

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

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<i>In the Matter of</i>)	
)	MB Docket No. 02-70
COMCAST CORPORATION AND AT&T CORPORATION,)	
)	
Transferors,)	
)	
and)	
)	
AT&T COMCAST CORPORATION,)	
)	
Transferee,)	
)	
Application For Authority to Transfer Control)	
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To: The Commission

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation (“EchoStar”) hereby submits its Comments in response to the above-captioned request to transfer control of licenses and authorizations held by Comcast Corporation (“Comcast”) and AT&T Corporation (“AT&T”) to AT&T Comcast Corporation (“AT&T Comcast”). EchoStar is a Direct Broadcast Satellite (“DBS”) distributor that currently competes against both AT&T and Comcast in the market for multi-channel video programming distribution (“MVPD”) services. EchoStar is not opposed to the proposed AT&T-Comcast merger but asks the Commission to impose a narrowly tailored, merger-specific condition to eliminate the program access “terrestrial loophole” in AT&T Comcast’s territory.

EchoStar also notes that this proposed merger has profound implications for the Commission’s evaluation of the proposed merger of EchoStar and Hughes Electronics Corporation in at least two respects. *First*, it creates a veritable Colossus in the market for the purchase of programming,

risking to exacerbate even further the disparities in the price and other terms of programming that exist today between EchoStar and large cable Multiple System Operators like AT&T and Comcast. The EchoStar-Hughes consolidation will create the critical mass needed to begin to counter (even without being able to match) the overwhelming strength that AT&T Comcast would be able to muster in the purchase of programming. *Second*, the acceleration of broadband deployment that AT&T and Comcast cite as the primary benefit from the merger may further entrench the Applicants' power in the provision of high-speed Internet access, making it all the more important to introduce the competitive broadband satellite offering promised by the EchoStar-Hughes merger.

I. THE COMMISSION SHOULD CONDITION APPROVAL OF THE PROPOSED TRANSFER OF CONTROL ON APPLYING THE PROGRAM ACCESS RULES TO AT&T COMCAST'S TERRESTRIALLY DELIVERED PROPRIETARY LOCAL AND REGIONAL CONTENT

EchoStar does not oppose the merger of Comcast and AT&T but believes that the merger would exacerbate barriers to competition EchoStar has experienced acutely in Comcast's franchise areas. Specifically, Comcast has avoided the pro-competition program access rules by delivering key programming terrestrially and denying critically important regional sports and other content to competing MVPDs. This has had a demonstrably negative effect on new entrants' ability to offer comparable service and, therefore, has diminished MVPD competition within Comcast's territory.

The proposed merger could export this practice across the largest aggregation of cable subscribers, or for that matter any other kind of MVPD subscribers, in the United States for the foreseeable future. The Commission should use its merger authority to do what it claims it has been unable to do so far: stop cable operators from using the terrestrial loophole to circumvent the pro-competitive objectives of the program access laws.

A. Comcast's current practice of delivering regional sports and other localized content terrestrially has harmed the ability of other MVPDs to compete

In order to understand EchoStar's concern regarding the Comcast-AT&T merger, the Commission need look no farther than the well-documented behavior of Comcast with respect to programming and sports franchises over the last several years. Comcast has systematically acquired ownership stakes in, and exclusive rights to, some of the most competitively crucial programming assets in one of the nation's largest media markets. It has leveraged that position to shut out competing MVPDs, denying consumers the benefits of full-blown competition.

In 1996, Comcast acquired a majority interest in a company that controls the Philadelphia 76ers basketball team and the Philadelphia Flyers hockey team. It also acquired an interest in the Philadelphia Phillies baseball team. See, e.g., *In the Matter of EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089, 2092 (1999). Having acquired interests in three of the four major Philadelphia area professional sports teams, starting on October 1, 1997, Comcast decided to transmit this sports programming terrestrially (either via microwave or fiber optic cable) to its own headends, even though a substantial part of that programming had previously been transmitted by satellite. Comcast proceeded to deny EchoStar and DIRECTV access to the programming on the ground that the Communications Act's prohibition on exclusive deals applies only to satellite-delivered programming. The Commission has vindicated that position and has declined to find that Comcast intended to evade the exclusivity rule in violation of the general unfair practices prohibition of the Act. On the other hand, the Commission has expressed concern with the prospects of increased migration of programming to terrestrial delivery.¹

¹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd. 4358, 4435 (1997) ("*Third Annual Report*") (recognizing that due to improved technology and lower costs for terrestrial transmission, "it may become possible for a vertically-integrated programmer to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules concerning access to programming.").

Regional sports programming is critical to competition in any MVPD market and Comcast's behavior has eviscerated MVPD competition in Philadelphia. According to one recent survey, between 40% and 58% of cable subscribers would be less likely to subscribe to an MVPD provider if it lacked local sports. Comments of RCN Telecom Service, Inc., *In re Sunset of Program Access Exclusive Contract Prohibition*, CS Docket No. 01-290, at 18 (Dec. 3, 2001). As the Commission recognized, Comcast itself has said that its regional sports franchise, Comcast Sports Network ("CSN"), "provides a significant marketing advantage against satellite and other competitors." *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 16 FCC Rcd. 6005, 6083 (2001).

The lack of regional sports available to DBS subscribers in Philadelphia has undercut the DBS industry's ability to compete. Philadelphia has by far the lowest DBS penetration rate of any major U.S. market -- 3.9% -- compared to a weighted average of 9.3% for the top 20 markets (including Dallas, 20.2%, and Los Angeles, 10.2%). See Forrester Research, Inc., Technographics Benchmark Survey, 2001. As noted in an economic study commissioned by EchoStar and DIRECTV,

[CSN] in Philadelphia shows that [the] terrestrial loophole has been used by a cable operator to foreclose competitors' access to essential programming, which has reduced competitive pressures in the local market. Foreclosure of competition through use of the terrestrial loophole may loom larger in the future as terrestrial transmission becomes cheaper and more readily available.²

The effect of Comcast's past behavior in denying competing MVPDs programming translates into less choice for consumers, less competition, and ultimately higher rates. The merger of

² *An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers*, Jonathan M. Orszag, Peter R. Orszag and John M. Gale at 30, filed in conjunction with EchoStar and DIRECTV Reply Comments, *In re: Sunset of Program Access Exclusive Contract Prohibition*, CS Docket No. 01-290, at 18 (Jan. 7, 2002). EchoStar in that proceeding supports extending the exclusivity prohibition beyond October 2002 and, to that end, hereby incorporates by reference its filings in CS Docket No. 01-290 into this docket. Indeed, this proposed merger further strengthens the case for extending the prohibition in light of the concern with expansion of Comcast's Philadelphia practice and broader foreclosure of additional programming.

Comcast and AT&T will only accelerate the looming future foreclosure predicted by the economists cited above. This troublesome development may portend exactly the generalization of the practice that the Commission has feared.

This concern is far from speculative: the Applicants expressly avow their intent to expand proprietary regional programming across AT&T Comcast's entire 41-state region. The Applicants extol Comcast's "established expertise" in producing local and regional programming, including sports, and claim that this will "enhance" the ability of the merged entity to offer AT&T's existing subscribers the kinds of programming currently enjoyed by Comcast customers, presumably by introducing Comcast's methods into AT&T's franchise areas. Application at 42.

The Applicants fail to connect these dots, however. Comcast's expertise encompasses, of course, the successful Philadelphia experience. Comcast, having benefited from the practice of terrestrially delivering regional programming in its current territory, logically would have an incentive to export this practice to the acquired territories of AT&T. Moreover, the merger could lead to an aggregation of interconnected cable systems, creating a potentially seamless web of terrestrial connectivity across a wide swath of the U.S.

This is presaged by the Applicants' reference to one of Comcast's successful proprietary regional networks, cn8: as "Comcast has grown, and built stronger clusters, cn8's reach, resources, and quality have all grown, too." Application at 43. Indeed they have. And as Comcast establishes the ultimate "cluster" by merging with AT&T, the "reach" of terrestrially delivered local and regional programming will grow, as well. If Comcast imports into AT&T's territories its laudable programming and technical expertise, the Commission also should anticipate the likelihood that Comcast's anticompetitive practices similarly will be brought to consumers living in AT&T's franchise areas. Thus, the concern with Comcast's exclusive dealing practices bears a direct relation to the proposed merger, and a problem restricted to the borders of Comcast's territory today is made worse by the proposed merger.

B. Closing the terrestrial loophole in the program access rules for AT&T Comcast would address an anti-competitive problem exacerbated by the merger

The Commission unambiguously has the authority to address in this proceeding Comcast's anticompetitive application of the terrestrial loophole. In rejecting the program access claims of EchoStar and DIRECTV, the Commission relied in part on its interpretation of the Congressional intent, based on the use of the term "satellite cable programming" in the exclusivity prohibition.³ There, the Commission was enforcing the program access provisions of the Communications Act, and was constrained by what it found to be the bounds of the exclusivity rule.

Here, by contrast, the Commission is charged with either approving, denying, or approving with conditions the transfer of licenses under much broader statutory authority.⁴ Moreover, it is well established that the Commission may impose conditions on a license transfer in order to address an anti-competitive outgrowth of the proposed transaction.⁵ The creation of AT&T Comcast, the largest MVPD in the U.S. with almost 40 million subscribers and a footprint extending over 41 states, would lead to the proverbial loophole swallowing the rule, as regional sports and other competitively critical programming would be migrated to nationwide terrestrial delivery systems, sheltering such programming from the pro-competitive statutory program access provisions and squelching MVPD competition. *See Third Annual Report*, 12 FCC Rcd. at 4435.

³ *EchoStar and DIRECTV v. Comcast*, 15 FCC Rcd. 22802, 22807 (2000).

⁴ See 47 U.S.C. §§ 214, 310 (establishing the "public interest" standard of review in license transfer proceedings).

⁵ See, e.g., *In re: Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc. Transferee*, 16 FCC Rcd. 6547, 6610 (2001). (The Commission has "broad authority to attach conditions to a transfer of lines and licenses to ensure that the public interest is served by the transaction ... [and may] prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act").

The Commission can prevent this systematic elimination of MVPD competition with a simple condition that AT&T Comcast no longer be allowed to invoke the terrestrial loophole in the prohibition on exclusivity. The Commission may articulate such a condition in a single ordering clause:

IT IS ORDERED that [the application for consent to transfer of control] is GRANTED, SUBJECT TO THE CONDITION that AT&T Comcast shall comply with 47 C.F.R. 76.1000-1004, or any successor provisions ("Program Access Rules"), EXCEPT THAT for purposes of this Order, "satellite cable programming" as used in the Program Access Rules shall mean "video programming which is transmitted via satellite **or any other means**, and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming."

EchoStar believes that such a condition would narrowly address a quantifiable anticompetitive phenomenon existing in Comcast's territory today and made worse by the merger. It would be merger-specific, simple, and well within the Commission's authority. The Commission should not lose this opportunity to protect consumers.

II. THE AT&T-COMCAST TRANSACTION HAS PROFOUND IMPLICATIONS FOR THE PROPOSED ECHOSTAR-HUGHES MERGER

Perhaps nothing more clearly illustrates the need for EchoStar and Hughes to stay competitive through their merger than the AT&T-Comcast consolidation. If consummated, this transaction will further increase cable and program ownership concentration. The Washington Post, *Giant Cable Merger Planned, AT&T, Comcast Set \$72 Billion Deal* (Dec. 20, 2001). The resulting cable behemoth will dwarf New EchoStar in terms of numbers of subscribers nationwide and will far surpass the individual subscriber bases of EchoStar and DIRECTV separately.⁶ Such a giant would have the leverage to extract

⁶ The merged entity – AT&T Comcast – would have roughly 22 million subscribers. However, that figure does not include the MVPD subscribers served by entities in which AT&T Broadband currently has an interest; for example, AT&T Broadband has a 25 percent interest in Time Warner's cable systems. According to AT&T Broadband, "[i]f [Time Warner Entertainment] and [Time Warner, Inc.] subscribers were nonetheless added to AT&T's totals, AT&T would be attributed with approximately 32,926,000 subscribers." See *Ex Parte* Letter from Douglas Garrett to Magalie Roman Salas, MM Docket No. 92-264, CS Docket No.

even greater cost concessions from video programmers, putting the DBS firms at an even larger competitive disadvantage. As part of its evaluation of this Application, the Commission should inquire into the extent of, and reasons for, the existing disparities in programming terms, which can only be compounded by the proposed transaction. In any event, the merger of EchoStar and Hughes will only begin to redress this imbalance, giving the combined entity the legitimate leverage to try to eliminate existing disparities.

EchoStar also notes that the benefits to flow from the EchoStar-Hughes transaction are even more compelling and transaction-specific than the similar benefits cited here by the Applicants. Broadband deployment is clearly the cornerstone of the Applicants' public interest rationale. They assert that their proposed merger will accelerate the deployment of facilities-based high-speed Internet service, digital video, and other broadband services. Application at 29. They state that the combination will result in an improved ability to finance capital expenditures through cost savings, scale economies, and synergies. *Id.* at 30-35. They explain that the merger will allow them to spread costs across a larger subscriber base. They claim that they will be able to achieve broadband efficiencies through consolidating call centers and other centralized functions. *Id.* at 34.

EchoStar does not dispute these benefits, and indeed agrees with the Applicants regarding the "significant risks and costs in developing and deploying new, facilities-based services to customers." *Id.* at 32. EchoStar and Hughes have pointed to very similar synergies in their merger application. However, the broadband benefits to flow from the EchoStar-Hughes merger are not only more concrete and more

99-251, at 2 (Dec. 18, 2001). If attributable subscribers are thus included, the combined AT&T Comcast would have more than 40 million subscribers – nearly 33 million AT&T subscribers and roughly 8 million Comcast subscribers – representing approximately half of all MVPD subscribers.

directly related to the transaction in question,⁷ they become all the more necessary precisely because of the acceleration of cable broadband deployment cited by the Applicants.

Each of AT&T and Comcast alone has already rolled out high-speed Internet access in significant parts of its territories. Moreover, each company today enjoys the lion's share of the market for high-speed access in those territories. Cable modem service is the undisputed leading broadband platform.⁸ Satellite broadband services, by contrast, remain in the early stages of deployment and cannot match the pricing or quality of cable broadband. Each of Hughes and EchoStar has been struggling in this area with a product that is simply not comparable to cable and cannot dent cable's dominant market power. Indeed, EchoStar has recently decided to scale down its efforts to attract residential subscribers with its current stand-alone product. The prompter deployment of broadband in more territories by AT&T Comcast makes it all the more important to close that gap, and to do so within a time frame that now looms even tighter than before due to the synergies resulting from the AT&T-Comcast merger. If approved, the EchoStar-Hughes merger will usher in for the first time a truly competitive residential broadband service by satellite, and do so in a meaningfully short period of time.

III. CONCLUSION

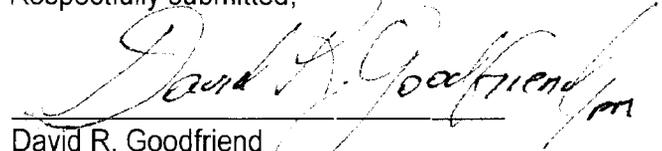
For the foregoing reasons, EchoStar requests that the Commission: (1) condition its approval of the proposed merger on a commitment by the Applicants to make available under the program

⁷ Among other things, the EchoStar-Hughes merger will aid satellite broadband deployment in ways that the AT&T-Comcast transaction cannot help the Applicants here – for example by mitigating the capacity constraints of each company and giving New EchoStar the necessary orbital and spectrum resources required to reach a critical mass of consumers. Neither AT&T's nor Comcast's enhanced cable plants are under similar capacity constraints, and the proposed consolidation of properties in different geographic areas will naturally not add to the capacity available in any particular area.

⁸ *In re Deployment of Advanced Telecommunications Capability*, 25 Comm. Reg. (P&F) 1123, at ¶¶ 44 and App. C, Table 1 (rel. Feb. 6, 2002) (cable modem lines account for 54% of the estimated 9.6 million high-speed lines reported as of June 2001).

access rules "satellite cable programming" when such programming is retransmitted by satellite **or any other means**; and (2) consider the broader implications of the proposed merger.

Respectfully submitted,



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