obviously anti-competitive. On the other hand, if EchoStar’s latest antitrust argument is to be believed, and cable and DBS are deemed to form part of the same market, then the Merger would produce a reduction of MVPD gatekeepers for local programming from three players to just two. Antitrust authorities virtually always condemn three-to-two mergers because they present strong likelihood of anti-competitive behavior.¹¹ In either case, then, the Merger is clearly anti-competitive,¹² and, as the National Rural Electric Cooperative Association observed, “This lack of competition will particularly disadvantage rural Americans, who are likely to suffer from higher prices, poorer quality service and other consequences of having only a single MVPD and satellite broadband provider.”¹³

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⁸ See, e.g., Petition to Deny filed by Northpoint Technology, Ltd. at 8-11.

⁹ See Complaint at ¶ 26, *EchoStar Communications Corp. v. DirecTV Enters., Inc.*, Civ. No. 00-K-212 (D. Colo. Feb. 1, 2000).

¹⁰ *Id.* at ¶ 120.

¹¹ See, e.g., NAB Petition at 51-56; Petition to Deny filed by American Antitrust Institute (“AIA Petition”) at 2.

¹² See, e.g., ACA Petition at 9-23; NAB Petition at 32-51; Petition to Deny filed by National Consumer’s League, et. al at 1-2 (“the family farmers and ranchers and other rural residents that rely on DBS for their television service will bear the burden of higher costs and inferior service from a monopoly provider.”).

¹³ Comments of the National Rural Electric Cooperative Association at 9.

Moreover, EchoStar cannot be heard to assert that C-band satellite service would provide a sufficient check on its virtual monopoly control of all DBS services.¹⁴ As the Commission is well aware, C-band network programming subscriptions have been dropping precipitously.¹⁵ Because C-band service no longer offers real competition for DBS, it is nothing short of disingenuous for EchoStar to argue that C-band service would provide a viable competitor in the market for satellite delivery of video programming.¹⁶

Despite its proposal to amass a virtual monopoly on national DBS service, EchoStar has admitted that it would not use its spectacular spectrum consolidation for the benefit of all Americans. To the contrary, EchoStar would shut rural consumers out of the benefits of local-into-local service if the Merger is approved, because it would limit local-into-local service to less than one-half of the nation's television markets.¹⁷ By depriving the majority of markets of the benefits of local-into-local service, EchoStar would ensure that the nation's spectrum is used to advantage only those programmers and subscribers deemed worthy in EchoStar's sole and essentially unchecked discretion. Leaving the majority of television markets unserved by local-into-local flaunts the efforts of Congress and this Commission to remove existing disparities between cable and satellite services with regard to the delivery of local broadcast signals.

The Petition to Deny jointly filed by Carolina Christian Television, Inc. and LeSea Broadcasting Corporation properly summarized the state of the record in this proceeding. It reads, "creating a single monopoly in MVPD in many rural areas and eliminating one-half of cable's MVPD competition in other areas will impair the statutory objectives of Satellite Home Viewer

¹⁴ Cf. Application at 41 and Declaration of Dr. Robert D. Willig attached thereto at ¶ 37.

¹⁵ *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Eighth Annual Report, FCC 01-389 (rel. Jan. 14, 2002), at ¶¶ 8, 13, 67, Appendix C, Table C-I.

¹⁶ See, e.g., Comments filed by PrimeTime 24 Joint Venture at 2-4.

¹⁷ See NAB Petition at iii.

Improvement Act of 1999 (“SHVIA”) and will not promote competition with cable, provide more local channels to more areas or allow more ethnic, foreign language and niche programming.”¹⁸

Quite simply, the public interest would not be served by permitting EchoStar to enlarge its arsenal of anti-consumer weapons and to simultaneously eliminate its most effective competitor in the market for the delivery of digital television programming services. On this record, the Commission cannot grant the Application.

II. If The Commission Declines to Deny the Application Summarily, It Must Designate the Application for a Hearing.

While the Application can and should be denied summarily due to the applicants’ failure to satisfy their affirmative burden, Paxson recognizes that the Commission may seek an expanded inquiry into the troubling matters raised by the numerous Petitions and opposition Comments through a formal hearing. The record in this proceeding provides more than sufficient support for commencing a hearing proceeding on the public interest harms that would flow from the Merger.

As demonstrated in Paxson’s Petition to Deny or Conditionally Grant and similar Petitions to Deny and Comments filed by other parties, the proposed concentration of virtually all DBS service nationwide would be *prima facie* inconsistent with the public interest. By controlling the nation’s only two DBS operators and virtually all of the country’s high-powered DBS satellite capacity, EchoStar will possess a powerful incentive to discriminate against noncommercial public interest programmers (by reducing the diversity of such programming available to DBS subscribers),¹⁹

¹⁸ Joint Petition to Deny filed by Carolina Christian Television, Inc. and LeSea Broadcasting Corporation at 10.

¹⁹ *See, e.g.*, Petition to Deny filed by Word Network at 5-6.

independent television stations (by continuing to evade must-carry rights),²⁰ and rural consumers (by refusing to use its spectrum to bring local-into-local service to all markets).²¹

As also demonstrated in Paxson's Petition and those of numerous other parties, the proposed concentration of virtually all DBS service into the hands of EchoStar raises a substantial and material question of fact concerning whether the grant of the Application would serve the public interest. EchoStar has demonstrated, time and again, its willingness to use its existing gatekeeper role to obstruct the efforts of Congress and the Commission to ensure availability of public interest DBS programming and the signals of must-carry stations.²²

Currently, the applicants are already preventing the attainment of the Congressional objectives supporting SHVIA. In SHVIA, Congress established a less rigorous must-carry regime than that applicable to cable precisely so that DBS licensees would be able to expand the distribution of local broadcast offerings throughout the country and thereby remove the current disparity between cable and satellite systems with regard to local stations. Nevertheless, despite the watered down nature of the satellite must-carry rules, DirecTV and EchoStar still do not offer local-into-local service in any market below the Top 50, and sizable percentages of DBS subscribers are not receiving local signals via satellite. Most troubling, however, is EchoStar's ongoing open defiance of SHVIA through its decision to carry stations serving minority audiences in a discriminatory manner that deprives those stations of the same access to EchoStar's DISH Network offered to stations affiliated with the major broadcast networks and to all cable channels.²³

²⁰ See, e.g., Petition to Deny or Conditionally Grant, by Paxson Communications Corporation ("Paxson Petition") at 3-5; Petition to Deny filed by Univision Communications, Inc. ("Univision Petition") at 7-11; Petition to Deny filed by Johnson Broadcasting, Inc. ("Johnson Petition") at 4-6.

²¹ See, e.g., Paxson Petition at 14-15; Univision Petition at 7; NAB Petition at 49-50.

²² Univision Petition at 4.

²³ Paxson Petition at 12; Univision Petition at 10; Comments filed by Pappas Telecasting, Inc. ("Pappas Comments") at 8-10.

Numerous filings in the record document how the actions of EchoStar concerning must-carry rights render it impossible for the Commission to approve the Merger.²⁴ At a minimum, there exists a substantial and material question of fact concerning whether the grant of the application would serve the public interest. If the Commission does not deny the Application summarily, it must designate it for a full hearing.

III. The Commission Can Only Approve the Application by Imposing Explicit, Stringent Conditions Ensuring That the Public Benefits From the Unprecedented Spectrum Consolidation.

Several parties, including Paxson, have proposed conditions that, at a minimum, are required by the public interest to retard the effect of EchoStar's near monopolization of the market for satellite-delivery of video programming. Paxson submits that the tremendously important issues at stake in this proceeding as well as EchoStar's past conduct compel the Commission's adoption of conditions that, when backed up by the threat of strict and immediate sanctions, would ensure full and universal carriage of all broadcast television stations' signals, both during and after the transition to digital television service. Consequently, at the very least, any Commission consent to the Merger must be conditioned on the following:

A. Full Compliance with Must-Carry Obligations.

- (i) Timely and faithful compliance with all notice, carriage, and election procedures and requirements set forth in SHVIA and the Commission's implementing orders;
- (ii) 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
- (iii) The cessation of all tactics that delay the launch of qualified must-carry signals.²⁵

²⁴ See, e.g., Johnson Petition at 4-7.

²⁵ It is worth noting that several parties have urged the Commission to condition any consent to the Merger on clear, explicit, and enforceable carriage obligations the merged entity. See Comments
continued...

B. Rapid Expansion of Local-into-Local Service.

- (i) 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;²⁶
- (ii) 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
- (iii) 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.

C. Facilitate the Transition to A Digital Television Broadcast Service

- (i) Permit each television station carried on the DBS platform to elect mandatory carriage rights for *either* its analog signal *or* its digital signals (dual carriage would not be required); and
- (ii) Require EchoStar to carry all multicast channels of those stations electing digital carriage in the same nondiscriminatory manner with which EchoStar would be required to carry analog signals.

D. Remove Barriers to Entry for Competitors

- (i) License a new Multi-channel Video and Distribution Service;²⁷ and
- (ii) Consider a divestiture of orbital slots, satellites or transponder capacity.²⁸

One of EchoStar's few supporters, Vivendi Universal, S.A., commented that "the merger will relieve anticipated DBS capacity constraints," which, naturally, means that there would be an increase in channel capacity available for local television stations and their multicast signals.²⁹ In

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filed by APTS/PBS at 7; Petition to Deny filed by Family Stations, Inc. and North Pacific International Television, Inc. at 5.

²⁶ Today, EchoStar and DirecTV together provide local-into-local service in 77 television markets.

²⁷ See Comments filed by Consumers Union, et al. at 4, 21-22.

²⁸ *Id.* at 4, 23.

²⁹ See Vivendi Comments at 5.

light of the merged entity's ability and incentives to discriminate against other programmers and to harm the public interest, it is absolutely essential that a small portion of the "freed up" bandwidth be used to benefit the public as outlined in this Section. Any conditions that fall short of these four goals will only serve to reward EchoStar for its deliberate discrimination against the noncommercial, local, and niche programming that it alone deems to be unworthy of non-discriminatory treatment.

Conclusion

In this proceeding, the Commission has received ample evidence that 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. This past conduct makes EchoStar a most unworthy shepherd of virtually all of the nation's DBS spectrum and service. The unprecedented concentration of DBS spectrum in the hands of EchoStar warrants denial or at least designation of the Application.

If the Commission chooses to consent to the Application, however, it must condition such consent on EchoStar's faithful performance of strict conditions ensuring that the public is no longer held hostage by EchoStar's conduct. EchoStar must be made to end its open defiance of the letter and spirit of SHVIA. EchoStar also must be required to begin playing a constructive role in the realization of several important public policy goals, including the preservation of the broadcast television industry and the rapid transition to digital television service.

Respectfully submitted,

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February 25, 2002

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