

**ORIGINAL**

U.S. DISTRICT COURT  
DISTRICT OF COLORADO

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-K-212

EHOSTAR COMMUNICATIONS CORPORATION,  
a Nevada corporation; EHOSTAR SATELLITE  
CORPORATION, a Colorado corporation; and EHOSTAR  
TECHNOLOGIES CORPORATION, a Texas corporation,

Plaintiffs,

v.

DIRECTV ENTERPRISES, Inc., a Delaware corporation;  
DIRECTV, Inc., a California corporation;  
DIRECTV MERCHANDISING, Inc., a Delaware corporation;  
DIRECTV OPERATIONS, Inc., a California corporation;  
HUGHES NETWORK SYSTEMS, a Delaware corporation; and  
THOMSON CONSUMER ELECTRONICS, Inc.,  
d/b/a RCA, a Delaware corporation,

Defendants.

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AND RELATED COUNTERCLAIMS

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**DIRECTV DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON  
EHOSTAR'S ANTITRUST CLAIMS  
(COUNTS 1, 2, 3, 4, 5, 6, 7 and 10, 11, 12 AND 13)**

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FOR PUBLIC INSPECTION

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## I. Introduction

EchoStar's antitrust claims, which attack a variety of DIRECTV's marketing and business practices, are viable only if DIRECTV has market or monopoly power. EchoStar alleges that DIRECTV has such power: "each of these anti-competitive arrangements [is] based on an abuse of [DIRECTV's] market power, [and] each such arrangement further solidifies [DIRECTV's] monopoly." Complaint, ¶ 102.

On literally hundreds of occasions, however, EchoStar has admitted, urged and sworn the exact opposite: that satellite television providers like DIRECTV (and itself) do not have market power because they compete with more dominant cable television providers. A typical example occurred on the very day this suit was filed. While EchoStar was telling this Court that DIRECTV has market power, it was telling the FCC that "broadcast stations do not need to be protected from the market power of satellite carriers for the simple reason that satellite carriers do not have market power." *EchoStar Comments*, February 1, 2000, at 2 (Ex. A at 3).<sup>1</sup> Here are just two more examples:

- "As a multichannel video programming distributor, EchoStar competes directly for subscribers with cable operators." *Schwimmer Declaration*, November 24, 1997, at ¶ 3 (Ex. B at 42).
- "EchoStar competes in the same market as cable operators. . . . EchoStar prices its service to beat comparable cable packages and tries to make its offerings as close a substitute for a cable subscription as possible." *EchoStar Comments*, April 6, 1998, at 6 (Ex. C at 72).

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<sup>1</sup> The text of this motion contains short-form citations to administrative, legislative, and Internet materials. Full citations to each are included in the separately-filed Appendix of Full Factual Authorities ("Full Appendix") to which the materials are attached. For the Court's convenience, DIRECTV has prepared a separate document, entitled "Excerpts of Factual Authorities," which contains just the relevant pages from the sources attached to the Full Appendix.

Because of these admissions and dozens more like them (set forth in the Appendix of Additional Evidence), EchoStar cannot argue in good faith that cable television does not compete with satellite television. The two consist of the same programming; they are marketed as alternatives; and most subscribers who now get their television via satellite used to watch cable. Both satellite and cable share the same market -- the pay television, or MVPD, market.<sup>2</sup> DIRECTV's share of this market is less than eight percent, which is insufficient as a matter of law in this Circuit to establish market power.

EchoStar seeks to sidestep this problem by characterizing the relevant market as a "high-powered direct-broadcast satellite market." That is a made-for litigation definition that conveniently excludes cable providers and thus ignores economic reality. In contrast, DIRECTV<sup>3</sup> will establish that: (i) EchoStar's antitrust claims require a showing of monopoly or market power in the relevant market; (ii) DIRECTV has neither monopoly nor market power in any reasonably plausible relevant market, *i.e.*, one that includes cable television providers; and (iii) DIRECTV is therefore entitled to summary judgment on EchoStar's antitrust claims.<sup>4</sup>

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<sup>2</sup> "MVPD" stands for multi-channel video programming distribution, and is an acronym widely used in the industry and by federal regulators to refer to all providers of multi-channel video, including cable, satellite, and various other technologies.

<sup>3</sup>We collectively refer to the four DIRECTV defendants as "DIRECTV." Defendant Hughes Network Systems, which itself is not a separate entity, is a division of Hughes Electronics Corporation that manufactures consumer electronics products. So does defendant Thomson Consumer Electronics.

<sup>4</sup> DIRECTV believes that every one of the numerous claims in EchoStar's complaint is deficient as a matter of law and susceptible to summary judgment. In addition, there are additional grounds on which certain of the claims challenged in this motion are susceptible to summary judgment. However, for purposes of efficiency and clarity, DIRECTV directs this particular motion only at EchoStar's antitrust claims on the basis of the common defect uniting all of these claims.

## II. Statement Of Undisputed Material Facts

### A. Background re Multi-Channel Video Programming Distribution

1. Before the 1980s, the only available television programming in most areas consisted of over-the-air transmissions by local broadcasters. This was often limited to network programming from NBC, CBS and ABC, as well as perhaps a few more channels. *See generally* FCC Office of Plans and Policy Working Paper, June 27, 1991, at 1, 11 (Ex. E at 124, 134).

2. Cable television arose as an alternative to broadcasting when, in the late 1970s and 1980s, advances in satellite technology allowed local cable systems to obtain new programming such as HBO, CNN, ESPN and Showtime. *See FCC Report and Order*, July 15, 1988, at ¶ 27 (Ex. F at 229). The cable companies packaged this new programming with local broadcast signals to create a new service: multi-channel video programming distribution ("MVPD"). It proved enormously popular, leading to a proliferation of cable programming, which, in turn, increased cable's popularity even more.

3. DIRECTV began to offer Direct Broadcast Satellite ("DBS") service, *i.e.*, subscription television delivered directly to consumers through a pizza-sized satellite dish, in 1994. EchoStar launched its DBS service in 1996, having been formed earlier by Charles W. Ergen, whose "vision" was "true effective competition to cable." *Ergen Testimony*, January 27, 1999, at 1 (Ex. G at 313); *Ergen Testimony*, July 28, 1998, at 1 (Ex. H at 322); *Ergen Testimony*, April 1, 1998, at 1 (Ex. I at 335); *Ergen Testimony*, February 4, 1998, at 1 (Ex. J at 349); *Ergen Testimony*, October 30, 1997, at 3 (Ex. K at 362).

4. Today EchoStar and DIRECTV are the two principal providers of satellite-based multi-channel video programming through their DBS services. Complaint, ¶¶ 21-22.

5. EchoStar, following terminology adopted by the Federal Communications Commission, calls itself "a multichannel video programming distributor ('MVPD') providing

Direct Broadcast Satellite[] service to subscribers throughout the United States." *EchoStar Comments*, August 6, 1999, at 1 (Ex. L at 370).

6. The fundamental characteristic of MVPD service is an offering of multiple video channels for a monthly subscription fee. This service, the essence of every cable offering, can be and is offered by several technologies besides cable. DBS is the most successful to date; EchoStar itself calls DBS "the closest competitor to cable television for the provision of multichannel video program distribution services." *EchoStar Comments*, March 2, 1999, at i (Ex. M at 387).

7. Other MVPD technologies include C-Band satellite service, Multichannel Multipoint Distribution Service<sup>5</sup>, Satellite Master Antenna Television Systems<sup>6</sup>, and a collection of technologies available to telephone companies wishing to offer MVPD service.<sup>7</sup>

**B. DBS Service and Cable Service Are Substitutes**

8. A consumer subscribing either to EchoStar (which markets under the name "DISH Network") or to DIRECTV gets fundamentally the same thing that cable sells: multiple channels of video programming. These typically consist of broadcast network programming; the "basic cable" programming like ESPN, CNN, and TBS; "premium" offerings like HBO, Showtime, and Pay-Per-View movies; and specialty channels like Home and Garden TV and computer-oriented ZDTV. *See, e.g., DISH Network Programming Overview* (Ex. O) and *Basic Channel Package List* (Ex. P).

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<sup>5</sup> MMDS systems transmit video programming to subscribers using microwave frequencies. The MMDS industry provides competition to cable operators, with approximately 820,000 MVPD subscribers nationwide. *Sixth Annual Report* at ¶ 87 (Ex. N at 470).

<sup>6</sup> SMATV systems focus principally on serving subscribers in multiple dwelling units. As of June 1999, there were approximately 1.5 million SMATV subscribers in the United States. *Sixth Annual Report* at ¶ 95 (Ex. N at 474-75).

<sup>7</sup> Telephone companies are viewed as formidable potential entrants into the MVPD market, though they do not yet represent a significant national MVPD presence. *Sixth Annual Report* at ¶ 121 (Ex. N at 488).

9. EchoStar's channel array allows it to claim that DISH Network is "[a] better value than cable," *DISH Network Advertisement*, March 16, 2000 (Ex. Q), because it "offers programming packages that have a better 'price-to-value' relationship than packages currently offered by most other subscription television providers, particularly cable TV operators." *EchoStar 10-K for year ending December 31, 1999*, at 6 (Ex. R at 607).

10. EchoStar tells consumers that DBS service is a direct substitute for cable service. For example, EchoStar's advertising says "The Best Television Has To Offer Doesn't Come From Cable, It Comes From Above. \*\*\* The Best Television Comes on a DISH." *EchoStar Advertisement [ECC 0006563]* (Ex. S)<sup>8</sup>.

11. Cable companies similarly tout their service as being a superior competitive alternative to DBS. For example, AT&T says: "AT&T Digital Cable gives you the entertainment you crave -- with greater variety, control, and programming choices -- right through the cable in your home. No special digital TV, no satellite equipment to buy and install." *AT&T Advertisement*. (Ex. T)<sup>9</sup>

12. Most DBS customers switched from cable. EchoStar's CEO has testified that "most of [EchoStar's customers] chose the DISH Network over their existing cable provider." *Ergen Testimony*, October 30, 1997, at 3 (Ex. K at 362). EchoStar has estimated that "about 60% of its subscribers have switched to EchoStar from cable systems." *EchoStar Comments*, July 23, 1997, at 3 (Ex. U at 741).

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<sup>8</sup> See Appendix of Additional Factual Authorities, Tabs 1-4 ("Additional Appendix"), for more advertisements promoting EchoStar as a direct substitute for cable service.

<sup>9</sup> See Additional Appendix, Tabs 5-6, for more advertisements comparing cable to DBS.

13. EchoStar "has viewed cable subscribers as its primary target market," and "has priced and structured its offering with the primary purpose of attracting cable subscribers." *Id.* at 2 (Ex. U at 740).<sup>10</sup>

**C. Every Federal Agency Considering The Issue Has Always Found That Cable and DBS Compete in the Same Market**

14. Federal legislation directs the FCC to report annually "on the status of competition in the market for delivery of video programming." 47 U.S.C. § 548(g). The FCC first did so in 1994, finding that the relevant product market should be defined as the MVPD market. *First Report* at ¶ 49 (Ex. W at 797).

15. The FCC found that the MVPD market includes cable companies and DBS providers, as well as other types of providers. *Id.*

16. The FCC has repeated this analysis five times since. Each time, it found that cable and DBS compete in the same relevant market.<sup>11</sup>

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<sup>10</sup> The Department of Justice has cited the cable companies' increased marketing against DBS as potent evidence supporting the existence of an MVPD market. *See, e.g., DOJ Comments*, January 14, 1999, at 4 (Ex. V at 771) (finding that "cable television companies have developed business plans that specifically counter the perceived competitive threat from DBS . . . [,] spend considerable time and money monitoring advances made by DBS and have devised 'anti-DBS' marketing strategies [including establishing a] '1-888-DISH-HEL[P]' hotline through which consumers interested in DBS are discouraged from purchasing it and steered back to cable").

<sup>11</sup> *See Sixth Annual Report* at ¶¶ 5, 8, 70 (Ex. N at 427-28, 461) (cable television "still is the dominant technology for delivery of video programming to consumers in the MVPD marketplace," "[m]uch of the increase in the growth of noncable MVPD subscribers is attributable to the growth of DBS," "DBS remains cable's largest competitor"); *Fifth Annual Report* at ¶¶ 6-7 (Ex. X at 954) (cable television "continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a dominant position in the MVPD marketplace," but there has been an "increase in the total number of subscribers to noncable MVPDs" that is "attributable to the continued growth of DBS"); *Fourth Annual Report* at p. 9 (Ex. Y at 1174 ("DBS service is available in almost all areas and constitutes the most significant alternative to cable television"); *Third Annual Report* at ¶ 4 (Ex. Z at 1403-05); *Second Annual Report* at ¶ 5 (Ex. AA at 1562-63).

17. The FCC has found *more than seventy times* that MVPD is the relevant market in which DBS service competes.<sup>12</sup>

18. The Department of Justice, the staff of the Federal Trade Commission, the United States General Accounting Office (GAO), and Congress have all considered whether cable and DBS compete in the same market, and all agree they do compete in one MVPD market. *See, e.g., DOJ Comments*, January 14, 1999, at 3 (Ex. V at 770) (relevant market is MVPD market); *DOJ Complaint*, May 12, 1998, at ¶ 62 (Ex. BB at 1737) (relevant product market is "the delivery of multiple channels of video programming directly to the home" via "a number of distinct methods, including cable, satellite or wireless technologies"); *Federal Trade Commission Reply Comments*, March 1998, at 3 (Ex. CC at 1750); *General Accounting Office Report*, July 1999, at 9 (Ex. DD at 1766); *Joint Explanatory Statement*, 145 Cong. Rec. H11792 (Ex. EE at 1801) ("Satellite . . . offers an attractive alternative to other providers of multichannel video programming; in particular, cable television"); *1992 Cable Act*, 47 U.S.C. § 522(13) ("multichannel video programming distributor" means a person such as, but not limited to, a cable operator [or] a direct broadcast satellite service . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming").

19. After DBS became commercially available, *no* governmental authority has *ever* recognized the existence of a separate relevant DBS market for evaluating competitive effects resulting from the activities of DBS providers.

**D. EchoStar has Repeatedly Told the FCC and Others That DBS Competes with Cable**

20. During its frequent participation in many FCC proceedings, EchoStar has declared at least twenty different times that cable and DBS providers compete with each other. These

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<sup>12</sup> Authorities establishing this proposition are included in the Full Appendix, Exhibits N, W-AA, JJ, MM and OO, and Additional Appendix, Tabs 7-68.

proceedings include rulemaking proceedings,<sup>13</sup> merger reviews and related transfers of DBS authorizations,<sup>14</sup> as well as program access complaints filed by EchoStar to obtain damages against its cable competitors and their programmer affiliates.<sup>15</sup> In addition to the statements cited in this motion, the attached Additional Appendix, Tabs 69-94, contain highlights -- by no means exhaustive -- of even more of these admissions by EchoStar.

21. In February 1999, EchoStar admitted that "cable television . . . is the major competitor to the satellite industry" in a pleading filed in the Southern District of New York and signed by the very counsel who represents EchoStar in this case. *See PrimeTime 24 Joint Venture Complaint*, September 23, 1998, at ¶ 11 (Ex. KK at 1952) and *EchoStar Answer*, Feb. 22, 1999, at ¶ 11 (Ex. LL at 2099).

22. In December 1998, EchoStar and MCI asked the FCC to permit EchoStar to acquire additional spectrum rights from MCI. *See FCC Order and Authorization*, May 19, 1999 (Ex. MM). In seeking the FCC's approval, EchoStar emphasized that "the MVPD market -- not any subset of that market -- is the relevant market for analyzing . . . the proposed transaction." *EchoStar-MCI Application*, December 2, 1998, at 7 (Ex. NN at 2206). EchoStar further argued that the transaction was in the public interest because it would "promot[e] competition in the MVPD market and thereby mitigat[e] the dominance of cable operators." *Id.*

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<sup>13</sup> *See, e.g., EchoStar Comments*, April 6, 1998, at i (Ex. C at 62) (commenting that "[r]educing the regulatory burdens that DBS providers face will increase the likelihood of effective competition in the multichannel video programming distribution ('MVPD') market").

<sup>14</sup> *See, e.g., EchoStar's Petition to Dismiss or Deny*, August 22, 1997, at ii (Ex. FF at 1830) (arguing that the challenged transaction was "carefully designed to thwart any likelihood that an entity unaffiliated with cable operators . . . might influence the use of the DBS spectrum to compete against other cable operators"); *EchoStar's Petition to Dismiss or Deny*, September 25, 1997, at iv (Ex. GG at 1864) (commenting that "[t]he sale of the MCI permit and DBS satellites to PRIMESTAR appears itself to be the product of the cable operators' market power and anti-competitive conduct").

<sup>15</sup> *See, e.g., FCC Order on Reconsideration*, June 30, 1999 (Ex. HH); *FCC Memorandum Opinion and Order*, January 26, 1999 (Ex. II); *FCC Memorandum Opinion and Order*, June 14, 1999 (Ex. JJ).

23. In this context, EchoStar argued specifically that DBS and cable companies compete in the same relevant product market:

EchoStar's existing DBS service corroborates that DBS operators can and do compete in the same market as cable operators -- albeit from a handicapped position. EchoStar prices its service to beat comparable cable packages and tries to make its offerings as close a substitute for a cable subscription as possible.

*EchoStar-MCI Application* at 8-9 (Ex. NN at 2207-2208).

24. EchoStar also argued that whatever differentiation may have existed between cable and DBS in the past, the two services were now directly competitive:

EchoStar has launched its DBS service and embarked on an aggressive strategy of competing against cable on price, and has thus departed from the DBS model prevailing in 1995. This change has obviated any need for the [FCC] to "push" DBS operators in the direction of positioning themselves as substitutes for cable — EchoStar has positioned itself voluntarily. . .

\* \* \*

. . . it is now possible for DBS to compete head-to-head with cable by providing all of the services seamlessly offered by the cable industry.

*EchoStar-MCI Application* at 21 (Ex. NN at 2220).

25. In granting EchoStar's application, the FCC relied on EchoStar's statements and found that:

[c]able operators and DBS operators compete in the same markets and at present, cable operators rather than DBS operators tend to dominate those markets. Thus if our grant of EchoStar's request allows it to offer a closer substitute to cable operator's offerings, then, by implication, some cable operators may suffer adverse economic impacts because of the increased competition. The public interest, however, is in insuring robust competition and not in protecting the financial interests of particular firms. In this particular instance, consumers will benefit from the increased competition.

*FCC Order and Authorization*, May 19, 1999 at ¶ 35 (Ex. MM at 2178).

26. In another proceeding before the FCC in 1998, EchoStar again argued, and the FCC found, that EchoStar "competes against cable operators in every cable franchise area and is

therefore a 'multichannel video programming distributor,'" within the meaning of the 1992 Cable Act. *FCC Memorandum Opinion & Order*, April 17, 1998, at ¶¶ 6, 21 (Ex. OO at 2319, 2323).

27. In fact, EchoStar has expressly disavowed the existence of any "DBS market" which its antitrust allegations in this case now require: "While the phrase 'DBS business' hints at an attempted gerrymandering of the relevant product market, PRIMESTAR has not denied, and cannot deny, that the MVPD market is the relevant market for analysis." *EchoStar Reply*, October 20, 1997, at 8 n.10 (Ex. PP at 2345).

#### **E. Cable Dominates The MVPD Market**

28. EchoStar has asserted on innumerable occasions that cable dominates the MVPD market. For example, "[i]ncumbent cable operators clearly continue to dominate the MVPD market." *EchoStar Comments*, September 8, 2000, at 3 (Ex. QQ at 2361).<sup>16</sup>

29. According to EchoStar, all satellite television providers combined have just 9.8% of the MVPD market. *EchoStar-MCI Application*, December 2, 1998, at 9-10 (Ex. NN at 2208-09).

30. EchoStar claims that DIRECTV has between 66% and 72% of DBS subscribers. *See Complaint* at ¶ 27.

31. EchoStar thus concedes that DIRECTV's share of the MVPD market is no more than 7.1 per cent.

### **III. Argument**

EchoStar pleads claims under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, as well as Colorado state analogs. At bottom, each of EchoStar's antitrust claims alleges that DIRECTV injured EchoStar by requiring third-party suppliers or distributors to deal exclusively with DIRECTV, or not at all. EchoStar challenges several different forms of

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<sup>16</sup> *See* Additional Appendix, Tabs 94-97, for additional admissions by EchoStar that cable dominates the MVPD market.

these so-called "exclusive deals": deals with distribution outlets (like retailers), deals with programming suppliers (like sports leagues) and deals with manufacturers of High-Definition television ("HDTV") sets.<sup>17</sup> Each of these deals, says EchoStar, either creates a monopoly or otherwise restrains trade. However, because exclusive dealing arrangements often have procompetitive effects, proof of a defendant's monopoly or undue market power is an essential element to all such antitrust claims in the Tenth Circuit (and elsewhere). EchoStar can prove neither. Therefore, its antitrust claims must fail.

**A. To Prevail on Any of Its Antitrust Claims, EchoStar Must Prove that DIRECTV Has Market or Monopoly Power.**

*Monopolization Claims (counts one, two, three, ten, eleven and twelve) Require Monopoly Power or Market Power.* EchoStar's monopolization claims allege that DIRECTV has attempted to eliminate competition in a market EchoStar defines as "high-powered DBS." Complaint ¶¶ 156, 164, 165; 166, 169, 170, 171, 215, 218, 221. To prevail on any of these claims, EchoStar must first properly define a relevant market, and must then prove that DIRECTV has monopoly or market power in that market. A Section 2 monopolization claim requires proof of "the possession of monopoly power in the relevant market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992). Attempted monopolization requires proof of "a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). To prove this "dangerous probability," EchoStar

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<sup>17</sup> Section 1 of the Sherman Act (like Colo. Rev. Stat. § 6-4-104) prohibits any agreement that constitutes an "unreasonable restraint on competition." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Section 2 of the Sherman Act (like Colo. Rev. Stat. § 6-4-105) prohibits actual and attempted monopolization of a market by a single firm. *See Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9<sup>th</sup> Cir. 1997) ("Section 2 of the Sherman Act prohibits monopolies, attempts to form monopolies, as well as combinations and conspiracies to do so."). And Section 3 of the Clayton Act prohibits a seller of "goods, wares, merchandise . . . or other commodities" from conditioning the sale of those commodities, or the availability of discounts on the price of those commodities, on the buyer's agreement not to deal with the seller's competitors, if such agreement threatens to substantially lessen competition or create a monopoly. 15 U.S.C. § 14.

must demonstrate that DIRECTV has market power in the relevant market. See *Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819, 823 (10th Cir. 1987). Finally, a conspiracy to monopolize claim under Section 2 requires proof of harm to the competitive process. See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 139 (1998). To prove that harm, EchoStar must show that DIRECTV has market power. See *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994).

To survive summary judgment, EchoStar must therefore make a sufficient showing to establish DIRECTV's monopoly power or market power in the properly defined relevant market. See *Bright*, 824 F.2d at 823-24. Monopoly power requires proof of both power to control prices and power to exclude competition. See *id.* at 824. Market power is "the ability to raise prices above those that would be charged in a competitive market." *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 (10th Cir. 1986) (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984)). EchoStar, as shown below, cannot make this showing, and its Section 2 claims must fail.

***Exclusive Dealing Claims (counts four, five, six, seven and thirteen) Are Analyzed Under the Rule of Reason.***<sup>18</sup> EchoStar also alleges that DIRECTV (or DIRECTV and Thomson together) unreasonably restrained trade by making exclusive deals with retailers and

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<sup>18</sup> EchoStar's Count VI alleges both "exclusive dealing" and "tying" claims. The addition of a "tying" allegation does not save EchoStar's claim. First, the claim makes no sense, because the allegedly "tied" product, "DTV-compatible High Power DBS receiving equipment" (Complaint ¶ 190), contradicts EchoStar's other allegations of a "DBS equipment" or "DBS service" market. Also, EchoStar does not compete in any "DTV-compatible" equipment market. Second, to prevail on this claim, EchoStar must prove that DIRECTV has market power in the "tying" product market, in this case, the HDTV set market. *Eastman Kodak Co. v. Image Technical Svces, Inc.*, 504 U.S. 451, 464 (1992). HDTV technology, as EchoStar admits, is an "emerging technology" (Complaint ¶ 106), and no HDTV manufacturer can have market power in such circumstances. Most important, EchoStar must still show that DIRECTV's and Thomson's conduct creates a substantial threat that they will acquire market power in the tied product market, in this case, the MVPD service market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 38 (1984) (O'Connor, J., concurring); *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 758 F.2d 203, 210 (7<sup>th</sup> Cir. 1985).

distributors of satellite equipment and service that supposedly prevent those retailers from selling EchoStar-compatible equipment and service.<sup>19</sup> Because there are "well-recognized economic benefits to exclusive dealing arrangements"<sup>20</sup> (*Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997)), the Rule of Reason governs these arrangements. *Id.* They may be unlawful where they "create or extend [the] market power of a supplier." *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J, concurring); *see also U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993) (exclusive arrangement may reinforce market power and raise prices for consumers where outlet foreclosed).

***Claims Made Under the "Rule of Reason" Require Market Power.*** Market power is an essential element of any "Rule of Reason" claim brought under Section 1 of the Sherman Act (and its Colorado counterpart) or Section 3 of the Clayton Act. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) ("[r]ule of reason analysis first asks whether the offending competitor ... possesses market power in the relevant market"). As stated above, market power is "the ability to raise prices above those that would be charged in a competitive

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<sup>19</sup> None of EchoStar's federal antitrust claims predicates liability on a practice "like price-fixing, . . . entirely void of redeeming competitive rationales" that is eligible for *per se* condemnation under the Sherman Act. *Mitchael v. Intracorp. Inc.*, 179 F.3d 847, 856 (10<sup>th</sup> Cir. 1999). All of EchoStar's antitrust claims – even the one state law claim (Claim 13) that EchoStar mislabels as a *per se* claim – require EchoStar to prove that DIRECTV has substantial market or monopoly power. Claim 13 alleges a conspiracy between DIRECTV and RCA "in *per se* violation (and otherwise in violation) of Col. Rev. Stat § 6-4-104." Complaint ¶ 224. However, because RCA and DIRECTV are not competitors, their purported "vertical" conspiracy to boycott DISH Network (*see id.* ¶ 225) would not be *per se* illegal under any circumstances. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) ("precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors").

<sup>20</sup> For example, Judge Posner observed in *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7<sup>th</sup> Cir. 1984) that exclusive dealing agreements between manufacturers and distribution outlets can be procompetitive by assuring the distributor devotes all of its resources to promoting the manufacturer's product, thus making that product more competitive with alternatives.

market." *Westman Commission Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 (10th Cir. 1986). Here in the Tenth Circuit, proof of monopoly or market power is a "critical first step, or 'screen' or 'filter,' which is often dispositive of the case." *SCFC*, 36 F.3d at 965. In either a Section 1 or Section 2 case, the Tenth Circuit first analyzes whether a firm has that power. *See id.* If and only if market power is found, the Court then "proceed[s] under rule of reason analyses to assess the procompetitive justifications of the alleged anticompetitive conduct." *Id.* This Court need not reach factual issues about DIRECTV's conduct, because DIRECTV lacks market power in the relevant market.

**B. DIRECTV Has No Monopoly or Market Power, Because DIRECTV, and All Other DBS Providers, Compete with Cable Television.**

*On the very day this case was filed*, EchoStar admitted that "satellite carriers do not have market power." *EchoStar Comments*, February 1, 2000, at 2 (Ex. A at 3). This devastating statement is just the tip of an iceberg of dispositive admissions that wreck EchoStar's proposed "DBS market" (Complaint ¶ 1) and show that cable companies, not satellite providers, have the real market power in a correctly defined MVPD market.

**1. The Relevant Product Market Is the Multi-Channel Video Programming Market, Which Includes Cable.**

**a. A Properly Defined Market Must Include All Products That Are Reasonably Interchangeable.**

The first step in determining whether a firm has market or monopoly power is to define the relevant market. *See SCFC*, 36 F.3d at 966 (citations omitted). In evaluating whether any jury could reasonably accept EchoStar's proposed DBS-only market definition, the ordinary Rule 56 standards apply. Absent a genuine issue regarding any material fact, summary judgment is appropriate. *See Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett*, 477 U.S. 317, 322

(1986), cited in *Aspen Limousine Serv. Inc., v. Colorado Mountain Express, Inc.*, 919 F. Supp. 371, 374 (D. Colo. 1995) (Kane, J.).

Market definition, a fact issue, can be summarily adjudicated, where, as here, a proposed market is overly narrow, implausible, and result-oriented. See, e.g., *Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 44 F.3d 1465 (10<sup>th</sup> Cir. 1995) (summary judgment granted due to plaintiff's failure to establish market power, based on too narrow a market definition), *rev'd on other grounds*, 479 U.S. 103 (1986).<sup>21</sup> "[T]he courts are not free to accept whatever market is suggested by the plaintiff . . ." *Gough v. Rossmoor*, 585 F.2d 381, 389 (9<sup>th</sup> Cir. 1976); *SCFC*, 36 F.3d at 968-69; *Adidas America, Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (antitrust plaintiff may not "define a market so as to cover only the practice complained of; this would be circular or at least result-oriented reasoning."). The problem with result-oriented "markets" such as the one EchoStar proposes is that they "create[] the illusion of market power where none may exist." *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4<sup>th</sup> Cir. 1986).

The bedrock principle of market definition is that a market must include all products (or services) that have "reasonable interchangeability for the purposes for which they are produced." *United States v. E.I du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Telex*, 510 F.2d at 917 ("the legal standard is whether the product is reasonably interchangeable"). In other words, a relevant market must include all sellers or products of services that have the "potential ability to deprive each other of significant levels of business." *Thurman Indus. Inc., v. Pay 'N Pak Stores*, 875 F.2d 1369, 1374 (9<sup>th</sup> Cir. 1989). Summary judgment is regularly granted where there is undisputed evidence that products or services omitted from the

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<sup>21</sup> See also *Key Fin. Planning Corp. v. ITT Life Ins. Co.*, 828 F.2d 635, 643 (10<sup>th</sup> Cir. 1987) (affirming summary judgment on conspiracy to monopolize claim based, among other things, on market definition that excluded interchangeable products); *Horst v. Laidlaw Waste Sys.*, 917 F. Supp. 739, 743-44 (D. Colo. 1996) (granting summary judgment for defendant for failure by plaintiff to define geographic market properly); *Telex Corp. v. IBM*, 510 F.2d 894, 915-919 (10<sup>th</sup> Cir. 1975) (reversing judgment based on improperly defined product market).

plaintiff's proposed market definition are interchangeable and competitive with products within that definition. *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437, 1457 (D. Kan. 1990) (summarily adjudicating product market: "as a matter of law the trial court must not exclude from the relevant product market definition products which vigorously compete with the product defined by [the] trial court.").

**b. Cable and Other MVPD Services Are Interchangeable with DBS.**

The principle of reasonable interchangeability dooms EchoStar's claims here. Three indisputable facts cement EchoStar's outright admission that "the MVPD market -- not any subset of that market -- is the relevant market." *EchoStar-MCI Application* at 7 (Ex. NN at 2206).

*MVPD Operators Sell Substantially the Same Thing:* Cable companies, DBS providers and other MVPDs fundamentally sell the same thing: subscription television. Indeed, for the most part, they sell exactly the same programming, be it network programming, the "basic cable" channels, or the "premium" and Pay-Per-View offerings. This kind of "physical" similarity is not required for two products or services to fall within an antitrust market. See, e.g., *du Pont*, 351 U.S. at 393-400. But where it exists, a single market is evident. See *Westman*, 796 F.2d at 1226 (single market indicated where two products "have essentially similar physical characteristics"); IIA P. Areeda, et al., ANTITRUST LAW 258 (1995) (antitrust market "includes (1) identical products [and] (2) products with such negligible physical or brand differences that buyers regard them as the same product").<sup>22</sup>

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<sup>22</sup> EchoStar argues for a High-Power DBS-only market by enumerating various ways in which DBS service is different from cable. Complaint ¶ 125. For example, EchoStar points out that DBS providers offer "more than 200 channels of programming" and "digital video." *Id.* This gets EchoStar nowhere. Physical differences among products do not put them in separate markets where, as here, they are substitutes for one another. *du Pont*, 351 U.S. at 393-400. The Tenth Circuit addressed this in *Telex*, 510 F.2d at 917, stating: "Where there are market alternatives that buyers may readily use for their purpose, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically

(continued...)

*MVPD Operators Actively Compete Against Each Other:*

Cable Rates Are On The Rise Again...

# **DUMP CABLE FOR DISH NETWORK!**

*EchoStar Advertisement (Ex. RR).*

This advertisement makes it clear. DBS companies seek cable customers and vice versa. EchoStar says "it has viewed cable subscribers as its primary market ... and [a]ccordingly, ... has priced and structured its offering with the primary purpose of attracting cable subscribers." *EchoStar Comments*, July 23, 1997, at 2 (Ex. U at 740). The fact that EchoStar, a DBS provider, is pricing its service in competition with cable is particularly noteworthy. This shows the cross-elasticity of demand between cable and DBS service -- the hallmark of a single market. *Westman*, 796 F.2d at 1226; *Telex*, 510 F.2d at 917.

**Consumers Routinely Switch From Cable to DBS:** EchoStar admits that 60% of its customers came from cable. *EchoStar Comments*, July 23, 1997, at 3 (Ex. U at 741). Although no precise mathematical test determines what per cent substitution is required before a market must include a product or seller, such a substantial percentage of substitution shows vigorous competition between DBS and cable. *See, e.g., City of Chanute*, 743 F. Supp. at 1457. By definition, "[t]wo products, *A* and *B*, are in the same relevant market if substitutability at the competitive price is very high." IIA P. Areeda, et al., *ANTITRUST LAW* 253 (1995); *see also id.* at 259 (Further noting that "actual shifts between two products in response to -- or even without -- changes in their relative prices indicate a single market");

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<sup>22</sup> (...continued)

identical products would be part of the market."). Here, cable television and satellite television are both still television, as EchoStar's advertising slogan -- "The Best Television Comes on a DISH" -- confirms. *See Ex. S.*

ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS (FOURTH) 505 (1997) (The ultimate determinant of whether products belong in the same market is whether customers are willing to substitute one product for another).

In short, the undisputed evidence of active marketing and substitution between cable and DBS proves they are in the same antitrust market.

**2. DIRECTV Has No Market Power in the Relevant Product Market And Is Thus Entitled To Summary Judgment.**

As noted earlier, EchoStar has admitted that "satellite carriers do not have market power." *EchoStar Comments*, February 1, 2000, at 2 (Ex. A at 3). In its MCI Application, EchoStar admitted that "all DBS/DTH<sup>23</sup> services combined" have just 9.8% of the MVPD market. *See EchoStar-MCI Application* at 9-10 (Ex. NN at 2208-09). Thus, even accepting the Complaint's allegation that DIRECTV has between 66% and 72% of DBS subscribers (Complaint ¶ 27), DIRECTV's market share in the MVPD market would, at most, be 7.1%. This is well below the lowest possible threshold necessary to establish monopoly power. *Colorado Interstate Gas Co. v. Natural Gas Pipeline of Am.*, 885 F.2d 683, 694 n.18 (10<sup>th</sup> Cir. 1989) ("Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, [but] lower courts generally require a minimum market share of between 70% and 80%"); *Valley Liquors, Inc. v. Renfield Importers*, 822 F.2d 656, 666-67 (7<sup>th</sup> Cir. 1987) ("Without a showing of special market conditions or other compelling evidence of market power, the lowest possible market share legally sufficient to sustain a finding of monopolization is between 17% and 25%"); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51

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<sup>23</sup> "DTH" stands for Direct-to-Home, and, in this context, refers to Medium-Power Ku band and large dish or "C-Band" satellite television services. Thus, "DBS/DTH" captures all subscription television satellite providers. Perhaps, nothing better illustrates the completely result-oriented nature of the relevant market definition EchoStar alleges in its Complaint than the fact that it not only disregards competition between cable and DBS but also the reasonable interchangeability between High-Power DBS and these other two kinds of satellite-based subscription television services.

F.3d 1421, 1438 (9<sup>th</sup> Cir. 1995) ("most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price.").

A 7.1% share of the relevant market likewise creates an overwhelming presumption, never rebutted in the reported case law, that DIRECTV does not have market power. *See also Continental Trend*, 44 F.3d at 1465 (affirming summary judgment where defendant controlled less than 10% of the relevant market); *L.A.P.D., Inc. v. General Elec. Corp.*, 132 F.3d 402, 404-05 (7<sup>th</sup> Cir. 1997); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7<sup>th</sup> Cir. 1987) (shares under 25% are insufficient as a matter of law to demonstrate market power). Absent a showing of DIRECTV's market power, EchoStar cannot show that DIRECTV's conduct harms competition and violates the rule of reason. *SCFC*, 36 F.3d at 965; *see also Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 633 F. Supp. 1360, 1478 (D. Kan. 1987) (citations omitted), *aff'd in relevant part*, 899 F.2d 951 (10<sup>th</sup> Cir. 1990):

[A] plaintiff seeking to challenge an "exclusive dealing arrangement" must demonstrate the defendant possesses market power, as this is a prerequisite to being able to restrain trade unreasonably. Thus, to establish the existence of a genuine issue of material fact as to its "exclusive dealing" claim, [plaintiff] must produce evidence tending to show [defendant] possesses "market power" which the Tenth Circuit has defined as "the power to control" prices or "the power to exclude competition."

EchoStar cannot demonstrate that DIRECTV has such market power. Therefore, DIRECTV is entitled to summary judgment on EchoStar's antitrust claims.

**C. EchoStar Should Be Estopped by Its Admissions, and the FCC's Reliance upon Them, from Denying that the Relevant Market Includes All Pay Television Providers.**

As shown above, EchoStar's claim that the relevant market is limited to high-powered DBS is wholly incompatible with dozens of statements made previously before administrative

agencies like the FCC.<sup>24</sup> The Tenth Circuit applies collateral estoppel<sup>25</sup> to facts and issues fully adjudicated by federal administrative agencies. *See Saavedra v. Albuquerque*, 73 F.3d 1525, 1534-35 (10<sup>th</sup> Cir. 1996) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991)). In this case, EchoStar has "won" in administrative proceedings by repeatedly advancing a position that flatly contradicts the essence of the antitrust claims it advances in this action. Consequently, EchoStar should be collaterally estopped to deny the existence of cable-DBS competition, the existence of the MVPD market, the market power of cable, and the lack of market power among DBS providers, because it has had a full and fair opportunity to litigate (and in fact did litigate successfully) the same issues in prior actions before the administrative agencies like the FCC.

Moreover, the sheer frequency and consistency with which EchoStar has touted the fact of competition in the MVPD market should give rise to a judicial estoppel against EchoStar. The Tenth Circuit has, in the past, refrained from imposing judicial estoppel, due to its concern that the doctrine may stifle inquiry on the merits. *Parkinson v. California Co.*, 233 F.2d 432,

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<sup>24</sup> *See, e.g., FCC Order and Authorization*, May 19, 1999, at ¶¶ 11, 15 (Ex. MM at 2172, 2173): In this license transfer proceeding, the FCC's Order granting an assignment of MCI's spectrum rights at the 110° W.L. orbital location to EchoStar necessarily determined the following facts in EchoStar's favor: (1) cable and DBS providers compete in the MVPD market; (2) the MVPD market is the proper market for analyzing DBS providers' market power; and (3) that cable providers, not satellite providers, dominate the relevant MVPD market. *See also, e.g., FCC Memorandum Opinion and Order*, April 17, 1998, at ¶ 21 (Ex. OO at 2323), in which EchoStar asserted, and the FCC found in its ultimate decision, that EchoStar "competes with cable operators in every franchise area in the continental United States." The FCC's authority to grant EchoStar's requested relief here necessarily depended on finding that EchoStar competed with Fox/Liberty's cable affiliates. Consequently, EchoStar should be estopped from litigating here the issue of whether or not it competes with cable.

<sup>25</sup> The elements of collateral estoppel are: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *See, e.g., Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10<sup>th</sup> Cir. 1995).

438 (10<sup>th</sup> Cir. 1956). But, the persistence with which EchoStar has argued that it competes in the MVPD market should dissipate any such concern here. Indeed, the Tenth Circuit has acknowledged that the doctrine **could** be applied against a party that has prevailed in a prior proceeding as a result of taking an inconsistent position. *See United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10<sup>th</sup> Cir. 1986). This is such a case; indeed, as mentioned above, EchoStar's dozens of factual admissions, made in FCC and federal court proceedings, concerning the relentless competition between cable and DBS providers, cable providers' power and the relevance of the MVPD market squarely contradict the very premise underlying its antitrust claims here. Because of its repeated past - - and present - - efforts to win on the basis of utterly incompatible positions, this court should apply the doctrine of judicial estoppel to EchoStar's inconsistent statements regarding the relevant market in this proceeding.

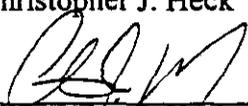
#### IV. Conclusion

For the foregoing reasons, this Court should enter judgment in favor of DIRECTV and against EchoStar on counts one through seven and ten through thirteen of EchoStar's Complaint.

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