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

Application of

ECHOSTAR COMMUNICATIONS CORPORATION,
GENERAL MOTORS CORPORATION,
HUGHES ELECTRONICS CORPORATION,

Transferors,

and

ECHOSTAR COMMUNICATIONS CORPORATION,

Transferee,

For Authority to Transfer Control.

EXPEDITED ACTION REQUESTED

CS Docket No. 01-348

Application of

ECHOSTAR SATELLITE CORPORATION
AND HUGHES ELECTRONICS CORPORATION

for Authority to Launch and Operate
NEW ECHOSTAR 1 (USABBS-16).

CS Docket No. 01-348
File No. SAT-LOA-20020225-00023
S2435

To: The Commission

AMENDMENT TO CONSOLIDATED APPLICATION
FOR AUTHORITY TO TRANSFER CONTROL

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To: The Commission

AMENDMENT TO CONSOLIDATED APPLICATION
FOR AUTHORITY TO TRANSFER CONTROL

EchoStar Communications Corporation ("EchoStar"), General Motors Corporation ("GM") and Hughes Electronics Corporation ("Hughes"), a wholly owned subsidiary of GM (collectively, the "Applicants"), hereby amend the above-captioned merger application.' The Applicants respectfully request expedited consideration of the amended application. As set forth herein, the proposed transaction, as amended, would strongly serve the public interest.

I. INTRODUCTION AND SUMMARY

The proposed merger between EchoStar and Hughes' is designed to generate extraordinary efficiencies and significantly enhance competition in the Multichannel Video Programming Distribution ("MVPD) market. In the ***Hearing Designation Order*** (or "***HDO***"), the Federal Communications Commission ("Commission") recognized that the transaction will generate substantial benefits, but also identified a number of competition-related concerns stemming from the resulting reduction in the number of firms providing Direct Broadcast Satellite **("DBS")** service.[3] On account of these concerns, the Commission stated it could not

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[1] The application amendment is composed of this narrative description setting forth the proposed condition to merger approval, a public interest statement explaining that the condition is sufficient to resolve the Commission's concerns and attached FCC Form 312. Except to the extent specifically modified by these submissions, the original Application, as amended, evidentiary filings and related submissions made by the Applicants in this proceeding remain unchanged in all material respects. Under the Commission's Rules, no form or fee is required for an amendment of a DBS application. ***See*** 47 C.F.R. § 1.1107. While the Commission has recently consolidated Part 100 with Part 25 of its Rules and has subjected DBS applicants to 47 C.F.R. § 25.114, ***see Policies and Rules for the Direct Broadcast Service,*** Report and Order, 17 FCC Rcd. 11331, 11350 (2002), the Applicants have already filed FCC Form 312 applications for all DBS license transfers as a matter of convenience, even before that rule became applicable to DBS. The present minor amendment merely adds a proposed condition to grant of the merger application. Nevertheless, out of an abundance of caution, the Applicants are hereby filing an amended FCC Form 312 application for the licenses implicated in the proposed condition that includes an asterisk describing this condition.

[2] ***See*** Consolidated Application for Authority to Transfer Control, CS Docket No. 01-348 (filed Dec. 3, 2001) at n.2. The holding company referenced there is expected to be HEC Holding, Inc., a Delaware corporation.

[3] ***See generally Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation,*** Hearing Designation Order, FCC 02-284, CS Docket No. 01-348 (rel. Oct. 18,2002) ***("Hearing Designation Order").***

conclude on the basis of the record assembled up to that point that the proposed transaction would serve the public interest, and designated the above-captioned applications for an evidentiary hearing. However, the Commission afforded the Applicants thirty days from the mailing of the ***Hearing Designation Order*** to file an amended application ameliorating the competition concerns identified by the Commission:

To cure the Commission's concerns, the Applicants hereby amend the proposed merger application in a manner that will ensure the creation and competitive viability of an additional, facilities-based DBS competitor -- R/L DBS Company, LLC ("Rainbow"), an indirect wholly-owned subsidiary of Cablevision Systems Corporation ("Cablevision"). Specifically, the Applicants hereby amend their merger application to request approval of the merger contingent on the execution of a divestiture agreement that will include the assignment to Rainbow of Echostar's authorizations to provide DBS service from the 61.5° W.L. and **148"**W.L. orbital locations and associated satellite resources, as well as resale of New Echostar's services by Rainbow. This remedy is significantly broader than the proposal presented by the Applicants to the Department of Justice on October 28,2002.

Under this proposed remedy, the parties and New EchoStar would agree? as a condition to approval of the merger, to, among other things:

- Divest to Rainbow EchoStar's license for **11** licensed frequencies at the 61.5° W.L. slot;
- Assign to Rainbow the right to operate over **6** frequencies at the 61.5" W.L. slot that EchoStar uses under a lease with Dominion (assuming, as EchoStar has preliminarily concluded, that the lease permits assignment by Echostar);

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[4] ***See id.*** at ¶ 295.

[5] These proposals remain subject to definitive agreement with Rainbow.

- Divest to Rainbow EchoStar's license for **24** frequencies at the **148° W.L.** slot;

- Divest to Rainbow EchoStar's Special Temporary Authority for 2 unassigned frequencies at the 61.5" **W.L. slot** and **8** frequencies at the **148" W.L.** slot:

- Divest to Rainbow the EchoStar **III** satellite by sale and the EchoStar I and II satellites by lease, providing sufficient capacity to carry Rainbow's transmissions on the divested spectrum;

- Share with Rainbow facilities for local signal collection and backhaul **of** local broadcast transmissions, thereby reducing Rainbow's costs of offering local broadcast channels on its DBS service:

- Grant to Rainbow resale rights. New EchoStar will license to Rainbow the right to resell New EchoStar's full line of DBS services, including all new and enhanced DBS services enabled by the merger. In return, under the proposal, Rainbow would license its full product line to New EchoStar for New EchoStar to resell to its subscribers. This means that services provided from the entire DBS orbital spectrum of 61.5°, 101°, 110°, **119°**, 61.5" and 148" **W.L.** locations will be available to all customers of New EchoStar and to all customers of Rainbow. Each company will market, package and price as it sees fit, thus enhancing competition between DBS firms and against the cable companies:

- Give Rainbow enhanced ability to market to existing DBS subscribers. During the equipment transition process (*i.e.*, the set-top box and dish swap), New EchoStar will give subscribers in need of an upgrade the option of switching their DBS service to Rainbow or of taking Rainbow service in addition to New EchoStar service; and

- Ensure open access to retail distribution. The companies **are** also willing to discuss methods to ensure that Rainbow is able to attain open access to retail distribution.

The Applicants plan to soon file a separate application seeking the Commission's approval for the license transfers to Rainbow encompassed by this transaction.

The proposed divestiture will create a DBS competitor with a capacity to provide programming equal to, and in all probability greater than, each of the DBS firms today, eliminating all the uncertainties about Rainbow's entry in the market identified by the

Commission in the ***Hearing Designation Order***.[6] This means that, if the Commission approves the merger, consumers will enjoy a triple win. ***First,*** they will obtain virtually all of the benefits of the merger, including expanded local-into-local service, residential broadband service by satellite, and a more vigorous competitor against cable (and against the video/Internet access that cable operators provide). ***Second,*** at the same time, consumers will secure a ***second*** vigorous DBS competitor, and no reduction in the number of competing providers, in the MVPD market. Instead of "3 to 2" or a "2 to 1," this transaction will be a "3 to 3" or "2 to 2" combination in most areas of the country. Finally, by virtue of the divestiture proposal, which will strengthen Rainbow, consumers will benefit from a more powerful competitor than either EchoStar or DIRECTV would be alone – a move from two spectrum-constrained DBS providers to two newly configured providers that will be substantially strengthened compared to the status quo.[7] Indeed, the effectiveness of the proposed remedy has been bolstered even further by a very recent development – a transaction announced on November 4th between NBC and Cablevision where, among other things, NBC will purchase Cablevision's interest in Bravo. That transaction increases substantially the capital that could be available to Rainbow and should remove any remaining doubt that Rainbow's entry will become likely, timely and effective by virtue of the amended merger proposal.

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[6] ***See Hearing Designation Order*** at ¶ 143.

[7] Rainbow will be able to compress more channels of programming from each of its DBS channels than New Echostar, since it will not be inhibited by the burdens of legacy equipment that, as the ***Hearing Designation Order*** recognizes, hamper the Applicants. ***See Hearing Designation Order*** at ¶ 79 ("We agree with the Applicant that the spot beam satellites on which the Opponents base their claims may not be technically and economically viable, at this time. . . . This is not to say that these technologies would not be economically feasible in a 'greenfield' application . . . .").

Rainbow's right to resell New EchoStar services and the option for New EchoStar subscribers in need of an equipment upgrade after the merger to switch to Rainbow will ensure that Rainbow's entry will be adequate and effective and that it will exert sufficient discipline on New EchoStar's conduct. These supplemental terms, not presented to the Department of Justice at the October 28,2002 presentation, are designed to enable Rainbow to achieve economies of scale more quickly and with less risk. They are anticipated to do so by providing Rainbow with, among other things: (1) a broader range of video programming and services to offer immediately and the full range of programming and services generated by the merger to offer in the future; **(2)** another outlet and revenue stream (from New EchoStar resale) for its own programming and services; and **(3)** unprecedented access to potential customers. In addition, the net result of the proposal will be a level of competition and programming diversity that far exceeds what exists today and that will significantly expand options to all consumers. In other words, not one but two companies will be able to take full advantage of the huge benefits unleashed by the merger. Because of the right to resell New EchoStar service, Rainbow might choose, for example, to provide complementary programming from 61.5" **W.L.** and **148° W.L.** (as opposed to programming duplicating New EchoStar's offerings), minimizing the duplicative use of the DBS spectrum and preserving the promise of spectrum efficiency.

Therefore, while preserving other merger benefits, the creation of an additional DBS provider will cure all of the countervailing competition concerns identified by the Commission even if these concerns were viewed in the light least favorable to the Applicants.'

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[8] The condition should also allay the Commission's spectrum policy concern about a single provider controlling all U.S. "full-CONUS" orbital locations. The combination of the two DBS wing slots will provide Rainbow with full-CONUS coverage. In fact, one of these slots can provide service to almost all of the United States, and the other one can also provide service to

For example, the proposed divestiture condition **will** create an additional competitor regardless of how narrowly the relevant product and geographic markets are defined:[9] and it will eliminate the possible welfare losses feared by the Commission even accepting the worst-case scenario for such losses postulated in the ***Hearing Designation Order.***

In fact, the ***Hearing Designation Order*** acknowledges the possibility that the merger, even if left unconditioned, might produce net welfare benefits for consumers.[10] In addition, the Applicants respectfully submit that in the ***HDO*** the Commission demonstrably underestimated the size of the benefits to be generated by the merger, and conversely overstated the extent of the competitive harms associated with the merger. For purposes of this amended application, however, it is not necessary to engage in a precise and definitive quantification of benefits and competitive effects. As mentioned, the Applicants' remedy proposal is more than adequate to neutralize the perceived competition concerns even assuming the worst set of facts and assumptions for the Applicants.

Accordingly, as the Applicants argue in a separate Petition for Suspension of Hearing filed today, the Commission should suspend the hearing for the purposes of evaluating the remedial value of the Applicants' amended application. The Commission should place the amended application on public notice, and grant the application without a hearing if it agrees

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well over half of the United States. This means that the two orbital locations divested to Rainbow have overlapping coverage and that consumers in many states will be able to receive Rainbow programming from both slots.

[9] The Applicants continue to believe firmly that the **MVPD** market is the relevant product market for analyzing this transaction, but the remedy proposal presented here would have the same effect – preservation of the number of providers – even in the DBS industry.

[10] While the Commission substituted its own diversion rates and other numbers in the Applicants' simulation analysis, many of the cases it considered still yield significant net welfare benefits. ***See Hearing Designation Order*** at Appendix **E, ¶ 30.**

with the Applicants that the proposed remedy is effective in ameliorating its competition concerns.

This will conserve both the Commission's and the parties' resources, allow a Commission decision well before the trigger dates for termination of the Merger Agreement, and increase the likelihood that the merger, as modified, will be consummated, resulting in significant consumer benefits. The Agreement and Plan of Merger between EchoStar and Hughes contains several termination provisions, including, among other things, provisions that permit Hughes to terminate the transaction under certain circumstances if Commission approval is not received on or before January **6,2003,** or if the merger is not consummated by January **21, 2003.** Accordingly, the parties urgently need Commission resolution before the effective termination dates; only expedited action can secure meaningful relief for the parties and for consumers.

11. BACKGROUND

In addition to its CONUS slots, EchoStar currently offers DBS service from the **61.5"W.L.** and **148"W.L.** orbital locations (the "wing slots"). Specifically, EchoStar is licensed to operate **11** frequencies at **61.5"W.L.**,[11] subleases six frequencies from Dominion Video Satellite, Inc. (which has a license for a total of 8 channels at that location), and also holds an STA to operate over the remaining **13** channels **(11** of which are allotted to Rainbow but are currently unused)." EchoStar is also licensed to operate on **24** frequencies at the **148º W.L.**

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[11] ***See Application of Direct Broadcasting Satellite Corporation for Assignment of Direct Broadcast Satellite Orbital Positions and Channels, 8*** FCC Rcd 7959 (Int'l Bur. **1993).**

[12] At this orbital location, EchoStar holds a license for **11** frequencies, Rainbow holds a permit for **11** frequencies, and Dominion Video Satellite, Inc. ("Dominion") holds a license for 8 frequencies; the remaining 2 frequencies are unassigned. The International Bureau has granted Special Temporary Authority ("STA") to EchoStar to operate over the frequencies assigned to

orbital location,[13] and operates over the remaining eight frequencies at that location pursuant to STA.[14] EchoStar has invested hundreds of millions of dollars in acquiring the rights to use the **61.5" W.L.** and **148" W.L.** orbital locations and building the satellites that are deployed there (Echostar I and II at 148° W.L., and EchoStar III at **61.5" W.L.**).[15]

Rainbow is currently constructing a satellite to provide DBS service from its allotted 11 channels at the **61.5" W.L.** slot. Rainbow plans to offer multichannel DBS service throughout the continental United States, with an added emphasis on locally and regionally oriented programming.[16] Under its current standalone plans, Rainbow is scheduled to launch the satellite in March **2003,** and to begin offering its DBS service to consumers by the end of **2003.**

Rainbow and the two unassigned frequencies, *see Direct Broadcasting Satellite Corporation Application for Special Temporary Authority to Operate a Direct Broadcast Satellite over Channels* **1-21** *(odd) and* **23-32** *(odd and even) at 61.5 W.L.,* **13** FCC **6392** (Int'l Bur. **1998);** *Direct Broadcasting Satellite Corporation Application Authority of a Direct Broadcast Satellite, Application for Modification and Request for Special Temporary Authority to Test,* **13** FCC Rcd **10080** (Int'l Bur. **1998).** *See also Dominion Video Satellite, Inc.,* **14** FCC Rcd **8182** (Int'l Bur. **1999);** Dominion uses two of its frequencies for its religious programming and subleases six of its frequencies to Echostar.

[13] *See Application of EchoStar DBS Corporation For Authority to Construct Launch and Operate a Direct Broadcast Satellite System at 148" W.L.,* **12** FCC Rcd **11946** (Int'l Bur. **1996);** *EchoStar Satellite Corporation, et. al, Application for Authority to Make Minor Modifications to Direct Broadcast Satellite Authorizations, Launch, and Operational Authority,* **13** FCC Rcd **8595** (Int'l Bur. **1998);** *EchoStar Satellite Corporation Application for Authority to Make Minor Modifications to Direct Broadcast Satellite Authorizations, Launch, and Operation Authority,* **15** FCC Rcd **23636** (Int'l Bur. **2000).**

[14] *See* FCC File *Nos.* **SAT-STA-20011025-00091** and **SAT-STA-20020716-00115 (STA** renewal application).

[15] In addition to the significant costs typically associated with implementing a U.S.-licensed satellite system, EchoStar acquired the license for the **148" W.L.** orbital location by paying **$52.3** million as the winning bidder at an auction conducted by the Commission in **1996.**

[16] Rainbow is not a **party** to this application, and the submission is based solely on publicly available information about Rainbow's DBS plans.

III. PUBLIC INTEREST ANALYSIS

The Applicants incorporate by reference the public interest showing that they have made for the merger in their original application and subsequent submissions. The merger will produce significant benefits and create a more vigorous competitor to cable operators than either DIRECTV or EchoStar could be on a stand-alone basis. This section is focused on the public interest effect of the Applicants' divestiture proposal. In short, the proposed divestiture will neutralize the competitive concerns identified by the Commission and, in fact, create more effective competition still, since Rainbow itself will likely be a more robust competitor than either EchoStar or DIRECTV could be without the merger.

A. Divestiture

Under the proposal, New EchoStar will divest all of EchoStar's rights to all of its frequencies at the 61.5" W.L. and 148"W.L. locations to Rainbow.[17] New EchoStar will also transfer to Rainbow (at its request) up to three currently orbiting satellites, by selling for a mutually agreeable price EchoStar III at 61.5" W.L., and leasing EchoStar I and EchoStar II at 148"W.L. These satellites, which would supplement Rainbow's first satellite, will be sufficient to use all the frequencies that would be assigned to Rainbow at each slot. The leased satellites would be leased until Rainbow launched one or more new, more efficient satellites to replace them. The transaction would close no later than December 31,2003, subject to regulatory approval.[18] With additional spectrum, Rainbow believes that it could carry over 300 standard

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[17] EchoStar would also assign the lease to the frequencies currently leased from Dominion to Rainbow, assuming, as it currently believes, that it has right to do so.

[18] The Applicants urge the Commission to approve the merger prior to the relevant termination dates, subject to the condition subsequent of consummating the agreement with

definition national channels and **40** HDTV national channels, in addition to local broadcast channels and **16** standard and **2** HDTV regional networks in each of **22** regional areas.

The satellite transfers have the additional procompetitive benefits of providing New EchoStar with even greater incentives to complete its transition and spectrum reclamation efforts in a timely fashion. In order to avoid any disruption of the services it currently provides with the assets that will be divested to Rainbow, New EchoStar will need to reclaim full-CONUS spectrum and transition its wing slot customers to that spectrum before the end of **2003,** at the very latest.

Without the proposed divestiture, Rainbow's **DBS** offering will remain constrained by limited capacity **(11-13** frequencies) and the inability to serve effectively portions of the United States. However, with the additional spectrum and satellites acquired pursuant to the proposed divestiture, Rainbow would be a full-fledged **MVPD** competitor with channel capacity at least equal to, and likely greater than, either of the **DBS** companies today.

Cablevision. ***See supra*** at **8.** This is typical and consistent with divestiture conditions imposed by the Commission in the past. In fact, the proposed divestiture is far more concrete than divestiture requirements typically imposed by the Commission, where even the identity of the buyer is unknown at the time the condition is imposed. ***See, e.g., In the Matter of Telemundo Communications Group et al.*****, 17** FCC Rcd. **6958 (2002)** (approving the transfer of television licenses and giving the transferee **12** months to divest a station to come into compliance with television duopoly rule); ***In the Matter of Applications of UTV of San Francisco et al.*****, 16** FCC Rcd. **14975,14990 (2001)** (approving the assignment of television licenses held by subsidiaries of Chris-Craft Industries to Fox Television Stations, Inc. on the condition that Fox divests assets within a specified period of time in order to come into compliance with the multiple ownership and cross-ownership rules); ***In re Applications of Stockholder Renaissance Communications Corporation and Tribune Company,*** **12** FCC Rcd. **11866, 11890 (1997)** (approving a transfer of control of television stations with the condition that certain assets are divested within a specified time period in order to comply with multiple ownership rules).

B. The Proposed Divestiture Will Ensure That Rainbow Has the Spectrum and the Satellites To Be Competitive

As mentioned above, Rainbow currently has an FCC authorization for 11 of the 32 frequencies available at the 61.5"W.L. orbital location. EchoStar has a license for 11 frequencies at that location, while Dominion has a license for 8 frequencies, of which 6 are covered by a sublease to EchoStar.[19] The remaining two channels at that location are unassigned. EchoStar currently has an STA for the two unassigned frequencies (as well as Rainbow's currently unused 11 frequencies). As for the 148"W.L. orbital location, EchoStar has a license for **24 DBS** frequencies and an STA for the remaining 8 frequencies.

The footprint of satellites operating from the 61.5"W.L. location covers the entire continental United States, as well as Puerto Rico and the U.S. Virgin Islands.[20] That slot is technically not a "full-CONUS" slot only because some subscribers in certain limited parts of the United States cannot obtain the required elevation angle necessary for a clear line-of-sight to the satellite. This constraint is generally limited to certain portions of the northwestern Pacific Coast region, and may or may not arise depending on the subscriber's surrounding terrain. In any event, in recognition of these difficulties, the remedial proposal includes transfer **of** spectrum rights and satellite capacity at 148"W.L. as well. That latter slot is the "easternmost" western U.S. orbital location, *i.e.*, the western slot with the best coverage of a significant part of the

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[19] EchoStar leases 8 transponders of satellite capacity to Dominion, which subleases ***6*** transponders back to EchoStar. Dominion uses the remaining 2 transponders for its own programming.

[20] For example, all of the continental United States, including the states of Washington and Oregon, receives a sufficiently strong signal (48 dBW or more) from EchoStar III to allow service to small receive dishes (assuming no line-of-sight issues).

United States?' The geographic coverage of the 148" W.L. location not only complements that of 61.5° W.L., but also overlaps it. That location can therefore be used both to provide single-dish service to those subscribers in the Pacific Northwest who might have difficulties receiving service from 61.5" W.L., and to provide additional programming for consumers who can use two dishes to receive service from both slots.

One benefit of the transaction is that it will give customers in the Northeast a better "look angle" for core programming compared to their current satellite choices, thus opening up more choices for consumers whose access to satellite TV had been obstructed by trees or terrain features between the consumer and the incumbents' satellites. From the perspective of consumers in much of the eastern United States, Rainbow's satellite at the 61.5" W.L. location will be much higher in the sky than EchoStar's and Hughes' satellites. For example, the "look angle" from Boston to EchoStar's 119" W.L. core satellites is just 21°, and to DIRECTV's 101° W.L. location is 32°, but to the 61.5" W.L. slot that angle is 40". In Maine, the look angles from 119" W.L. and 101" W.L. are even lower. When the satellite is at a higher angle from the horizon, fewer consumers are blocked from receiving service by trees and other obstructions. Estimates are that anywhere from 15% to 30% of the potential subscribers in the Northeast cannot receive EchoStar service due to line of sight issues. This affects a large number of consumers because the Northeast is the most densely populated area of the country. Thus, Rainbow's offering of its core programming from 61.5" W.L. will expand the number of MVPD choices for many consumers who cannot receive satellite service now due to poor look angles.

[21] For that reason, EchoStar has paid a significant amount to obtain an authorization for that slot.

The combination of EchoStar's and Rainbow's wing-slot resources would offer **28** frequencies at the **61.5**"W.L. location and **24** frequencies at the **148**"W.L. location. In addition, the ***2*** unassigned frequencies at **61.5"W.L.** and **8** unassigned frequencies at **148**"W.L. that the FCC has authorized EchoStar to use under STAs, with no other application pending, also should be available to Rainbow. **All** told, Rainbow would have **32** frequencies at the **148**"W.L." location in addition to **30** frequencies at the **61.5**"W.L. orbital location.

Rainbow would be able to offer core national, regional and local programming to consumers nationwide on a single dish. Specifically, while Rainbow could transmit national programming from each wing slot, it could also make effective use of the wing satellites by transmitting regional programming, including local-into-local channels, from the appropriate slot. For example, San Francisco local channels and other regional content could be carried from the western wing slot, while Philadelphia local channels and regional content could be carried from the east. This would leave a large number of frequencies available for national programming as further described below.

With Rainbow and EchoStar's combined spectrum resources at the **61.5**"W.L. and **148° W.L.** locations, and Rainbow's ability to use those resources to maximum efficiency with new technology, Rainbow will be a full-fledged MVPD competitor with channel capacity at least as great as each of the DBS companies today.

Without this proposed divestiture, Rainbow would have **11** frequencies at **61.5**" W.L. The proposed divestiture would provide Rainbow a total of **62** frequencies **–** more than five times the number of DBS frequencies currently assigned to Rainbow:

	61.5”W.L.	**148”W.L.**
Rainbow’s License	**11** frequencies	
EchoStar’s Licenses	**11** frequencies	**24** frequencies
Unassigned/ STA	**2** frequencies	**8** frequencies
Dominion Lease	**6** frequencies	
Total	**62** frequencies	

[22] ***Hearing Designation Order*** at ¶ ***19.***

	DIRECTV	Rainbow
Frequencies for Core, National Service	26 at 101"W.L.	Matched with 23 frequencies each at 61.5" W.L. and at 148° W.L. with 15% improvement in modulation and compression
Frequencies for Local Service	6 at 101° W.L. 3-4 at 119"W.L.	Matched with 3 at 61.5" W.L. and 4 at 148° W.L. with 15% improvements in modulation and compression, and 15% improvement in spot-beam efficiency
Frequencies for Specialty Service	**3** at 110"W.L. 7-8 at 119"W.L.	Matched with 4 at 61.5" W.L. and 5 at 148"W.L. with 15% improvement in modulation and compression

Moreover, Rainbow's existing programming business will give it a significant advantage in utilizing this spectrum. Using its programming assets, Rainbow's stated plans include differentiating itself with regional content. This strategy will allow Rainbow to use spot-beams to expand capacity, by transmitting different regional content to different regional areas. Vertically unintegrated, DIRECTV and EchoStar lack any such content and have used spot-beams only for local broadcast channels.

Rainbow apparently views the above estimate of capacity gains as conservative. With the additional spectrum from the divestiture, and assuming the successful implementation of the technologies it has under development, Rainbow estimates it would have enough spectrum at the 61.5" W.L. orbital location to carry:[23]

[23] EchoStar and DIRECTV do not necessarily adopt Rainbow's conclusion that this level of spectrum utilization could be achieved because they are not privy to Rainbow's research and development and have not seen empirical evidence supporting this conclusion. Nevertheless, with the combined spectrum and the latest existing technology, it is clear that Rainbow will be able to offer programming that is competitive with either firm's current offering.

- **320** or more national standard definition television channels;[24]
- **40** national high definition television channels;
- local-into-local service and other regional programming (including High Definition) initially covering **143** DMAs, and eventually covering all **210** DMAs.[25]

In short, Rainbow standing alone, with the frequencies and satellites obtained through this divestiture proposal, could offer a competitive DBS service that provides at least as many channels as each DBS company offers today, and is very likely to offer more programming to consumers. This would result in two stronger DBS competitors, each of which would be able to offer a better package of programming to consumers than either can today. Thus, not only would the proposed divestiture cure the competition concerns expressed by the Commission, but it would ***add*** competition compared to the status quo, since the number of DBS providers will be the same and both will be stronger than either DBS provider is today. While the Applicants believe strongly that the relevant product market for analyzing this transaction is the MVPD market, such beneficial effect would be felt even if the relevant product market were defined as narrowly as the DBS industry, obviating any need for the Commission to resolve the relevant market issues.[26]

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[24] **320** channels is Rainbow's estimate of national programming capacity available from the **61.5**" W.L. slot alone. That number would increase depending on how much spectrum at the two slots Rainbow devotes to duplicative national programming.

[25] With the merger, New EchoStar will be able to greatly expand its local-into-local service. Rainbow would initially be able to serve **143** DMAs, and ultimately perhaps all **210** DMAs. Without the merger, there is no question that neither EchoStar nor DIRECTV would serve anywhere close to **143** DMAs with local programming. In other words, in no case would the number of satellite providers providing local-into-local to a particular area decrease compared to today, and in many cases it would increase from 0 to **1, 1** to **2** or 0 to 2.

[26] ***Hearing Designation Order*** at **¶¶ 110-115.**

C. Proposed Commitments to Reduce Rainbow's Costs and Facilitate Entry.

New EchoStar has committed to facilitate Rainbow's entry in the following ways. First, giving Rainbow resale rights and giving consumers in need of an upgrade the option of switching to Rainbow will ensure that Rainbow's entry will be adequate and effective and that it will exert sufficient discipline on New Echostar's conduct. Second, New Echostar's agreement to share various facilities and costs will also reduce a significant component of Rainbow's cost of providing service, particularly local service. These steps, **as** described further below, will reduce the bamers to entry and acceptance for the new entrant.

1. Resale rights and an enhanced opportunity to market to existing DBS subscribers will greatly facilitate Cablevision's entry.

These supplemental terms are designed to enable Rainbow to achieve economies of scale more quickly and with less risk. They are anticipated to do so by providing Rainbow with, among other things: **(1)** a broader range of video programming and services to offer immediately and the full range **of** programming and services generated by the merger to offer in the future; (2) another outlet and revenue stream (from New EchoStar resale) for its own programming and services; and **(3)** unprecedented access to potential customers. In addition, the net result of the proposal will **be.** a level of competition and programming diversity that far exceeds what exists today and that will significantly expand options to all consumers. In other words, not one but two companies will **be** able to take full advantage of the huge benefits unleashed by the merger. Because of the right to resell New EchoStar service, Rainbow might choose, for example, to provide complementary programming from **61.5"W.L.** and 148"**W.L.** (as opposed to programming duplicating New Echostar's offerings), minimizing the duplicative use of the **DBS** spectrum and preserving the promise of spectrum efficiency.

2. New EchoStar's commitment to share signal collection distribution costs will reduce Rainbow's operating costs.

New EchoStar and Rainbow would agree to share with Rainbow facilities for local signal collection, backhaul and distribution to uplink centers to reduce costs. This will enable Rainbow to deliver programming, particularly local programming, on a much more cost-effective basis than it would be able to without such an arrangement.

D. With the Divestiture, Entry Will Be Timely, Likely and Sufficient to Prevent Any Anticompetitive Consequences.

In discussing Rainbow's potential as an entrant, the ***Hearing Designation Order*** cited too many "uncertainties associated with the launch of a new satellite, operation of ground facilities, acquisition of distribution agreements with local equipment retailers and installers, and deployment of a new DBS service to assume that Rainbow DBS could have a significant competitive impact within the relevant two-year timeframe."[27] The divestiture proposal resolves or significantly allays these uncertainties. It endows Rainbow with additional operational satellite capacity, gives it access to facilities for local signal collection and backhaul of local broadcast transmissions and helps provide it with scale advantages that will speed up its entry and cement its competitive presence. By the same token, the divestiture proposal meets the requirement of timely, likely and sufficient entry articulated by the Merger Guidelines to deter anticompetitive conduct.[28]

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[27] ***Hearing Designation Order*** at ¶ **143.**

[28] ***See*** Merger Guidelines **§ 3.** The Section that follows discusses Rainbow's plans to the extent that the Applicants are familiar with them. Because Rainbow and Cablevision are actual competitors, they have not shared with the Applicants many important details of their plans, including distribution, marketing, programming and financing. Rainbow can provide the Commission with more detailed information on all these issues.

1. **Entry** will be timely.

As noted above, Rainbow will launch its first satellite in March **2003** and begin service no later than December **2003.** If approved, the merger will close before then.[29] Indeed, Echostar and Hughes need to consummate their merger and begin the spectrum reclamation/transition process in advance of Rainbow using the divested spectrum or satellites. New Echostar needs to reclaim some of its duplicated CONUS spectrum in order to have room on its CONUS transponders for the services currently carried on its wing slots, services that need to be moved to CONUS to permit Rainbow to use the divested frequencies and transponders.

Within a year of the merger, Rainbow will be fully operational, and offering service to the entire continental United States. Although the service is likely to have few subscribers when it launches, it will have established by then a national retail distribution network and will be actively marketing the product using both its internal resources (*e.g.,* ad avails on its programming) and outside marketing efforts. In all likelihood, it will have some differentiated content to appeal to consumers. In any event, the relevant metric in evaluating its competitiveness, of course, is not its current subscriber base, but its ability to grow in the event that the incumbents attempt to exercise market power.[30]

Rainbow will not be operational for a short period of time after the merger closes, but that is not competitively significant for a number of reasons. First, the timeliness of Rainbow's entry will be greatly enhanced by the resale rights and opportunity to market to

[29] See supra at 8. As discussed above, the Applicants urge the Commission to take expedited action and approve the merger prior to the contract termination dates.

[30] See *id.*

existing DBS subscribers described above. Indeed, the resale rights may enable Rainbow to start reselling New EchoStar service prior to commencing the service from its own slots.

Second, the threat of imminent entry would deter both New EchoStar and other MVPD providers from taking other actions that would ease Rainbow's ability to take their customers once it entered.[31] If New EchoStar failed to offer attractive prices and high quality service, that strategy would undermine EchoStar's and DIRECTV's significant investment in establishing DBS's reputation for good value and customer responsiveness, and would certainly backfire with the entry of Rainbow.

Third, when Rainbow begins service, New EchoStar will not yet have reclaimed enough spectrum to offer the full array of enhanced channel offerings and advanced services that the merger will bring. In fact, New EchoStar will be in the middle of its transition, which Rainbow might seek to exploit to attract new customers. Moreover, the chance that the launch could be delayed due to technical issues does not affect the basic dynamic protecting competition in the market, that threat of imminent entry will prevent the exercise of market power.

2. Entry is likely.

Entry that would deter or counteract the competitive effects of concern within a two-year period is considered timely under the Merger Guidelines.[32] Rainbow has already invested hundreds of millions of dollars in its new satellite, and is committed to investing hundreds of millions more. Thus, entry is not merely likely, but highly probable. There are only two events that could impede Rainbow's plans to enter: (1) a satellite launch failure, which might set back but would not prevent entry; and (2) a failure to raise enough capital to complete the

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[31] *See, e.g.,* United *States v. Penn-Olin Chemical Co.,* 378 U.S. 158, 174 (1964); *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 988 (D.C. Cir. 1990).

[32] *See* Merger Guidelines § 3.2.

entry process. The risk of launch failure is low, and the divestiture would also ameliorate that risk. The divestiture would also make capital for the project easier to raise.

a. Launch failure

The divestiture of the frequencies and lease of the satellites (as well as the resale rights) would provide a backup so that Rainbow could provide service in the very unlikely event of a launch failure.[33] Under its current plan, Rainbow has no backup in the event of a failure. With the divestiture, if the launch failed, Rainbow would still be able to transmit over 250 national channels, plus 250 regional and local channels, in addition to reselling New EchoStar services. While product offerings based on this capacity would likely not be as fully competitive with what New EchoStar will offer once the transition is complete, this offering, coupled with the prospect of additional capacity in the future, would be enough to serve as a competitive check, at least to the extent that one of the current DBS providers has done so.

Second, with the divestiture plan, Rainbow could begin construction of its second next-generation satellite as soon as the divestiture agreement is executed, a satellite it would not likely build without the divested spectrum. While this satellite would not be ready by December 2003, it would certainly be launched much earlier than if construction did not begin until after a launch failure.

b. Capital for the project

Both Cablevision and Rainbow are experienced operators with proven track records and established subscriber bases. Cablevision is one of the largest telecommunications and media entertainment companies in the country. It owns and operates cable systems in three

[33] Neither EchoStar nor DIRECTV has ever suffered complete launch failure. Lockheed Martin, Rainbow's vendor, is of course an experienced and highly capable satellite builder.