

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

In the Matter of:

Rainbow DBS Company LLC, Assignor

and

EchoStar Satellite L.L.C., Assignee

Consolidated Application for Consent to
Assignment of Space and Earth Station Licenses,
and Related Special Temporary Authorization

IB Docket No. 05-72

Call Signs: DBS 8701 and E020248

IB File No. SAT-ASG-20050128-00017:

IB File No. SES-ASG-20050131-00117:

IB File Nos. SAT-STA-20030623-00122;
SAT-STA-20040319-00081; and SAT-
STA-20040924-00191

JOINT PETITION TO DENY
APPLICATION FOR CONSENT TO ASSIGNMENT OF LICENSES

March 28, 2005

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APPLICATION FOR CONSENT TO ASSIGNMENT OF LICENSES

VOOM HD, LLC (“VOOM HD”) and The Association of Consumers to Preserve and Promote DBS Competition hereby submit their Joint Petition to Deny the above-referenced Application of EchoStar Satellite L.L.C. (“EchoStar”) to acquire from Rainbow DBS Company LLC (“Rainbow DBS”) (collectively, the “Applicants”), among other things, the authority to operate a Direct Broadcast Satellite (“DBS”) space station on eleven channels at the 61.5° W.L. orbital location.¹ As demonstrated herein, the proposed transaction would conflict with the FCC’s well-established policy of fostering competition and new entry among DBS service providers. Even more troubling, grant of the Application would directly conflict with the FCC’s specific finding that it would disserve the public interest for EchoStar to acquire any additional DBS capacity at 61.5° W.L.

¹ Application of EchoStar Satellite LLC for Space Station Assignment to Operate Permanently on 11 Channels and by STA on 2 Channels at 61.5WL, File No. SAT-ASG-20050128-00017, at 4 (filed Jan. 28, 2005) (citations omitted) (“Application”).

VOOM HD was formed for the express purpose of owning and operating a DBS business. It will have the management skills, financing, and dedication to needed to carry out this objective. Specifically: (1) Charles F. Dolan will bring extensive knowledge of and experience in the DBS business to the Company; (2) VOOM HD is in the process of obtaining financial commitments from its controlling investors in the amount of \$400 million in cash and credit; and (3) it stands ready, willing, and able to compete for the purchase of the Rainbow DBS transponders located at 61.5° W.L. should they once again become available in the market.² The Association of Consumers to Preserve and Promote DBS Competition is an association comprised of individuals, over the age of 18, who are consumers of DBS services, including VOOM.³ Both VOOM HD and The Association of Consumers to Preserve and Promote DBS Competition would be directly harmed by the decrease in DBS competition that would result from the sale of the above-referenced DBS licenses to EchoStar.

I. INTRODUCTION AND SUMMARY

Through the instant Application, the Commission is presented with the question of whether EchoStar's acquisition of eleven additional transponders at 61.5° W.L. would serve the public interest, convenience, and necessity. In the DBS marketplace, the FCC has opted to take a flexible, case-by-case approach to the evaluation of proposals that would increase industry consolidation. Thus, rather than applying specific rules limiting the amount of capacity that a single entity can control, as it has done in other areas, the Commission has stated that it will individually evaluate the competitive impact of DBS spectrum acquisitions, such as that proposed in the instant Application. In analyzing the potential competitive effects of this

² See Attachment 1 (Declaration of Charles F. Dolan, VOOM HD, LLC).

³ See Attachment 2 (Declaration of Jerome J. Sandler, President, The Association of Consumers to Preserve and Promote DBS Competition).

transaction, the Commission must determine not only whether it would comply with the Communications Act and agency rules and policies, but also whether any public interests harms arising from the transaction would be outweighed by tangible and specific public interest benefits. As demonstrated herein, the Application cannot pass muster under this balancing test.

In making individual decisions regarding the distribution of DBS spectrum, the FCC has developed a consistent policy of advancing competition both among DBS providers and in the broader marketplace for multichannel video programming distribution (“MVPD”) service. In particular, based on its conclusion that a marketplace with additional competitors can result in such important public benefits as greater price competition, additional new services, and increased technological innovation, the agency has made it a principal goal to foster the development of additional facilities-based DBS competition.

In furtherance of this general policy, the Commission recently had the opportunity to specifically consider whether the public interest would be served by allowing EchoStar (or DIRECTV) to acquire additional capacity at the 61.5° W.L. orbital slot. In the *Auction 52 Order*, the agency concluded that its public interest goals would be furthered by prohibiting the two leading DBS operators from bidding on the licenses for the two remaining transponders at that location. At the time, these transponders were the last two available licenses for DBS capacity capable of fully serving the eastern United States as well as most of the rest of the country. To better ensure that a competitive marketplace could develop, the FCC further restricted EchoStar and DIRECTV from acquiring, owning, or controlling these licenses within four years of the auction.

This Application effectively presents the Commission with the same issues it faced in *Auction 52*. Just four months removed from the issuance of that order, EchoStar seeks the FCC’s

permission to acquire *eleven* transponder authorizations at the very same orbital location that the Commission found in that proceeding to be uniquely situated to enhance competition. Indeed, grant of this Application would give EchoStar effective control over 30 of the 32 transponders available at 61.5° W.L., not to mention the fact that it currently has capacity on a total of twelve geostationary satellites as well as plans to construct four additional satellites. Already the nation's second largest DBS operator and third largest MVPD, EchoStar's stance as one of two dominant DBS providers would become further entrenched if the Commission grants the proposed transaction. Moreover, by eliminating one of only three facilities-based providers of DBS service to U.S. consumers, the proposed transaction would result in the loss of the highly unique DBS service VOOM offers to its approximately 40,000 subscribers. The proposed transaction thus indisputably conflicts with the agency's stated policy of promoting competition in the DBS marketplace.

Even more problematic, the Application is directly at odds with the FCC's specific determination that it would disserve the public interest for EchoStar to acquire additional capacity at the important 61.5° W.L. location. What is more, EchoStar seeks special temporary authority to operate the two particular transponder licenses that were at issue in *Auction 52*—capacity that is to be “off limits” to EchoStar for the next four years. Accordingly, there can be no question that the proposed transaction would contravene governing FCC precedent.

Further, the Applicants have failed to satisfy their burden of proof that the transaction would produce concrete public interest benefits outweighing the unquestionable substantial harms that would result. As shown herein, the Applicants' cursory statements that the proposed transaction will promote competition in the MVPD market and permit EchoStar to provide additional local-into-local service are not supported by facts, are not transaction-specific, and are

not sufficient to offset the substantial competitive harms that would arise. For these reasons, VOOM and The Association of Consumers to Preserve and Promote DBS Competition respectfully submit that the Commission must deny the instant Application.

II. THE FCC EVALUATES COMPETITIVE ISSUES INVOLVING THE ALLOCATION OF DBS SPECTRUM ON A CASE-BY-CASE BASIS

In the DBS context, the FCC has chosen to analyze issues involving the distribution of DBS spectrum in assignment, transfer, and auction proceedings on a case-by-case basis.⁴ As far back as 1981, the agency decided that, rather than adopting specific ownership restrictions for the DBS service, it would be more effective to take an “open and flexible approach” that resolved such matters in the context of individual cases.⁵ Since that time, the agency consistently has reviewed DBS ownership matters in the context of particular adjudications.⁶ This case-by-case analysis differs significantly from the FCC’s approach to some other services

⁴ See generally *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, Notice of Proposed Policy Statement and Rulemaking, 86 F.C.C.2d 719 (1981).

⁵ *Id.* at 750.

⁶ *Policies and Rules for the Direct Broadcast Satellite Service*, Report and Order, 17 FCC Rcd 11,331, 11,333 (¶ 2) (2002) (noting that it has been the FCC’s practice “to analyze DBS/DBS ownership issues in the context of assignment and transfer applications on a case-by-case basis”); see also *Policies and Rules for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, 13 FCC Rcd 6907, 6939 (¶ 58) (1998) (stating that “a continued case-by-case approach would maintain our longstanding commitment to a flexible regulatory structure for DBS service, and would not prejudice our ability to address specific cases based on the facts in existence at any particular time”).

Notably, EchoStar explicitly has shown its support for this case-by-case approach, arguing in 1998 that “the Commission should continue to evaluate transactions resulting in a greater aggregation of DBS spectrum on a case-by-case basis.” Comments of EchoStar Communications Corporation in IB Docket No. 98-21, Policies and Rules for the Direct Broadcast Satellite Service, at 7 (filed April 6, 1998).

it regulates. For example, broadcast licensees traditionally have been subject to a series of specific and detailed local and national ownership rules.⁷

When evaluating major assignments or transfers of FCC licenses that are not covered by specific ownership regulations, the Commission applies a balancing test that weighs the potential benefits of the proposed transaction against its countervailing harms. Under the so-called *Bell Atlantic/NYNEX* framework, the Commission considers both whether a proposed assignment will “comply with the Commission’s rules” and its potential “effects on competition.”⁸ In so doing, the FCC analyzes competitive harms and public interest benefits on a sliding scale. Thus, where the potential harms to competition raised by a proposed transaction are substantial, the burden of proof on applicants to demonstrate transaction-specific benefits correspondingly becomes more demanding.⁹

⁷ See, e.g., *2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003).

⁸ *Applications of Various Subsidiaries and Affiliates of Geotek Communications, Inc., Debtor-in-Possession, Assignors, and Wilmington Trust Company or Hughes Electronics Corporation, Assignees, Applications of Wilmington Trust Company or Hughes Electronics Corporation, Assignors, and FCI 900, Inc., Assignee, For Consent to Assignment of 900 MHz Specialized Mobile Radio Licenses*, 15 FCC Rcd 790, 794-95 (¶ 8) (2000) (citing *Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19,985 (1997) (“*Bell Atlantic/NYNEX Order*”), *recon. denied*, 16 FCC Rcd 706 (2001)). The Applicants concede that this proceeding is governed by the public interest standard set forth in Section 310(d) of the Communications Act and acknowledge that “the Commission has traditionally weighed the public interest benefits of the proposed transaction against any potential harm to determine whether, on balance, the benefits outweigh the harms.” Application at 5.

⁹ See, e.g., *Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control*, Memorandum Opinion and Order, 14 FCC Rcd 14,712, 14, 825 (¶ 256) (1999) (“As the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest. This sliding scale approach requires that where, as here, potential harms are indeed both substantial and likely, the Applicants’ demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”) (citation omitted) (“*Ameritech/SBC Order*”); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18,025, 18,137-38 (¶¶ 196-99) (1998) (“*WorldCom Order*”); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063 (¶ 157).

As demonstrated herein, the Applicants have failed to meet their burden under *Bell Atlantic/NYNEX*. By creating a level of consolidation in the DBS industry that would make competitive entry highly unlikely, if not impossible, the proposed transaction undeniably would create significant public interest harms. The public interest benefits that the parties, in turn, claim will emerge from the transaction are not transaction-specific and, in any event, would not come close to counterbalancing the clear and substantial competitive harms that would arise.

III. THROUGH ITS CASE-BY-CASE APPROACH TO OWNERSHIP CONCENTRATION IN THE DBS MARKETPLACE, THE FCC HAS DEVELOPED A CONSISTENT POLICY OF FOSTERING COMPETITION

The Commission consistently has sought to ensure that the DBS service reaps the benefits—*e.g.*, “price competition, the development of additional new services, and technological innovation”¹⁰—generated by effective competition between multiple, facilities-based competitors. Just four months ago, in the *Auction 52* proceeding, the agency clearly demonstrated its continued commitment to fostering the emergence of additional facilities-based DBS providers. Notwithstanding EchoStar’s assertion that the instant Application does not violate any FCC rules or policies,¹¹ the proposed transaction is fundamentally at odds with the pro-competitive policy determinations enunciated in both *Auction 52* and numerous prior FCC decisions.

A. The Recent *Auction 52 Order* Reaffirmed The FCC’s Commitment To Greater Intramodal DBS Competition And Adopted A Specific Application Of This Policy Governing The 61.5° W.L Orbital Slot

In the *Auction 52 Order*, the full Commission decided that no DBS operator currently operating satellites at orbital locations capable of providing service to all 50 U.S. states (*i.e.*, full-

¹⁰ See *Auction of Direct Broadcast Satellite Licenses, AUC-03-52*, Order, 19 FCC Rcd 23,849, 23,856 (¶ 17) (2004) (“*Auction 52 Order*”).

¹¹ See Application at 8.

CONUS orbital slots), which includes EchoStar, would be allowed to acquire at auction the two remaining unlicensed DBS authorizations at 61.5° W.L.¹² The agency concluded that “a restriction on eligibility for this license will serve the public interest by helping to promote the development of an additional provider of DBS services.”¹³ In addition, and in order to preclude the possibility that the pro-competitive policy of the auction restriction would be thwarted by the premature resale of the licenses to a “previously ineligible entity,” the agency further determined that EchoStar and other such entities would be restricted from acquiring the two licenses at issue in that proceeding for a four-year period following the auction.¹⁴ Thus, the Commission’s decision in *Auction 52* is not merely a one-time prohibition that restricts EchoStar and DIRECTV from bidding on those two transponders during one specific auction; rather, it is a blanket, four-year ban that bars both entities from gaining control of this capacity by any means.

In restricting incumbent, full-CONUS DBS operators from participating in the auction for the unlicensed slots at 61.5° W.L., the FCC emphasized that its decision was supported by “significant public policy reasons.”¹⁵ Specifically, the Commission stated that its “principal goal [was] to enhance the possibility that an additional DBS provider can develop because [of its belief] that a marketplace with additional competitors would likely result in such public benefits

¹² See generally *Auction 52 Order*; see also Application at 9. Notably, this decision was issued by the full Commission, rather than the Wireless Telecommunications Bureau, to which “authority to establish specific procedures for Auction No. 52 ha[d] [already] been delegated.” See *Auction 52 Order*, 19 FCC Rcd at 23,850 (¶ 3) (“In the case of Auction No. 52, the full Commission issued a public notice ... seeking comment on two issues that were more appropriate for a Commission-level (rather than Bureau-level) decision. ... The second non-procedural issue involved eligibility for DBS licenses. Thus, we sought comment on various questions regarding possible eligibility restrictions for its licenses that were to be included in Auction No. 52.”); see also *Public Notice*, Auction of Direct Broadcast Satellite Service Licenses Scheduled for Aug. 6, 2003, 18 FCC Rcd 3478 (2003) (citation omitted).

¹³ See *Auction 52 Order*, 19 FCC Rcd at 23,849 (¶ 1).

¹⁴ See *id.* at 23,864 (¶ 31).

¹⁵ *Id.* at 23,856 (¶ 17).

as greater price competition, additional new services, and increased technological innovation.”¹⁶ (Interestingly, Rainbow DBS itself advanced this position in its filings with the agency in that proceeding, arguing that “the eligibility criteria it has proposed for the two unassigned channels at 61.5° W.L. will promote the public interest in video competition generally and among DBS operators specifically by facilitating the entry of a new, facilities-based DBS provider, which will speed innovation, increase consumer choice, and provide substantial consumer welfare.”¹⁷)

Moreover, in light of the scarcity of U.S. orbit locations that are considered to be full-CONUS, the agency stressed the importance of channels located at 61.5° W.L. as resources in the potential development of DBS competition.¹⁸ While these channels are not full-CONUS, they are among the few that are capable of providing full service to the eastern portion of the United States as well as most of the rest of the country.

Although in the past the Commission has found that increasing a DBS operator’s ability to compete with incumbent cable operators by allowing them to acquire additional satellite capacity was a public interest benefit that could help offset the potential harms of a proposed transaction,¹⁹ the agency concluded in *Auction 52* that “the public interest may now best be

¹⁶ *Id.* at 23,860 (¶ 23) (citation omitted); *see also id.* at 23,864 (¶ 31) (“As we have explained, the purpose of the eligibility restriction we adopt today is to promote the development of an additional DBS provider.”).

¹⁷ *Id.* at 23,854 (¶ 9); *see also id.* at 23,853 (¶9) (noting that Rainbow DBS also asserted that “the Commission should prohibit EchoStar and [DIRECTV] from eligibility for the two available channels at 61.5° W.L. because, given the market power they possess, these two operators have a strong incentive to acquire the two channels in order to foreclose rivals”).

¹⁸ *Id.* at 23,859 (¶ 21).

¹⁹ *See, e.g., Application of MCI Telecommunications Corporation, Assignor, and EchoStar 110 Corporation, Assignee, For Consent to Assignment of Authorization to Construct, Launch, and Operate a Direct Broadcast Satellite System Using 28 Frequency Channels at the 110° W.L. Orbital Location, Order and Authorization, 16 FCC Rcd 21,608, 21,610 (¶ 1) (1999) (“MCI Order”) (concluding that “[g]rant of these applications will serve the public interest because they ... will likely allow EchoStar to provide consumers with a more competitive alternative to cable offerings”).*

served by providing opportunities for additional DBS service providers.”²⁰ In this regard, the agency noted that “it is less important to provide opportunities for the two major incumbent DBS providers to become even stronger competitors to cable TV systems than it is to foster additional competition.”²¹ In particular, because “EchoStar has now become a strong competitor,” the FCC concluded that its ability to compete in either the DBS or larger MVPD market would not be “affected by its not acquiring the 61.5° W.L. license.”²² Moreover, the Commission declared “that even though DBS provides a competitive alternative to cable, that does not diminish the public’s interest in increased competition among providers of DBS service.”²³

B. Advancing Competition Among Multiple Facilities-Based DBS Providers Long Has Been A Commission Goal

The policy underlying the FCC’s decision in the *Auction 52 Order*—*i.e.*, the promotion of additional DBS facilities-based competitive entry—is by no means new. To the contrary, that decision is but the latest example in a long series of case-by-case determinations that increased intramodal DBS competition will benefit the marketplace:

²⁰ *Auction 52 Order*, 19 FCC Rcd at 23,863 n.76. The FCC also noted that even the mere presence of a provider of niche services—*i.e.*, an operator that provides a more limited, but differentiated offering of programming services—would provide public interest benefits: “Moreover, even if an additional DBS license used the 61.5° channels not to become a major competitor but instead to provide programming and other services significantly different from the services provided by existing DBS providers serving all 50 states, the provision of such additional choices to consumers should nevertheless have substantial benefits to those customers, especially in those rural or suburban locations unserved by cable systems or served only by low channel capacity cable systems.” *Id.* at 23,860 (¶ 23). *See also id.* at 23,863 (¶ 27) (“We also believe that, even if the 61.5° W.L. channels are ultimately used to provide a specialized or niche service that becomes a complement to other DBS services, rather than as part of a service that duplicates all the programming of other service providers, such use will be in the public interest.”).

²¹ *Id.* at 23,863, n.76.

²² *Id.*

²³ *Id.* at 23,863 (¶ 27).

- In the *First Space Station Licensing Reform Order*, the Commission “adopted a presumption with respect to non-geostationary satellite orbit (‘NGSO’)-like systems that *three licenses are necessary to maintain a competitive market*.”²⁴
- In refusing to extend EchoStar’s special temporary authority (“STA”) to operate the transponders whose licenses were at issue in *Auction 52*, the FCC found that granting the STA instead to Rainbow DBS would “serve the public interest” by enabling “a new entrant in the DBS business ... the opportunity to use expanded capacity ... in order to help initiate its DBS service.”²⁵ Moreover, the FCC noted that its decision was “consistent with [its] recognition in other instances of the value of facilitating the ability of new entrants to offer additional services to consumers.”²⁶
- The Commission designated for hearing the EchoStar/DIRECTV merger application, in part, because it concluded that the transaction “could likely undermine our goals of increased and fair competition in the provision of DBS service.”²⁷
- In 1995, the FCC imposed a one-time auction rule that required divestiture within one year by a successful bidder for the 110° W.L. orbital position of any attributable interest in channels at either of the other two full-CONUS orbital locations (*i.e.*, 119° W.L. and 101° W.L.),²⁸ stating that this restriction was “intended to ensure that, for the time being, each full-CONUS orbital location will have an operator that is independent of and competitive with the other full-CONUS operators.”²⁹ This determination effectively ensured that there would be three distinct facilities-based DBS providers. The agency’s auction restriction was upheld by the D.C. Circuit, which concluded that the auction rule “was reasonably aimed at promoting [] competition by fostering the development of a third independent and competitive

²⁴ *Id.* at 23,860, (¶ 23) n.66 (citing *Amendment of the Commission’s Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10,760, 10,788 (¶ 64), n.149 (2003)) (emphasis added).

²⁵ *EchoStar Satellite Corp., Application for Renewal of Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61.5 W.L. Orbital Location*, Order and Authorization, 18 FCC Rcd 19,825, 19,826 (¶ 6) (2003).

²⁶ *Id.*

²⁷ *Application of EchoStar Communications Corp., Gen. Motors Corp., and Hughes Elecs. Corp.*, Hearing Designation Order, 17 FCC Rcd 20,559, 20,562 (¶ 3) (2002) (“*EchoStar/DirecTV HDO*”).

²⁸ *See generally Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712 (1995), *aff’d*, *DirecTV, Inc., v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

²⁹ *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd at 9714 (¶ 5); *see also MCI Order*, 16 FCC Rcd at 21,617 (¶ 18) (“In the 1995 Auction Order ... we sought to encourage the emergence of new DBS entrants by limiting the capacity that an incumbent could acquire in the auction.”).

provider of DBS service and preventing the concentration of all the full-CONUS channels in only two firms.”³⁰

- In 1999, EchoStar and MCI sought FCC approval of the assignment of MCI’s authorization to construct, launch and operate a DBS system using 28 frequency channels at the 110° W.L. orbital location,³¹ an assignment that would violate the auction restriction imposed in 1995 and by which EchoStar “propose[d] to acquire the assets of a joint venture of MCI and AskyB, which was poised to enter the DBS industry.”³² In considering the Application, the FCC highlighted as a potential harm that, “if [it] allow[ed] EchoStar to acquire MCI’s authorization . . . , another firm with the intent of competing with cable operators is unlikely to enter the U.S. DBS industry.”³³

This pro-competition policy is consistent with Congressional objectives. Section 309(j)(3)(B) of the Act requires the Commission, in specifying eligibility for licenses to be auctioned, to seek to promote “economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants.”³⁴

IV. GRANT OF THE INSTANT APPLICATION WOULD CONFLICT WITH BOTH GENERAL AND SPECIFIC FCC POLICY DIRECTIVES

This Application effectively presents the Commission with the same issues it faced in its *Auction 52 Order*. Just four months after the release of that decision—in which the FCC determined that it would disserve the public interest for EchoStar to acquire two additional DBS transponders at 61.5° W.L.—EchoStar seeks to acquire *eleven* additional transponders at that

³⁰ *DirectTV*, 110 F.3d at 831.

³¹ *See generally MCI Order*.

³² *Id.* at 21,615 (¶ 12).

³³ *Id.* at 21,618-19 (¶ 21); *see also id.* at 21,617 (¶ 18) (“In the 1995 Auction Order . . . we sought to encourage the emergence of new DBS entrants by limiting the capacity that an incumbent could acquire in the auction.”). Although the Commission ultimately approved the transfer from MCI to EchoStar, it did so because, “[a]s a result of . . . changed circumstances [*i.e.*, the emergence of other competitive entry possibilities], [it] d[id] not believe that the reasoning behind the 1995 DBS channel limitation rule should be applied to the particular transactions.” *Id.* at 21,619 (¶ 21).

³⁴ 47 U.S.C. § 309(j)(3)(B).

location. What is more, EchoStar seeks special temporary authority to operate the very same two transponders that were at issue in *Auction 52*, capacity that the FCC determined should be strictly “off-limits” to EchoStar for a minimum of four years. Looking to solidify even further its dominance at 61.5° W.L., EchoStar also has announced its intention to seek permanent control of these two transponders.³⁵ Thus, there is no basis whatsoever for the Applicants’ assertion that grant of the instant Application would be fully consistent with existing Commission policy.³⁶

First, the proposed transaction indisputably conflicts with the agency’s stated policy goal of promoting competition among DBS operators. Grant of the Application would give EchoStar effective control over 30 of the 32 transponders available at 61.5° W.L., making the DBS marketplace almost impenetrably dominated by just two providers. In total, EchoStar—the nation’s second largest DBS operator³⁷ and third largest MVPD³⁸—already owns or leases capacity on twelve satellites in geostationary orbit.³⁹ In addition, it has entered into contracts to construct four new satellites, which are expected to be completed between 2005 and 2008, and has service agreements to lease capacity on two additional satellites under construction.⁴⁰

In addition, while the Commission concluded in *Auction 52* that allowing EchoStar to acquire just two additional transponders at 61.5° W.L. would be contrary to the development of competition, the proposed transaction would be even more detrimental to the development of

³⁵ See Application at 10.

³⁶ *Id.* at 8.

³⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, at Table B-3 (Feb. 4, 2005).

³⁸ See News Release, “DISH Network Passes 11 Million Customer Milestone; Company Now Third Largest Pay-TV Provider” (rel. Jan 1, 2005), at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=400.

³⁹ EchoStar 2004 10-K, at 6-8 (filed Mar. 16, 2005).

⁴⁰ *Id.* at 9.

facilities-based entry. It can hardly be disputed that an alternative provider could launch a far more competitive DBS business if it had the ability to operate eleven transponders capable of providing service to the vast majority of the United States than merely two such channels.

By eliminating one of only three facilities-based providers of DBS service to consumers in the United States, the proposed transaction also would result in a loss of service to the approximately 40,000 existing subscribers to the VOOM DBS service. Many of these subscribers have made substantial up-front payments in order to receive the unique program services offered by VOOM. Unlike DIRECTV and EchoStar, VOOM focuses on the provision of high definition (“HD”) service, offering subscribers the unique opportunity to subscribe to nearly 40 HD channels, more than half of which provide commercial-free service.⁴¹ Due to its recent conversion to more efficient compression technology, moreover, VOOM now offers subscribers approximately 130 video channels in all.

Moreover, the adverse effects of the proposed transaction would be particularly pronounced in markets that either are not served by any cable operator or are served by only a low-capacity cable operator. As explained in detail in the attached analysis of Economists Incorporated, the Commission previously has recognized that at least in local communities where these conditions exist, the relevant product market for purposes of analyzing the competitive impact of a DBS transaction “may be considerably more narrow than all MVPD services” and, in fact, “may be limited to just DBS services.”⁴² The FCC expressly has recognized that the higher levels of competition in markets served by high-capacity cable systems may not protect

⁴¹ See Attachment 3 (letters from existing VOOM subscribers expressing appreciation for its unique service and a strong interest in its continued existence).

⁴² See Attachment 4 (Michael G. Baumann, Economists Incorporated, Analysis of EchoStar and Rainbow DBS Application, at 5-8 (March 28, 2005) (citing *EchoStar/DirectTV HDO*, 17 FCC Rcd at 20,609 (¶¶ 114-115)) (“EI Analysis”)).

consumers residing in DBS-only or low-capacity cable areas.⁴³ In particular, DBS operators may target promotions, and provide a higher level of customer service, to consumers residing in more competitive MVPD markets. Moreover, a disproportionately large percentage of DBS subscribers reside in geographic areas with limited or no cable options.⁴⁴ Accordingly, the increased DBS consolidation that would arise from grant of the Application would have a disproportionate impact on consumers residing in rural areas or small communities, where fewer MVPD options typically exist.

Even more problematic, the proposed transaction is directly at odds with the FCC's specific determination that it would disserve the public interest for EchoStar to acquire additional capacity at 61.5° W.L. EchoStar not only has effectively disregarded the Commission's determination in *Auction 52*, but now it is upping the ante significantly by seeking to acquire a much larger piece of the highly valuable spectrum available at this orbital location. Accordingly, there can be no question that the proposed transaction would contravene both general Commission policy concerns and specific FCC precedent governing EchoStar's eligibility to acquire transponders at the critical 61.5° W.L. orbital slot.

V. THE BENEFITS CLAIMED BY THE APPLICANTS ARE NOT FACTUALLY SUPPORTED, ARE NOT TRANSACTION-SPECIFIC, AND ARE NOT SUFFICIENT TO OFFSET THE SUBSTANTIAL HARMS THAT WOULD RESULT

As explained above, the Applicants “bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.”⁴⁵ In order to satisfy their duty to show that the benefits of the transaction will outweigh the harms, the

⁴³ *Id.* at 8 (citing *EchoStar/DirecTV HDO*, 17 FCC Rcd at 20,628 (¶¶ 181-82)).

⁴⁴ *Id.* (citing *EchoStar/DirecTV HDO*, 17 FCC Rcd at 20,611-12 (¶ 123)).

⁴⁵ *See* Section II, *supra*. *EchoStar/DirecTV HDO*, 17 FCC Rcd at 20,574 (¶25).

Applicants “must provide sufficient support for any benefit claims so that the Commission can verify the likelihood and magnitude of each claimed benefit.”⁴⁶ In addition, any public interest benefits must be transaction-specific; *i.e.*, they “must be likely to be accomplished as a result of the [transaction] but unlikely to be realized by other means that entail fewer anticompetitive effects.”⁴⁷

The Applicants here, however, have utterly failed to satisfy these standards.⁴⁸ Indeed, the Application offers only cursory statements regarding the potential public interest benefits of the proposed transaction. Specifically, the Application asserts, without providing any supporting facts, that the proposed transaction will “promot[e] competition in the [MVPD] market”⁴⁹ and “permit EchoStar to offer ... local channels that will assist EchoStar in complying with SHVERA’s prohibition on certain two-dish offerings of local stations.”⁵⁰ In fact, neither claim withstands scrutiny.

⁴⁶ *EchoStar/DIRECTV HDO*, 17 FCC Rcd at 20,630 (¶ 190).

⁴⁷ *Id.* at 20,630 (¶ 189) (citations omitted); *see also id.* (As the Commission explained in the *Bell Atlantic/NYNEX Order*: “Efficiencies that can be achieved through means less harmful to competition than the proposed merger ... cannot be considered to be true pro-competitive benefits of the merger.”) (citation omitted); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. For Consent to Transfer Control of Licenses and Authorizations File Nos. 0001656065, et al. and Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corp. For Consent to Assignment and Long-Term De Facto Lease of Licenses File Nos. 0001771442, 0001757186, and 0001757204 and Lafayette Communications Co., LLC For Consent to Assignment of Licenses File Nos. 0001808915, 0001810164, 0001810683, and 50013CWAA04*, Memorandum Opinion and Order, 19 FCC Rcd 21,522, 21,599-600 (¶ 205) (2004) (“First, the claimed benefit must be transaction- or merger-specific. ... Furthermore, speculative benefits that cannot be verified will be discounted or dismissed.”) (“*AT&T/Cingular Order*”).

⁴⁸ Based upon the EchoStar press release issued when the deal was announced—which revealed that EchoStar did not have specific plans for the Rainbow 1 satellite, but rather that it “is assessing how the Rainbow satellite’s flexibility can best be utilized to enhance DISH Network’s existing service”—this does not come as a surprise. News Release, “EchoStar to Purchase Satellite from Cablevision” (rel. Jan. 20, 2005), at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=68&item_id=665115.

⁴⁹ Application at 2.

⁵⁰ *Id.* at 7 (emphasis added).

A. EchoStar’s Acquisition Of Additional DBS Capacity At 61.5° W.L. Would Undermine—Not Promote—MVPD Competition

With respect to MVPD competition, the FCC concluded in the *Auction. 52 Order* that “the public interest may now best be served by providing opportunities for additional DBS service providers, and that it is less important to provide opportunities for the two major incumbent DBS providers to become even stronger competitors to cable TV systems.”⁵¹ In particular, the FCC explained that since “EchoStar [had] become a strong competitor,” it did “not believe its ability to compete in either the DBS or larger MVPD market [would] be affected by its not acquiring the 61.5° W.L. license.”⁵² Those same conclusions are, if anything, more valid here, where EchoStar seeks to acquire eleven channels at the “unique” 61.5°W.L. orbital location. Given that the FCC already has found that EchoStar has sufficient capacity to effectively compete in the broader MVPD marketplace, EchoStar’s acquisition of additional capacity through this proposed transaction would, in fact, undermine MVPD competition.

B. The Applicants Have Failed To Show That The Proposed Transaction Will Increase EchoStar’s Ability To Comply With SHVERA

EchoStar claims that grant of the transaction would enhance its ability to comply with The Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”). Even if true, this marginal benefit would be insufficient to outweigh the clear anticompetitive harms that would result from the transaction. SHVERA states in relevant part that “[e]ach satellite carrier that retransmits the analog signals of local television broadcast stations in a local market shall retransmit such . . . signals in such market by means of a single reception antenna and associated

⁵¹ *Auction 52 Order*, 19 FCC Rcd at 23,863 n.76.

⁵² *Id.*

equipment.”⁵³ This “single-dish” requirement becomes effective 18 months after the legislation’s date of enactment.

It is reasonable to assume, however, that Congress, in passing this statute, believed that EchoStar—one of only two satellite carriers providing local-into-local service—was capable of complying with this legislation without first acquiring additional capacity. Indeed, with respect to its existing local-into-local offerings, complying with the “single-dish” requirement would appear to be a “zero sum” game. For its part, EchoStar has agreed to comply with the requirement, stating publicly that it would “work with local broadcasters, Congress and the Federal Communications Commission to meet this tight deadline”⁵⁴

Even more revealing, however, is the fact that in September 2004, prior to negotiating the deal to acquire the Rainbow DBS capacity, EchoStar stated in a filing with the Securities and Exchange Commission that it “currently plan[s] to transition all markets to a single dish by 2008.”⁵⁵ Thus, it appears that EchoStar not only had the capacity necessary to comply with SHVERA’s requirements prior to this attempt to acquire the Rainbow satellite, it also had the intention of doing so. Accordingly, and consistent with FCC precedent,⁵⁶ the ability to comply with SHVERA is not relevant to the Commission’s consideration of the instant Application.

⁵³ Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, Title IX, Sec. 203(a)(2) (*to be codified as* 47 U.S.C. § 338(g)).

⁵⁴ News Release, “EchoStar Statement on Passage of Satellite Bill” (rel. Nov. 21, 2004), at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker+dish&script=410&layout=68&item_id=646314.

⁵⁵ EchoStar DBS Corp. Form 8-K, Exh. 99.1 (filed Sept. 27, 2004).

⁵⁶ *See, e.g., AT&T Corp., British Telecomms. plc, VLT Co. L.L.C., Violet License Co., LLC, and TNV [Bahamas] Ltd. Applications*, Memorandum Opinion and Order, 14 FCC Rcd 19,140, 19,150 (¶ 20) (1999) (“[O]nly merger-specific efficiencies, *i.e.*, those that would not occur but for the merger or are unlikely to be achieved through less competitively-harmful means than the merger, are relevant to the public interest analysis.”).

C. The Transaction Will Not Enable Increased Provision Of Local-Into-Local Service

The Applicants also make the unsupported assertion that acquisition of the Rainbow 1 satellite would enable EchoStar to provide “additional programming including, ... *some* local channels.”⁵⁷ However, this claimed benefit, even if it would be achieved, is far too insignificant to offset the substantial harms that the proposed transaction would produce and was specifically rejected by the Commission in the *Auction 52 Order*. There, the agency “recognize[d] the fact that EchoStar has indicated that it might use the channels to provide more local into local service, and that both EchoStar and DirecTV have suggested that providing local-into-local service is a Commission goal.”⁵⁸ The agency further acknowledged “the importance of local broadcast television and that ‘an increase in the amount of DBS-provided local-into-local service ... [could] increase competition in MVPD markets and should benefit consumers through increased choice, lower prices, or both.’”⁵⁹ Nevertheless, the agency concluded that “the benefits of encouraging another DBS competitor outweigh the benefits represented by the possibility that one of the two large DBS incumbents might use those channels to provide more local-into-local service.”⁶⁰

EchoStar already provides local-into-local service in at least 152 out of 210, or 73 percent of all Nielsen Designated Market Areas (“DMAs”). Moreover, EchoStar appears to be adding rapidly to the number of markets to which it provides local-into-local service even without the additional capacity that the Rainbow 1 satellite would provide. According to EchoStar press

⁵⁷ Application at 7 (emphasis added).

⁵⁸ *Auction 52 Order*, 19 FCC Rcd at 23,861 n.70.

⁵⁹ *Id.*

⁶⁰ *Id.*

CERTIFICATE OF SERVICE

I, Charles F. Dolan, hereby certify that on March 28, 2005, I caused a copy of the foregoing Joint Petition to Deny Application for Consent to Assignment of Licenses to be mailed via first-class postage prepaid mail to the following:

David K. Moskowitz
Executive Vice President and General Counsel
EchoStar Satellite L.L.C.
9601 South Meridian Blvd.
Englewood, CO 80112

Philip L. Malet
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

James L. Dolan
President and CEO
Rainbow DBS Company LLC
200 Jericho Quadrangle
Jericho, NY 11753

/s/
Charles F. Dolan

ATTACHMENT 1

DECLARATION OF CHARLES F. DOLAN
VOOM HD, LLC

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

In the Matter of:

Rainbow DBS Company LLC, Assignor

and

EchoStar Satellite L.L.C., Assignee

Consolidated Application for Consent to
Assignment of Space and Earth Station Licenses,
and Related Special Temporary Authorization

Call Signs: DBS 8701 and E020248

IB File No. SAT-ASG-20050128-00017;

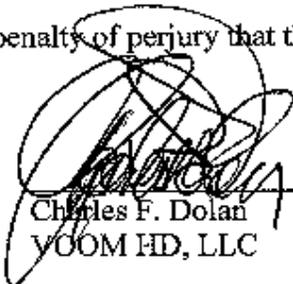
IB File No. SES-ASG-20050131-00117;

IB File Nos. SAT-STA-20030623-00122;
SAT-STA-20040319-00081; and SAT-
STA-20040924-00191

DECLARATION OF CHARLES F. DOLAN

1. My name is Charles F. Dolan, and I am the sole member of Dolan Family Holdings, LLC, which is the sole member of VOOM HD, LLC ("VOOM HD"). I am also the founder and Chairman of the Board of Cablevision Systems Corporation ("Cablevision"). Rainbow DBS Company LLC ("Rainbow DBS"), an indirect wholly owned subsidiary of Cablevision, currently provides the VOOM DBS service to approximately 40,000 subscribers.
2. VOOM HD was formed for the express purpose of owning and operating a DBS business. It will have the management skills, financing, and dedication needed to carry out this objective. First, I will bring extensive knowledge of and experience in the DBS business to the Company.
3. Second, VOOM HD is in the process of obtaining financial commitments from its controlling investors in the amount of \$400 million in cash and credit in order to finance the continued provision of the VOOM HD service.
4. Third, VOOM HD stands ready, willing, and able to compete for the purchase of the Rainbow DBS transponders located at 61.5 W.L. should they once again become available in the market.

I, Charles F. Dolan, declare under penalty of perjury that the foregoing is true and correct. Executed on March __, 2005.



Charles F. Dolan
VOOM HD, LLC

ATTACHMENT 2

DECLARATION OF JEROME J. SANDLER
THE ASSOCIATION OF CONSUMERS
TO PRESERVE AND PROMOTE DBS COMPETITION

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

In the Matter of:

Rainbow DBS Company LLC, Assignor

and

EchoStar Satellite L.L.C., Assignee

Consolidated Application for Consent to
Assignment of Space and Earth Station Licenses,
and Related Special Temporary Authorization

Call Signs: DBS 8701 and E020248

IB File No. SAT-ASG-20050128-00017:

IB File No. SES-ASG-20050131-00117:

IB File Nos. SAT-STA-20030623-00122;
SAT-STA-20040319-00081; and SAT-
STA-20040924-00191

DECLARATION OF JEROME J. SANDLER

1. My name is Jerome J. Sandler, and I am the President of The Association of Consumers to Preserve and Promote DBS Competition (the "Association").
2. I have been a subscriber to the VOOM DBS service since May 2004.
3. The primary purpose of the Association is to inform consumers and the FCC about the importance of preserving and promoting competition among DBS providers. Increased DBS choices will promote greater price competition, the development of new services, and technological innovation – all of which will benefit DBS viewers. To that end, the members of the Association work collaboratively to preserve and promote competition among DBS providers.

I, Jerome J. Sandler, declare under penalty of perjury that the foregoing is true and correct. Executed on March 26, 2005.


Jerome J. Sandler
President
The Association of Consumers to Preserve and
Promote DBS Competition

ATTACHMENT 3

LETTERS FROM EXISTING VOOM SUBSCRIBERS

Selected Letters of Customer Support for VOOM:

Source: Inner Circle responses and "Press Inquiry" e-mails, 2/18/05-3/17/05

I highly value the service you provide. With only a few exceptions the only television I watch anymore is your high definition programming. I do not live where there is any terrestrial HD service and I depend on you for HD programming. I'll continue to subscribe as long it's available. Given the limited HD offerings from the other sat and cable providers I do not consider them interesting enough to bother with. I was very pleased to read the letter posted to your website and hope you are able to find some way to continue either as a service provider or even just a content provider. Thanks again for a great product.

Sharon Sharpe

Home Phone: [REDACTED]

Acct: [REDACTED]

My HDTV is over a year old and up to now I could only view 7 hdtv Sat channels with low hdtv pq & only fair sound quality. Voom has changed all that. I watch hdtv practically all of the time; since I now have great choices from over 30 chaneells & 7 ota locals.I am now using my hdtv to the max,instead of watching mostly sd. I love Voom I only regret I waited too long to get your great service!

Richard

[REDACTED]@ [REDACTED]

On the first of February, I had the VOOM service installed at my home. I had been a previous subscriber of Direct TV as well as the Dish Network.

Voom is far superior to the other services. I am delighted with the amount of HD programming, especially the proprietary content that is produced by VOOM. Especially entertaining to me is the Rave channel and the concert videos.

The technical quality is far superior to the other sattelite services, and the VOOM remote is much more intuitive.

At the time of installation, we were not able to get any of the network programming in HD. Could you let me know when this will be available in my area?

Thanks again for the great product, and I will certainly reccommend the service to my friends and associates.

Sincerely,

Gary Hassen

[REDACTED]@ [REDACTED]

I wanted to drop a line and say how thrilled I am with my Voom HD service. I am a horror movie enthusiast and I am totally blown away by your Monster HD channel. The clarity of the movies you show is beyond outstanding, and your variety of films from the last 5 decades is equally outstanding. I hope you continue to offer this channel and your many other fantastic channels. Nothing thing that makes your HD channels so great is the fact the movies are uncut. Thank you so much for restoring and preserving these irreplaceable pieces of cinematic history.

Sincerely,

Shane P. Banghart

[REDACTED]@ [REDACTED]

Home Phone: [REDACTED]

Acct: [REDACTED]

Selected Letters of Customer Support for VOOM:

Source: Inner Circle responses and "Press Inquiry" e-mails, 2/18/05-3/17/05

That VOOM has been a great experience for my house. From a service standpoint the order was taken and system installed (last June) with suprising ease. In fact I was shocked at how easy it was.

With a projector (1080i) and a 10' screen.....well you can imagine how exciting your programing looks!

Everyone, and I mean everyone, who walks into my theater and sees your program goes "WOW!" To bad they didn't see the old digial cable to appreciate the difference.

I know you guys have stuggled, but I am 100% confident that with the sales of HD sets as strong as they are it only takes one look at VOOM and no one wants to go back....ever.

I am proud of you for taking on this challange. I have read many a forum string wishing you the best. But you know we, your loyal views, need to step up to the plate too. We need to bring you new customers.

How about a challenge to us loyal customers? You're doing your part. We should do ours. A grass roots challenge to find new VOOM customers. Maybe a referral promotion??? I want to see all these forum typist go knocking on doors for you. I for one have a "VOOM party" scheduled for March 2 in my theater, wish me luck.

Ed Winsted

Home Phone: [REDACTED]

Acct: [REDACTED]

I love your service. I can finally use my plasma the way it's supposed to be used. Anyway, I receive emails from www.cnet.com and one email disturbed me. The following is a quote from David Katzmaier: "You've probably heard that Voom, the satellite HDTV venture run by Cablevision, (think about that for a second), has until March 31 to get bailed out of its financial troubles by founder Charlie Dolan. Meanwhile, mainstream satellite players Dish Network and DirecTV have quietly announced a switchover to the MPEG-4 format, which will render current satellite HDTV receivers obsolete. Read all about it in our updated "Three ways to get HDTV programming" feature."

I would really hate to see your company go away. Our local Voom installers said that you plan on sending another satellite up this year so there will be more channels. Should I plan on your company expanding and purchasing your DVR box when it's available or start shopping for another HDTV service? Sincerely,

George R. Jenkins

Home Phone: [REDACTED]

Acct: [REDACTED]

Please tell me you are not going to shut down at the end of this month.

I LOVE my voom! I have several HDTVs and you have the most HD programming. Please tell me what to do if you do shut down voom.

PLEASE!

Steve Taylor

Hi,

I have only had Voom for exactly one month but iam sooo amazed at your system. I was a Time Warner customer before and they could not hold a candle to Voom. I was soo distressed when i heard Voom may be going out of business by the end of this month. Please tell me you will not and may only be bought out by someone else who will continue Voom's excellent work on maintaining its high Defination channels...I can't bare going to Dish net or Direct Tv since they don't even have a fraction of the high Def channels Voom has. I love your service and have had NOOO problems at all since installation. Please fight hard to stay in... Thank you for your excellent service:-)

Selected Letters of Customer Support for VOOM:

Source: Inner Circle responses and "Press Inquiry" e-mails, 2/18/05-3/17/05

Jeanette

[redacted]@ [redacted].com

please voom dont go any where we love you and your the best so far out thire we have seen also can yu guys please partner with www.skyangel.com please voom dont go dont mave us have less hd also dont have us have to choose from dishnetwork or directtv wo allready lost primestar not another come and go company we want voom to say a live

[redacted]@ [redacted].com

Hi, I just recently got the VOOM system installed in my home. I have only had it about 2 weeks, but WOW!!!!. I love the VOOM service. The HD is awesome. I have been reading in the news about a possible shutdown of VOOM and was wondering what to do if anything. I love VOOM and it would be a real shame to lose such a great service. I think a lot of people are just now starting to hear about VOOM. I just found out about it about a month ago and decided to give it a try after purchasing a new HDTV. I have not been sorry! I have been so pleased. I really hope you guys give VOOM another chance to show more people what it can deliver.

Thanks,

Jimmy Moss

[redacted]
Home Phone: [redacted]
Acct: [redacted]

I just want you to know that prior to getting VOOM I did alot of research and to be honest all I could come up with was various complaints and people not liking your service. I went ahead and got rid of DISH, that I have had for four years, and made an appointment to have VOOM installed, All I have to say is the installer was GREAT.....I love VOOM and would recommend it to everyone. I love the remote and the menu. I find the menu to be very fast and I love the picture in the upper right hand corner that plays the channel that you have been watching. Thanks again for your service . I AM GLADE THAT I DID NOT LISTEN TO ALL THE NEGATIVES THAT ARE OUT THEIR ABOUT VOOM. I am with you for the long haul. Keep up the great service.....

Michael Brown

[redacted]@ [redacted].com

Is it true that Voom is ending? Will the plug be pulled in the near future? I love Voom!!! I know that if it was given enough time with more ads and promotions it would have done great. HDTV is the future and Mr. Dolan Sr. is a very smart man. I hope that good comes out of his efforts for the future of HDTV. Brenda Truex. A very happy loyal Voomer in Ohio

Brenda Truex

[redacted]@ [redacted].com
Home Phone: [redacted]
Acct: [redacted]

Selected Letters of Customer Support for VOOM:

Source: Satellite Guys Forum Posts, 2/14/05-3/17/05

SMSLina

02-14-2005 03:03 PM

Mr. Dolan--

I want to thank you for being an innovator in the HD field--for having a vision and not letting anyone dissuade you from it. All great men and great ideas run into obstacles, the important thing is just to keep doing what you're doing...once the world finds out how great your company is, you'll be unstoppable!!

Part of my job description is to sell DirectTv, but I myself have Voom, and I find that I can't stop talking about it!! I sell HDTVs all day long, and Voom just makes more sense, which is why I have it, even though I could get free Direct if I wanted it! I can't wait for the HD DVR, and the capability to get locals from other cities (our local Fox affiliate hasn't switched over yet, so no one in our area could get the Superbowl or any of the playoff games in HD). Several of my customers have signed up for Voom at my recommendation, and they all love it!! I know that if more people in the midwest saw Voom advertising, your service would be hugely popular here. No one that I know has even heard of it, except for the people that have been to my house and seen it, who quickly signed up for it themselves.

Thanks again for all that you have been through and still are doing to be the best in the field. Keep that HD content coming!!!

Thank you,
Carolina Terrazas
:)

teamw

02-14-2005 03:22 PM

Best to Voom

Mr Dolan:

As a current D* and Voom subscriber, and former E* subscriber, thanks for saving us from the total mediocrity of your competitors - they promise HD, you deliver it. And may you do so profitably in the future. With the recent additions to your channel line up (my wife watches Food and HGTV), I will dispense with DTV as soon as your financing arrangements are confirmed. I do hope you will add HDNet to your lineup - it's now the only thing I will miss from DTV. Meanwhile, I continue to recommend your service to my friends, a recommendation forcefully supported by comparisons of Voom and DTV programs on my Sharp 45" LCD.

John W

mdanderson

02-19-2005 11:48 AM

Mr. Dolan:

Just wanted to say thank you for bringing Voom to the public and I having been enjoying it since April of last year. The picture is excellent for the most part and the DD5.1 sound is really nice. My installer was great and very patient and I continue to enjoy the new channels that are being added. I hope Voom continues to provide great HD programs and moves forward with new technology. Thanks again.

Matt Anderson

Selected Letters of Customer Support for VOOM:*Source: Satellite Guys Forum Posts, 2/14/05-3/17/05***adidadi**

02-18-2005 02:50 PM

Mr. Dolan,

You are a true visionary. You deliver the real potential of HD into our homes while others claim to. You have created an astonishing, revolutionary product that customers have immediately become loyal to due to its incredible attributes. I have nothing but the most respect for you for pursuing and delivering a dream, a dream we all enjoy. Thank you.

Adriano Aragon

calikarim

02-18-2005 08:26 PM

Thank you Mr Dolan

Thank you Mr Dolan for keeping HD alive, and voom going foreward. The day i found voom was going to stay alive was the happiest day of my life. Me and my friends celebrated the whole nite. You have a vision and it will pan out. Wait till your other HD channels roll out and the Dvr comes out, the whole United States will come crawling to the doors of Voom. Voom will be on every lips . Everyone will wait to taste the savory flavor of HD, thru the lens of voom. Mr Dolan we all know you are a genius, all of America will find out. The revolution is just beginning, and you are George Washington of 2005.

May voom live forever. God bless you. Mr Dolan you should be Time Man of the year.

JWK

02-20-2005 01:29 AM

Dear Mr. Dolan,

Your vision was brave and beautiful. Because of you, I've enjoyed a year filled with television the way it *should* be in the twenty-first century.

With network affiliates multicasting in some ill-conceived desire to degrade their product so that it looks just as bad as what we get from a second-rate cable or satellite provider, you alone took the opposite tack and poured all of your resources into crystal clear high-definition feeds.

My local PBS station splits their digital bandwidth between *four* channels. Thanks to you, and the PBS-derived content on EquatorHD and Rave, I get to actually see shows like Smart Travels and Soundstage the way they were meant to be seen.

I love Voom's content. Voom has raised the bar as far as how many HD channels a satellite provider can offer. And while I know Voom hasn't been cheap to fund, I think the programming Voom has acquired for its service is remarkable in its value and diversity.

I don't know what'll happen to Voom in the future. Every day seems to bring new hyperbole about the status of the service. Is it going under? Will it be expanded? Will our boxes just go dark some morning? I've decided I don't care. Or more precisely, I've decided not to think much about it. It's nothing I can control. Instead, I choose to revel in my Voom while it lasts.

I do have one small request, if I may be so bold: Could you ask whoever handles Rave to play some more videos? I was born in the early 1970s, and spent my formative years in the age of MTV, back when MTV actually played videos. As such, they're a personal favorite of mine. And while watching the same concert twice is as dull as watching paint dry, seeing a video two or three times in a day isn't bad at all.

HDTV is worth the fight. I pray that the greedy mediocrity of innumerable low-quality, standard definition channels doesn't win the war for the souls of our nation's television sets. If quality wins out, we'll have

Selected Letters of Customer Support for VOOM:

Source: *Satellite Guys Forum Posts, 2/14/05-3/17/05*

Voom to thank for it.

Sincerely,

Jared Kendall

[REDACTED]@[REDACTED]

Amphicar770

02-28-2005 10:48 AM

Mr. Dolan,

It is refreshing to discover that there are still individuals in corporate America who actually have a vision beyond the upcoming quarter. Thank you for your continued commitment to VOOM.

I myself am a new subscriber to VOOM. I have had E* and Digital Cable both of which pale in comparison. I could not be more pleased with the service and I intend to remain as a long-time customer and advocate.

There is nothing wrong with the VOOM concept which a good marketing plan can not resolve. I encourage you to stick with your vision and I am certain that VOOM will become a huge success. The hardware market has finally reached the point where WalMart is now selling 26" HD LCD's for \$750 dollars. If the VOOM message can only get out to all of these new HD owners they will be yours.

I have seen the the future of television and it is clearly spelled VOOM.

Best Regards,

Mike Israel

Royersford, PA

e-mail [REDACTED]@[REDACTED]

Home Phone: [REDACTED]

Acct: [REDACTED]

huntsmontana

03-02-2005 12:29 PM

VoOm= Freedom

Dear Mr Dolan, as posted in a thankyou note from the pages above I find the analogy to freedom very pertinent.

When the board decided to yardsale rainbow 1, I posted in a forum that we were tampering with the 1st amendment.

Long story short. I am a dealer for voom and Dish network and have both displayed in my showroom. I had witnessed the live broadcast of the Presidential Innaguaration both from HDNews and fox and NBC (the latter two in sd). The thing that makes me feel that this borders on a quest for free speech is this. During the parade some goof in the crowd had lit the end of a long stick and attempted to start a red white and blue banner on fire (hung on a building).....

I was watching this as all three networks had similar angles of coverage. You could not see it in sd. It only was unvelled by high definition. To me this was as much of a milestone as the move from black and white to color. From 12"rpm to cd. A new fresh standard.

One could not see this goof on regular tv. Only available on Voom.

To me this historical. This was the first innagueral in High definition and you did it. I support your quest for HD content you have great entertainment with your 21 channels alone.

Obviously with the cloud of rumors and unknown my equipment inventory is low. I am a small retailer who pushes HD more than most. I want to continue the spread. So to you, I say way to go! Damn the torpedoes... Full speed ahead! We here are behind you.

Voom = Freedom

Selected Letters of Customer Support for VOOM:

Source: *Satellite Guys Forum Posts, 2/14/05-3/17/05*

Thanks, Bob Hunt
Shooting Star Satellite llc
Montana USA

socalpanman

03-02-2005 05:21 PM

Thanks and Looking Fwd to More

Thank you Mr. Charles Dolan for the vision. My family thanks you for extreme high quality of service, programming. The customer support through all the growth and troubles has always been exceptionally friendly and helpful. The bar is set. The time has come. Voom isn't not an idea that came too early. Rainbow DBS laid the foundation that has made the HD consumer comfortable with making the jump. You have caused the dramatic swell in sales. These new people will be eager for a Voom service. Even if all ends now the industry can't go back. At the very least the name may change but the content is so good that survival somehow has to happen. I'm a Mac user for over 25 years.

You did Great! This has been my best entertainment investment.

JohnnyVoom

03-03-2005 07:22 PM

Although I knew of the difficulties facing Voom, I started my subscription last weekend and went all the way with Va Va Voom. I am agog at the quality of the picture and sound. As long as there is Voom I will never go back to D*. This is the tv I have waited for. Additionally, this is the satellite system for people who love tv whether it's HD or not. It's a great lineup of programming. Monsters HD and the other exclusive channels are my personal favorites. TV is no longer boring and the programs on my HDTV are beautiful (how many DTV customers can say that). Thank you, Mr. Dolan for having the vision. As long as there is Voom, you will have a grateful customer in me. -JJ

jayhawk33

03-04-2005 12:12 AM

100% Awesomely Beautiful HDTV

:) This is the BEST picture quality I've ever experienced. I've tried to achieve good picture quality thru Cox cable here in Texas but have failed. Until I recieved Voom & started using VaVa Voom I thought that it was going to be a hopeless battle. Thank You Voom for saving my HDTV expectations & blowing them away!!!! :)

:eek: I just found out tonight while trying to visit the website (voom.com) that the company was in fear of closing. All I can say to that is damn the people who are responsible for this. :mad: There is nothing that can even come close to Voom. :yes I just couldn't believe what I was reading on MSNBC about the company leaving. Thank god for people like you who stand in determination on keeping the future of TV in mind. I know if it wasn't for you for coming up with the idea of HBO I wouldn't have grown up with Fraggle Rock & be in love with the Sopranos today. :yes Sir all I can truly say to you is FIGHT, FIGHT, FIGHT !!!!!!!!!!!!!!!

:yes Long Live VOOM the King of HDTV :yes



Selected Letters of Customer Support for VOOM:

Source: Satellite Guys Forum Posts, 2/14/05-3/17/05

Tvlman

03-04-2005 04:11 PM

March 4, 2004
Huntington Beach, Ca

Dear Mr. Dolan,

This is my second letter of thanks to you for continuing to fight for the wonderful concept of High Definition known as VOOM. Good things don't always come easy and I would like to thank you for your untiring efforts in spite of heavy opposition. VOOM is the best thing that has ever happened to Television and the American People. If there is any thing either I or the other VOOM fans can do to help you in your task you only have to ask. I wish you continued success in the days ahead.

Thanks again,

Don Dickerson
Huntington Beach, CA

e-mail: d[REDACTED]
Home Phone: [REDACTED]
Acct: [REDACTED]

M_Teahan

03-04-2005 05:15 PM

Thanks!

Mr. Dolan,

Thanks for having the vision to see the future of broadcasting and for having the guts to fight for it. If it were simply about the money, you should have walked long ago, but it was most likely the notion that you could do something better that got you into this business so many years ago.

I am one of the legion of clients that doubled your subscriber base in the last few months and discovered this mess only after having recommended the service to a rather successful agent here in Los Angeles.

I'm sticking with you and your team through to the end. My HDTV would not be the same without you.

Michael Teahan
Glendale, CA

:bow

e-mail: M[REDACTED]
Home Phone: 3[REDACTED]
Acct: 2[REDACTED]

gutter

03-06-2005 08:08 PM

Mr. Dolan,

You have always been slightly ahead of your time. The recent announcements of NBC/Universal and other networks increasing their HD says that they are now catching up to you. You are right...This is no time to backtrack but to look forward. Thanks and good luck.

Selected Letters of Customer Support for VOOM:*Source: Satellite Guys Forum Posts, 2/14/05-3/17/05***texansga18**

03-07-2005 02:12 PM

Mr Dolan,

Whatever happens i will know you have done your best. I am on pins and needles here waiting to see what the final outcome was in your board meeting, but i have faith a technology like Voom will live on. You have done what no other satellite service has done, created the most HD channels right off the bat and allowed us who are the HDTV owners to utilize our HDTV's like they were meant to be used. From what i have been reading on you, i know you are not a quitter so you will do whatever it takes to win now or later. I have never been sooo pleased with a service like Voom and i recently dropped my cable service to get Voom and it was the best decision i have ever made. Cable can't hold a candle to what you created. And fighting for your company as you are shows you have heart which is lacking in all others who are only about money, not what the customers want. HD is what we want and you delivered what NO ONE ELSE HAS. You are a man of true honor and heart. I only wish your son could have learned what heart means to customers rather than what he can get out of this. I'm sure you instilled good business values in him, but obviously he will one day learn the hard way its not only about fighting for your dream, but about working hard to keep that dream alive. There are struggles in all new companies starting out, but the ones who stuck it out are the ones still around today. I applaud you!!! Signed; a very pleased Voom customer till the end.

Richard Fuller

03-07-2005 05:30 PM

Mr. Dolan thank you for providing such a stellar satellite service which put emphasis on High Definition the wave of the future.

Thank you
Richard Fuller

E-mail: [REDACTED]
Home Phone: [REDACTED]
Acct: 4 [REDACTED]

RRaymo

03-10-2005 11:08 AM

To Charles Dolan, Mickey Alpert, et al...
2/10/2005
Dear Voom,

Thanks for the continuing effort in improving your fledgling service, the boardroom battles, the ongoing uphill battle against the two other DBS businesses (one of which got \$12K from me over 11 years,) and on.

I'm sure you remember just how much money that USSB/Hughes venture lost in their first three years--and are willing to bet with me that your baby will be profitable in that time (hell or high-water--and you have had both of late.)

Don't hesitate to call on any one of us here on the Sat-Guys Forum for a gut-check at any moment... as you'll be sure to get all forms of both useful and slightly crazed opinions as needed.

Best, and Break-A-Leg (preferably someone else's...)

Rick Raymo

Selected Letters of Customer Support for VOOM:

Source: Satellite Guys Forum Posts, 2/14/05-3/17/05

E-mail: [REDACTED]
Home Phone: [REDACTED]
Acct: [REDACTED]

nicholassjenkins

03-12-2005 10:00 PM

Mr. Dolan:

Thank you for providing an additional DBS choice.

For most of us, the real problem is lack of broadcaster choices. In my area, I can suffer with 6 local TV stations OTA, or 1 cable company (w/no OTA STB support). Previously, I could choose from 2 Satellite providers (dish size is a limitation where I live). Voom's entry into the market provides 4 antenna-supportable choices, 3 with real channel selection volume, rather than the 1 poor-service cable choice. This is good for me and the market, and hopefully you. The better content via the 21 custom channels and the HD focus are an enormous a bonus. But the real appreciation is for simply providing another quality service provider offering in an otherwise sparse landscape.

At this point, I understand you are investing/betting your own fortune on your Edsel, and I appreciate it.

Thank you,
-NICK

Nick Jenkins
E-mail: [REDACTED]
Home Phone: [REDACTED]
Acct: [REDACTED]

randyopro

03-15-2005 06:14 PM

:D Mr. Dolan

I have only been a VaVaVoomer for about 1 month and I cannot even think about going back to "E" or using some other inferior service.

Thank you for the most incredible TV experience I have ever had

Please don't let VOOM die

STILL VOOMIN' IN CHICAGO :) :D :) :D :yes :D :yes :) @party :up :dev

ATTACHMENT 4

MICHAEL G. BAUMANN
ECONOMISTS INCORPORATED

ANALYSIS OF ECHOSTAR AND RAINBOW DBS APPLICATION

Analysis of EchoStar and Rainbow DBS Application

by
Michael G. Baumann

March 28, 2005

Analysis of EchoStar and Rainbow DBS Application

Michael G. Baumann

I. Introduction

I have been asked by VOOM HD, LLC to review the Application for Consent to Assignment of Licenses filed by EchoStar Satellite L.L.C. and Rainbow DBS Company, LLC.¹ In particular, I have been asked to review the Application in light of the Commission's recent findings in the proposed acquisition by EchoStar of certain assets from General Motors Corporation and Hughes Electronics Corporation and the Commission's recent Order regarding the auction of two available Direct Broadcast Satellite channels at the 61.5° W.L. orbital location.² Based on the Commission's findings in these other matters, I conclude that the Commission should deny the Application.

II. The Proposed Transaction

EchoStar Satellite L.L.C. (EchoStar), a subsidiary of EchoStar Communications Corporation, and Rainbow DBS Company LLC (Rainbow DBS), a subsidiary of Cablevision Systems Corporation, are applying for consent to an agreement reached in January 2005 for EchoStar to purchase certain satellite assets from Rainbow DBS for \$200 million. Specifically, EchoStar seeks to purchase Rainbow 1, a direct broadcast satellite located at

¹ *Application for Consent to Assignment of Licenses*, In the Matter of Rainbow DBS Company LLC (Assignor) and EchoStar Satellite L.L.C. (Assignee), Consolidated Application for Consent to Assignment of Space Station and Earth Station Licenses, and related Special Temporary Authorization ("Application").

² *Hearing Designation Order*, Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee), FCC 02-284, Released: October 18, 2002 ("Hearing Designation Order"), and *Order In the Matter of Auction of Direct Broadcast Satellite Licenses*, FCC 04-271, Released: December 3, 2004 ("Auction of Direct Broadcast Satellite Licenses").

61.5° W. L., together with the rights to 11 DBS frequencies at that location. As part of the transaction, EchoStar will also acquire ground facilities and related assets at Black Hawk, South Dakota.³

III. Description of the Parties

A. EchoStar (DISH Network)

Founded in 1980, EchoStar is a public traded company headquartered in Englewood, Colorado. EchoStar's core business, the delivery of direct broadcast satellite (DBS) service, is offered to consumers through its subsidiary, DISH Network. EchoStar currently owns or leases twelve satellites in geo-stationary orbit.⁴ EchoStar has entered into contracts to construct four new satellites, expected to be completed between 2005 and 2008, and has entered into service agreements to lease capacity on two additional satellites under construction.⁵ With over 11 million subscribers today, EchoStar is the second largest DBS operator⁶ and has grown to become the third largest multichannel video programming distributor (MVPD).⁷

The FCC has licensed EchoStar to operate 96 DBS frequencies at various orbital positions, including 11 frequencies at the 61.5° W.L. orbital location. In addition, "EchoStar also won a license in Auction No. 52 to operate on 29 additional DBS channels."⁸ EchoStar III, which currently operates at the 61.5° W.L. orbital location, "can now operate a maximum

³ Application, pp. 1-2, and EchoStar Form 10-K, March 16, 2005 ("EchoStar 2004 10-K"), p. 2.

⁴ EchoStar 2004 10-K, pp. 6-8.

⁵ EchoStar 2004 10-K, p. 9.

⁶ EchoStar 2004 10-K, p. 12, and FCC, Eleventh Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 04-227, Released: February 4, 2005 ("Eleventh Annual Report"), Table B-3.

⁷ See News Release, "DISH Network Passes 11 Million Customer Milestone; Company Now Third Largest Pay-TV Provider" (released Jan 1, 2005), at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=400.

⁸ Auction of Direct Broadcast Satellite Licenses, ¶ 25.

of 26 transponders, but due to redundancy switching limitations and specific channel authorizations it currently can only operate on 18 of the 19 FCC authorized frequencies EchoStar utilizes at the 61.5 degree west orbital location.”⁹

Program package offerings from EchoStar’s DISH Network include an entry-level “America’s Top 60” which offers 60 of the most popular video channels for \$26.99 per month and an expanded “America’s Top 120” package for \$37.99 per month. Other packages offered include an “America’s Top 180” for \$47.99 per month and an “America’s Everything Pak” which includes HBO, Cinemax, Showtime and STARZ! for \$81.99 per month. In 155 of the largest markets in the United States, representing over 95 percent of all U.S. television households, satellite delivered local channels can be added to any of these packages for an additional \$5.99 per month.¹⁰

B. Cablevision (Rainbow DBS, VOOM)

Cablevision Systems Corporation, headquartered in Bethpage, NY, is a leading entertainment and telecommunications company. As of December 31, 2004, Cablevision serviced approximately 2.96 million cable television subscribers in and around the New York City metropolitan area, making it the sixth largest cable operator in the United States.¹¹

Cablevision owns Rainbow DBS, a direct broadcast satellite provider that is marketed as VOOM. VOOM began providing DBS service in October 2003. VOOM service is transmitted by the Rainbow DBS satellite, Rainbow 1, which was launched in July 2003 and is located at 61.5° W.L. From this orbital position, the satellite can provide coverage to the contiguous United States.¹² In addition to its Rainbow 1 satellite, Rainbow DBS leases 16

⁹ EchoStar 2004 10-K, p. 6.

¹⁰ EchoStar 2004 10-K, pp. 2-3.

¹¹ Cablevision Form 10-K, March 16, 2005 (“Cablevision 2004 10-K”), p. 4.

¹² The 61.5° W.L. orbit location is visible from all of CONUS (Alaska and Hawaii are not visible). However, the look angle, the upward tilt of the DBS earth station antenna at which it must be pointed to receive the signal from the satellite, for example in Washington State, is sufficiently low that it may often be blocked by terrestrial obstacles (trees, buildings, etc.).

transponders from SES Americom on its Americom 6 satellite, which is located at 72° W.L. Rainbow DBS has FCC licenses to construct, launch and operate five fixed service, Ka-band satellites and entered into a contract in November 2004 for the construction of these five satellites.¹³ As of February 28, 2005 VOOM had approximately 40,000 subscribers.¹⁴

VOOM is the first MVPD service to offer a comprehensive array of high-definition (HD) television programming and it carries a larger number of high-definition channels than any other satellite provider or cable television system. At present, the VOOM service offers over 39 channels in high-definition, including 21 exclusive VOOM channels and approximately 90 standard definition channels. Future products from VOOM include a digital video recorder capable of recording and playing back HD programming.¹⁵

VOOM's program packages range from \$49.90 per month for 26 HD channels plus other standard definition channels to \$89.90 per month for 39 HD channels, including premium channels from HBO, Cinemax, Showtime and STARZ!. Installation and monthly equipment rental charges vary depending upon whether the customer purchases or leases the equipment.¹⁶

C. VOOM HD

VOOM HD, LLC ("VOOM HD") is a new private company formed by certain holders of Cablevision Class B Common Stock, including Charles F. Dolan, Cablevision's Chairman and Thomas C. Dolan.¹⁷ VOOM HD has made offers to acquire the business, assets and liabilities of the Rainbow DBS satellite business. To date, these offers have not been accepted.

¹³ Cablevision 2004 10-K, p. 12.

¹⁴ Id.

¹⁵ <http://www.voom.com>.

¹⁶ Id.

¹⁷ Cablevision 2004 10-K, p. 13.

IV. Relevant Market

The first step in determining the competitive impact of the proposed assignment of licenses is to identify the relevant product and geographic markets. The Commission addressed the issue of market definition during its investigation of EchoStar's proposed merger with DirecTV, another DBS provider. For purposes of this report, I have relied on the findings of the Commission in that investigation.

A. Product market

The Department of Justice/Federal Trade Commission's *Horizontal Merger Guidelines* define the relevant product market as the smallest group of competing products that passes the test in which a hypothetical monopolist of the products could profitably impose a "small but significant and non-transitory price increase."¹⁸

Applicants in this matter argue that the market for MVPD services is the appropriate market for consideration of the proposed transaction.¹⁹ While this is consistent with the *tentative* product market adopted by the Commission in evaluating the EchoStar/DirecTV merger, the Commission stated, "The record strongly suggests that the relevant product market is considerably more narrow than all MVPD services."²⁰ The Commission went on to state "the relevant product market may be limited to just DBS services, as EchoStar itself argued in its antitrust lawsuit against DirecTV."²¹ The Commission further stated "the administrative

¹⁸ *Horizontal Merger Guidelines*, issued by the U.S. Department of Justice & Federal Trade Commission, April 2, 1992, revised April 8, 1997 ("*Merger Guidelines*"), §4.

¹⁹ Application, p. 6.

²⁰ Hearing Designation Order, ¶ 114.

²¹ Hearing Designation Order, ¶ 115, and, *Amended Complaint*, EchoStar Communications Corp. v. DirecTV Entertainment Corp., No. 00-I-212 (D. Colo. 2000).

law judge will consider whether the relevant product market includes services provided by all cable companies, or just by high-capacity cable systems, or neither.”²²

The relevant product market derived from the analysis depends on the products involved in the start of the analysis. In the Commission’s *Hearing Designation Order* denying the merger of EchoStar and DirecTV, the Commission found that when analyzing the relevant product market, the starting point should be products supplied by the parties involved in the transaction.²³ By way of example, the Commission stated that low-capacity cable system subscribers may find DBS services to be a sufficiently close substitute to cable services to switch to DBS in response to a small increase in price of cable services, however DBS subscribers may not find low-capacity cable systems to be a close enough substitute and will not switch away from DBS services in response to a small price increase. Thus, the Commission suggested that when starting with cable systems it may be appropriate to include DBS services in the relevant product market, but when starting with DBS systems, low-capacity cable systems would not be included in the relevant product market because they do not constrain price increases by DBS providers.²⁴

As support for low-capacity cable systems not being a sufficient substitute for DBS services, the Commission cited Warren Communications News’ Data by Design statistic showing that 72% of cable systems have fewer than 53 channels and these cable systems serve 24% of cable subscribers in the U.S, while both EchoStar and DirecTV have the capacity to offer as many as 300 channels.²⁵ In addition, Commission staff analysis of churn data supplied by EchoStar and DirecTV showed that churn rates between those two providers was higher in areas with low-capacity cable systems and that DBS had significantly higher penetration in

²² Hearing Designation Order, ¶ 115.

²³ Hearing Designation Order, ¶ 109.

²⁴ Hearing Designation Order, ¶ 109.

²⁵ Hearing Designation Order, ¶ 111 and fn. 333.

areas served by low-capacity systems relative to areas served by high-capacity cable systems.²⁶

As observed by the Commission, while “the evidence...suggests that high-capacity cable systems are a closer substitute for DBS service than low-capacity cable systems,” “the evidence...strongly indicates that the services offered by the Applicants [EchoStar and DirecTV] are closer substitutes to each other than are cable services offered by either high-capacity or low-capacity cable systems.”²⁷ Recently, the Commission reiterated this view of the relevant product market.²⁸

B. Geographic Market

Under the *Merger Guidelines*, the relevant geographic market is defined as the area in which a hypothetical monopolist, producing the relevant product, could profitably impose a “small but significant and nontransitory” increase in price, assuming all else equal.²⁹

In the market for MVPD service, the Commission has determined that the relevant geographic market is local.³⁰ This is because consumers make decisions based on the MVPD choices available to them. For simplification purposes, the Commission then aggregates the local geographic markets into three broad categories: (1) markets not served by any cable system; (2) markets served by a low-capacity cable system; and (3) markets served by a high-capacity cable system.³¹

²⁶ Hearing Designation Order, ¶ 112.

²⁷ Hearing Designation Order, ¶¶ 112-113.

²⁸ Auction of Direct Broadcast Satellite Licenses, ¶ 20.

²⁹ *Merger Guidelines*, §1.21.

³⁰ Hearing Designation Order, ¶ 119.

³¹ Hearing Designation Order, ¶ 120.

IV. Analysis of Potential Harm

A. Status of DBS Competition

In general, competition in a market exists if consumers have choices between goods or services that are close substitutes to one another. If competition exists, when one provider raises prices, consumers have close alternatives available to which they can switch. According to the Commission, “The level of competition depends on what products are substitutes (product market), where these substitute products are available (geographic market), what firms produce them (market participants), and what other firms might be able to produce substitutes if the price were to rise (market entry).”³²

Given the Commission’s analysis concerning the relevant product market, DBS competition is likely to be particularly important in geographic categories (1) and (2).³³ Since DBS services provide the only competitive options for MVPD service to consumers located in uncabled areas, a disproportionately large percentage of DBS subscribers are in areas that do not have cable.³⁴ Moreover, the Commission found that competition between DBS and high-capacity cable systems in geographic category (3) areas would not necessarily protect consumers in geographic category (1) and (2) areas. In particular the Commission noted that DBS providers have implemented promotions that target customers in particular cable service areas and that they also could discriminate in terms of service quality.³⁵

There are currently only four operators that hold licenses to provide DBS service: EchoStar, DirecTV, Dominion Video Satellite, Inc., and Rainbow DBS.³⁶ Of these, only

³² Hearing Designation Order, ¶ 97.

³³ Auction of Direct Broadcast Satellite Licenses, ¶ 20.

³⁴ Hearing Designation Order, ¶ 123, and *Complaint*, United States of America, et al., v. EchoStar et al., (October 31, 2002), ¶ 37.

³⁵ Hearing Designation Order, ¶¶ 181-182.

³⁶ Eleventh Annual Report, ¶ 53.

EchoStar and DirecTV operate in all 50 states. According to the Commission, as of June 2004, DirecTV is the leading DBS provider and second largest MVPD with around 13 million subscribers; EchoStar is the second largest DBS operator and fourth largest MVPD with around 10 million subscribers; Rainbow DBS' service, VOOOM, in eight months had grown to around 25 thousand subscribers; and Dominion Video Satellite's service, Sky Angel, was estimated to have approximately 1 million subscribers.³⁷

The Commission "has a long-standing policy of promoting competition in the delivery of spectrum-based communications services and has implemented numerous measures to foster entry and ensure the availability of competitive choices in the provisioning of such services."³⁸ In particular, the Commission has employed measures to foster competition in the provision of DBS service.³⁹

Indeed, prior to the proposed transaction, the Commission established a set of rules that would apply when it auctioned off a license to use the last two available DBS channels at 61.5° W.L.⁴⁰ This orbit location is important because the two channels are the last two available capable of serving the entire Eastern United States. The Commission stated that any licensee currently operating satellites at orbit locations capable of providing DBS service to the 50 U.S. states will be prohibited from acquiring, owning, or controlling this license for a period beginning with the release date of the Order (December 2004) and ending four years after the award of the initial license.⁴¹ The FCC felt that such a restriction was necessary because either EchoStar or DirecTV's acquisition of the two channels at 61.5° W.L. would prevent another DBS provider from using the last two available channels that serve all of the

³⁷ Eleventh Annual Report, ¶ 55.

³⁸ Eleventh Annual Report, ¶ 88.

³⁹ Eleventh Annual Report, ¶ 89.

⁴⁰ Auction of Direct Broadcast Satellite Licenses.

⁴¹ Auction of Direct Broadcast Satellite Licenses, ¶ 1.

eastern United States to compete against the other large DBS companies.⁴² “We conclude that such a restriction on eligibility for this license will serve the public interest by helping to promote the development of an additional provider of DBS services.”⁴³

It is inconsistent with the Commission’s goal of fostering competition in the provision of DBS service, for the Commission to grant the transfer of 11 channels at 61.5° W.L. to EchoStar when just less than four months ago the Commission decided that it would serve the public interest and benefit competition to prevent EchoStar from acquiring 2 channels at that same location.

B. Benefits of another DBS provider

In determining who would be eligible to bid in the auction for the 61.5° W.L. license, Rainbow DBS contended that the public would benefit by a new, facilities-based DBS provider. Rainbow DBS further contended that a new DBS provider would increase the speed of innovation, increase consumer choice and provide substantial consumer welfare.⁴⁴

In previous findings, the Commission seems to agree with Rainbow’s contention that more choices would be in the best interest of consumers. In 2002, the Commission established the Multichannel Video Distribution and Data Service (MVDDS). In doing so, the Commission concluded that another platform operator of DBS services would provide significant public interest benefits. The Commission believed that an additional DBS provider would lead to lower prices, improved service quality, increased innovation, and increased service to unserved or underserved rural areas.⁴⁵

⁴² Auction of Direct Broadcast Satellite Licenses, ¶ 33.

⁴³ Auction of Direct Broadcast Satellite Licenses, ¶ 1.

⁴⁴ Auction of Direct Broadcast Satellite Licenses, ¶ 11.

⁴⁵ MVDDS Second R&O, 17 FCC Rcd at 9680, ¶ 165.

The Commission determined it was appropriate not to let EchoStar and DirecTV participate in the auction for the remaining 61.5° W.L. license because “increased choices in the DBS marketplace could yield important public interest benefits, including greater price competition, the development of additional new services, and technological innovation. Enhanced DBS competition has the potential to bring such benefits to consumers both in markets in which DBS operators compete with cable systems and in markets in which they do not.”⁴⁶ Furthermore, the Commission stated its belief that the benefits of encouraging another DBS competitor outweigh the benefits obtained if either EchoStar or DirecTV used the available channels to provide more local-into-local service.⁴⁷ This is because “[O]pportunities for the development of an additional DBS competitor are limited.”⁴⁸

The Commission believes “that the development of an additional DBS provider could benefit consumers.”⁴⁹ Moreover, the Commission determined that consumers would benefit either from similar programming at lower prices or different program options.⁵⁰ Even if the new DBS provider was not a major competitor, but offered programming and services significantly different from what is currently being provided, customers would be better off.⁵¹

C. VOOM as an effective competitor

As stated above, VOOM is the first service to offer a comprehensive array of high-definition (HD) television programming and it carries a larger number of high-definition channels than any other satellite provider or cable television system. VOOM offers programming services significantly different from what is currently being provided by other

⁴⁶ Auction of Direct Broadcast Satellite Licenses, ¶ 17.

⁴⁷ Auction of Direct Broadcast Satellite Licenses, fn. 70.

⁴⁸ Auction of Direct Broadcast Satellite Licenses, ¶ 21.

⁴⁹ Auction of Direct Broadcast Satellite Licenses, ¶ 20.

⁵⁰ Auction of Direct Broadcast Satellite Licenses, ¶ 24. Also see, ¶ 25 n70 and ¶ 34.

⁵¹ Auction of Direct Broadcast Satellite Licenses, ¶ 23.

MVPD services, to the benefit of consumers. In fact, VOOM is considered by outside observers the most likely to be an effective competitor. “The key point here, and the reason VOOM is our CE Pick of the Month, is that the service currently puts more HD content in one place than any other cable or satellite offering.”⁵² Hence, VOOM is evidence that a new DBS competitor can be innovative and increase consumer choice.

V. Alternatives to the Proposed Transaction

In evaluating the competitive effect of an acquisition, the *Merger Guidelines* recognize that under certain conditions an acquisition is not likely to create or enhance market power if absent the acquisition, the assets would otherwise exit the relevant market.⁵³ One of these conditions is that the seller has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm or division that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger. The *Merger Guidelines* state, “Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets -- the highest valued use outside the relevant market or equivalent offer to purchase the stock of the failing firm -- will be regarded as a reasonable alternative offer.”⁵⁴

In evaluating the Application, the Commission should consider whether there are alternative purchasers for the licenses at issue in the proposed transaction. It appears that there is at least one alternative buyer in VOOM HD.

VI. Conclusion

The opportunities for the development of additional DBS services are limited. Less than four months ago, the Commission determined that possibility for the development of an

⁵² CE Tips Magazine, March 2004, as reported at http://www.voom.com/see_it/why1.shtml.

⁵³ *Merger Guidelines*, §5.

⁵⁴ *Merger Guidelines*, fn. 39.

additional DBS provider was so important that it excluded EchoStar and DirecTV from bidding on a license for the last two channels at 61.5° W.L. Now, the Commission is being asked to allow EchoStar to acquire 11 licenses at the same orbit location. Consistent with its prior findings and determinations, the Commission should deny the Application.