

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

In the Matter of	)	
	)	
Rainbow DBS Company LLC, Assignor	)	IB Docket No. 05-72
	)	
and	)	File No. SAT-ASG-20050128-00017
	)	
EchoStar Satellite L.L.C., Assignee	)	File No. SES-ASG-20050131-00117
	)	
Consolidated Application for Consent to	)	File No. SAT-STA-20030623-00122;
Assignment of Space and Earth Station	)	SAT-STA-20040319-00081; SAT-
Licenses and Special Temporary Authority	)	STA-20040924-00191 (renewal
	)	pending SAT-STA-20050329-00078)
	)	
	)	Call Signs DBS 8701 and E020248
	)	

**RAINBOW DBS COMPANY LLC AND ECHOSTAR SATELITTE L.L.C.**

**OPPOSITION TO JOINT PETITION TO DENY**

April 12, 2005

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Rainbow DBS Company LLC (“Rainbow DBS”)<sup>1/</sup> and EchoStar Satellite L.L.C. (“EchoStar”)<sup>2/</sup> (collectively the “Applicants”) hereby submit this Opposition to the Joint Petition to Deny (“Petition”) filed by VOOM HD, LLC (“VOOM HD”)<sup>3/</sup> and The Association of Consumers to Preserve and Promote DBS Competition (“Association”) (collectively the “Petitioners”) in the above-captioned matter.<sup>4/</sup>

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<sup>1/</sup> Rainbow DBS is an indirect wholly-owned subsidiary of Cablevision Systems Corporation (“Cablevision”). Rainbow DBS currently provides the VOOM<sup>SM</sup> subscription television service through the Rainbow 1 satellite.

<sup>2/</sup> EchoStar is a leading provider of advanced digital television services under its DISH Network brand.

<sup>3/</sup> VOOM HD asserts that it is controlled by Charles F. Dolan through Dolan Family Holdings LLC, of which Mr. Dolan is the sole member. VOOM HD does not operate the VOOM<sup>SM</sup> subscription television service. The VOOM<sup>SM</sup> subscription television service is operated by Rainbow DBS.

<sup>4/</sup> VOOM HD, LLC and The Association of Consumers to Preserve and Promote DBS Competition, IB Docket No. 05-72, Joint Petition to Deny (filed March 28, 2005) (“Petition”).

On January 20, 2005 and January 27, 2005, the Applicants entered into a Satellite Sale Agreement and a Letter Agreement whereby EchoStar agreed to purchase and Rainbow DBS agreed to sell certain assets for \$200 million in cash consideration subject to Federal Communications Commission (“Commission” or “FCC”) approval of the transaction and antitrust clearance.<sup>5/</sup> The assets being sold include: (i) the Rainbow 1 satellite, (ii) associated earth station facilities located at Black Hawk, South Dakota, and (iii) related Commission authorizations to operate 11 Direct Broadcast Satellite (“DBS”) channels from the 61.5° W.L. orbital location, an additional two DBS channels that Rainbow DBS operates on Special Temporary Authority (“STA”) at 61.5° W.L., and the Black Hawk earth station facility. On January 28, 2005, the Applicants filed the above-referenced assignment applications (“Applications”) with the Commission, and they were placed on public notice on February 25, 2005.<sup>6/</sup> Only one formal petition was filed against the Applications, by VOOM HD and the Association.<sup>7/</sup>

The Commission should reject the Petition and grant the Applications because the Petitioners lack requisite standing to complain about the proposed transaction, and in any event have failed to demonstrate that the sale of these assets would harm competition or otherwise be

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<sup>5/</sup> The Hart-Scott-Rodino Act waiting period expired on February 28, 2005, without further action being taken by the Justice Department.

<sup>6/</sup> See EchoStar Satellite L.L.C. and Rainbow DBS Company LLC Seek Approval for the Assignment of FCC Licenses and Authorizations Held by Rainbow DBS Company LLC to EchoStar Satellite L.L.C., Public Notice, IB Docket No. 05-72, DA 05-501 (rel. February 25, 2005).

<sup>7/</sup> In addition to the Petition, the Commission has received approximately 330 informal comments and correspondence from the public. Most of these comments oppose the Applications because of their stated desire to continue to receive the VOOM<sup>SM</sup> service. As indicated herein, the Cablevision Board has recently confirmed its decision to discontinue the provision of the VOOM<sup>SM</sup> service, and that decision is not affected by the sale of the satellite and earth station assets that are the subject of this proceeding. The Cablevision Board’s decision moots any relevance that comments requesting the preservation of VOOM<sup>SM</sup> service may have had in this proceeding. To the extent not mooted, the response of the Applicants to these informal comments is subsumed in this response to the Petition.

contrary to the public interest. To the contrary, the prompt approval of the Applications will promote competition in the multichannel video programming distribution (“MVPD”) market and will serve the public interest by providing additional satellite and bandwidth resources for EchoStar’s MVPD services.

Contrary to Petitioners’ assertions, the sale of the Rainbow DBS assets to EchoStar will not harm competition because Rainbow DBS’s VOOM service failed to establish itself as a competitive presence in the market. To the extent the Petition is premised on the prospect that VOOM HD could purchase the satellite capacity in question and continue the VOOM service, the Petition is moot in light of the Cablevision Board’s confirmation last week of its decision to discontinue the VOOM service, regardless of the proposed transaction. Petitioners are effectively asking the Commission to replace EchoStar with VOOM HD as the assignee in this transaction, contrary to Section 310(d) of the Communications Act, which forbids the Commission to consider alternative assignees when reviewing an assignment application.

#### **I. PETITIONERS LACK STANDING TO FILE A PETITION TO DENY**

A petition to deny an application before the FCC may only be filed by a “party in interest.”<sup>8/</sup> Neither of these Petitioners is a party in interest, nor do they even attempt to assert facts regarding their standing to complain about the proposed transaction.

##### **A. Standard for Establishing “Party in Interest” Status**

Section 309(d)(1) of the Communications Act permits any “party in interest” to file a petition to deny.<sup>9/</sup> To comply with the statute, a petition must “contain specific allegations of fact sufficient to show that the petitioner is a party in interest.”<sup>10/</sup> A petitioner must allege

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<sup>8/</sup> 47 U.S.C. § 309(d)(1).

<sup>9/</sup> *Id.*

<sup>10/</sup> *Id.*

sufficient facts to demonstrate that (1) grant of the subject application would cause the petitioner to suffer a direct injury that is (a) concrete and particularized, and (b) actual or imminent rather than conjectural or hypothetical,<sup>11/</sup> and (2) there is a causal link between the claimed injury and the challenged action.<sup>12/</sup> To demonstrate this causal link, a petitioner must establish that (a) the injury fairly can be traced to the challenged action; and (b) the injury would be prevented or redressed by the relief requested.<sup>13/</sup>

Courts have made it clear that petitioners carry the burden of establishing their standing.<sup>14/</sup> However, the Petition does not allege, let alone establish, that either Petitioner has standing in this proceeding. The absence of any such allegations of standing, alone, is grounds for dismissing the Petition summarily.<sup>15/</sup> Moreover, it is clear that neither Petitioner could, even if it tried, make a sufficient case on the merits to establish its standing in this case.

#### **B. VOOM HD Lacks Standing**

VOOM HD is controlled by Charles F. Dolan through Dolan Family Holdings LLC, of which Mr. Dolan is the sole member. Mr. Dolan also is the Chairman of the Board and a controlling shareholder of Cablevision, the ultimate parent company of the assignor of the Applications, Rainbow DBS. As a principal of one of the applicants, neither Mr. Dolan nor any

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<sup>11/</sup> See *Los Angeles Cellular Telephone Co.*, *Order*, 13 FCC Rcd 4601, 4603-4604 ¶ 5 (1998); *AmericaTel Corp.*, *Memorandum Opinion, Order, Authorization and Certificate*, 9 FCC Rcd 3993, 3995 ¶ 9 (1994). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

<sup>12/</sup> See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978).

<sup>13/</sup> *Lujan*, 504 U.S. at 560-61.

<sup>14/</sup> See, e.g., *American Library Association v. FCC*, \_\_\_ F.3d \_\_\_, 2005 WL 588994, at \*2 (D.C. Cir. 2005); *KERM, Inc. v. FCC*, 353 F.3d 57, 59 (D.C. Cir. 2004). See also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-04 (1998).

<sup>15/</sup> See *United States Telecommunications Association v. FCC*, 359 F.3d 554, 593-94 (D.C. Cir. 2004) (denying standing to NASUCA because “nothing in the administrative record or NASUCA’s opening brief establishes that NASUCA is qualified to represent those interests in federal court.”).

entity controlled by him can qualify as a “party in interest” to challenge the Applications.<sup>16/</sup> VOOM HD’s only stated interest in opposing the Applications is its desire to participate in the purchase of the Rainbow satellite and its related earth station and licenses.<sup>17/</sup> Under Section 310(d) of the Act, the FCC is prohibited from considering alternative assignees in the context of an assignment application.<sup>18/</sup>

**C. The So-Called Association of Consumers to Preserve and Promote DBS Competition Lacks Standing**

There is nothing in or outside the record to support the standing of the Association as a Petitioner in this proceeding.

**1. It is Not Clear if the Association Even Exists**

As a threshold matter, it is unclear whether the Association actually exists. There is no description of its membership or charter, and there is no available information that would permit one to become a member or to learn about its attributes. The Association does not appear to have a website. There is no telephone listing with Directory Assistance in Washington, D.C., Maryland, Virginia or New York. No history of the Association can be found. The Association has never made an FCC filing before this Petition. All available evidence strongly suggests that the Association is a mere fiction, created by a single individual, Dr. Jerome Sandler, for the sole

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<sup>16/</sup> A petitioner asking for denial of application to which he is for all intents and purposes an applicant would be analogous to bringing suit against one’s self. Such a case would not be justiciable. *See Globe & Rutgers Fire Ins. Co. v. Hines*, 273 F. 774, 777 (2d Cir. 1921) (“It is elementary that the same person cannot be both plaintiff and defendant at the same time in the same action.”).

<sup>17/</sup> Petition at 2 (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.”).

<sup>18/</sup> 47 U.S.C. § 310(d).

purpose of filing the Petition. Obviously, if an organization does not exist, it does not have standing to file a petition to deny as it, by definition, cannot be a “party in interest.”<sup>19/</sup>

## **2. Even if the Association Exists, It Does Not Have Standing**

Even if there is such an Association, it does not meet the qualifications for “associational” standing.<sup>20/</sup> The Declaration of Jerome L. Sandler, “President” of the Association, does not allege any concrete harm to him or any other member that would result from the approval of the Applications.<sup>21/</sup> Nor is there any showing that the Association is qualified to represent the interests of such members,<sup>22/</sup> and, in light of the dubious nature of the organization, no such showing is probably even possible. Finally, even if concrete harm to a member of the Association could be established, there is no likelihood that denial of the Applications would remedy that asserted injury.<sup>23/</sup>

Just last Thursday, the Cablevision Board of Directors confirmed its decision to shut down the Rainbow DBS business irrespective of the outcome of this proceeding.<sup>24/</sup> Thus, even if the Association were to prevail and the Applications were rejected, such an outcome would not redress the harm claimed. Finally, if the Association's goal is the sale of the Rainbow satellite

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<sup>19/</sup> See *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25-26 (D.C. Cir. 2002); *American Legal Defense Foundation v. FCC*, 808 F.2d 84, 88-91 (D.C. Cir. 1987).

<sup>20/</sup> See *Friends of the Earth, Inc. and Forest Conservation Council, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 23622, 23623 ¶ 3 (2003) (citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)).

<sup>21/</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41-43 (1976).

<sup>22/</sup> See *United States Telecommunications Ass'n v. FCC*, 359 F.3d 554, 593-94 (D.C. Cir. 2004) (citing *Hunt*, 432 U.S. at 344-45); *Sierra Club v. EPA*, 292 F.3d 895, 899-901 (D.C. Cir. 2002); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25-26 (D.C. Cir. 2002); *American Legal Foundation*, 808 F.2d at 89-90.

<sup>23/</sup> *Lujan*, 504 U.S. at 560-61 (associational standing requires showing that alleged injury will be “redressed by a favorable decision”); *Simon*, 426 U.S. at 38, 41-43.

<sup>24/</sup> Cablevision Systems Corporation, SEC Form 8-K, at 2 (filed April 8, 2005).

and its related licenses to VOOM HD, as previously indicated, the FCC is not empowered to grant that relief.<sup>25/</sup>

## **II. THE SALE OF THE RAINBOW DBS ASSETS TO ECHOSTAR WILL NOT HARM COMPETITION**

The Petition mistakenly alleges that by “eliminating one of only three facilities-based providers of DBS service to consumers,” the proposed transaction would harm competition.<sup>26/</sup> As a threshold matter, the Petitioners misunderstand the impact of the proposed transaction on competition in the MVPD market. The sale itself of the Rainbow DBS assets that are the subject of the proposed transaction will not eliminate the VOOM<sup>SM</sup> service. VOOM<sup>SM</sup> is being shut down as of April 30, 2005, pursuant to a vote by Cablevision’s Board of Directors,<sup>27/</sup> in the face of VOOM<sup>SM</sup>’s considerable operational losses and the service’s failure to attract an adequate number of subscribers to sustain itself.<sup>28/</sup> Petitioners in essence invite the Commission to substitute its judgment for that of the Cablevision Board and maintain VOOM<sup>SM</sup> on life support for the benefit of Petitioners, an invitation the Commission should -- and indeed is compelled to -- decline.

Even if the proposed transaction could be construed as resulting in the discontinuation of the VOOM<sup>SM</sup> service from the marketplace, the transfer of the subject Rainbow DBS assets will have no effect on competition. Despite Cablevision’s best efforts over the past six years to enter the DBS business, the VOOM<sup>SM</sup> service never established itself as a competitive presence in the market.<sup>29/</sup> The sale of assets of a failed business cannot harm competition.

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<sup>25/</sup> See Section IV, *infra*.

<sup>26/</sup> See Petition at 12-15.

<sup>27/</sup> Cablevision Systems Corporation, SEC Form 8-K, at 2 (filed April 8, 2005).

<sup>28/</sup> Rainbow Media Enterprises, Amendment No. 4 to SEC Form 10, at 20-21 (filed November 5, 2004).

<sup>29/</sup> See Declaration of Jonathan M. Orszag and Simon J. Wilkie ¶ 28 (April 12, 2005) (“Orszag-Wilkie Declaration”).

**A. The Cablevision Board Has Determined to Discontinue the VOOM<sup>SM</sup> Service Independent of the Sale of Assets to EchoStar**

Petitioners' argument is fatally flawed because it is grounded in a faulty premise -- that the denial of the requested authority to sell the Rainbow DBS assets to EchoStar and related licenses would somehow keep the VOOM<sup>SM</sup> service alive. In fact, the Cablevision Board has decided to discontinue the Rainbow DBS business independent of the sale of DBS assets to EchoStar. As early as January 20, 2005, in announcing the agreement to sell the Rainbow 1 satellite to EchoStar, Cablevision stated its intent to "explore strategic alternatives, including monetization," for the remaining Rainbow DBS related assets.<sup>30/</sup> While the original plan to shut down the service was deferred when Cablevision entered into negotiations with Petitioner VOOM HD to sell those remaining assets,<sup>31/</sup> those negotiations did not result in a definitive agreement. As a result, Cablevision's Board last Thursday confirmed its decision to shut down the service as of April 30, 2005,<sup>32/</sup> and, pursuant to the Board's directive,<sup>33/</sup> Rainbow DBS has notified subscribers of its intent to terminate the VOOM<sup>SM</sup> service.<sup>33/</sup>

Having failed to come to agreement on the purchase of the remaining non-satellite assets, VOOM HD has sought to use this proceeding to force Cablevision to sell the Rainbow 1 satellite to it rather than EchoStar.<sup>34/</sup> Consistent with its long-standing policy of not allowing its processes to be used as a sword or a shield in private dealings, the Commission must reject this

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<sup>30/</sup> Cablevision Systems Corporation, SEC Form 8-K, at 2 (filed January 21, 2005).

<sup>31/</sup> Cablevision Systems Corporation, SEC Form 8-K, at 2 (filed February 11, 2005); SEC Form 8-K, at 2 (filed March 3, 2005).

<sup>32/</sup> See Cablevision Systems Corporation, SEC Form 8-K, at 2 (filed April 8, 2005).

<sup>33/</sup> A copy of the notice emailed to subscribers is attached as Exhibit 4.

<sup>34/</sup> Petition at 2 (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."); Declaration of Charles F. Dolan ¶ 4 ("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.").

argument.<sup>35/</sup> Indeed, as explained below, the Commission is precluded by law from considering any other assignee than the one before it -- EchoStar.<sup>36/</sup>

**B. Because Rainbow DBS Proved Not to Be a Viable Competitor, the Proposed Sale of Assets and Assignment of Licenses Will Not Harm Competition**

Petitioners essentially argue that the proposed transaction would reduce the number of DBS competitors from three to two, which would harm competition.<sup>37/</sup> Contrary to the allegations in the Petition, however, the proposed asset sale to EchoStar will not reduce competition. As set forth in the attached Joint Declaration, competition analysis does not simply consider the number of firms trying to do business, but rather the number of firms actually exerting a competitive influence on the market.<sup>38/</sup> On that score, it is now clear that Rainbow DBS is not a viable competitor. Thus, the proposed sale of assets will have no cognizable effect on competition.<sup>39/</sup>

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<sup>35/</sup> See, e.g., Petition of Turner Broadcasting System, Inc. for Declaratory Ruling, *Memorandum Opinion and Order*, 101 F.C.C.2d 843, 853 ¶ 18 (1985) (“We also agree we should not permit our processes to be used to protect incumbent management or aid corporate challengers .... Intervention in such matters would involve us in a morass of corporate financing decisions and other corporate matters where the burden from our intrusion would far outweigh any conceivable public interest benefit.”); see also Instapage Network LTD.’s Request for Retroactive Bidding Credits, *Order on Reconsideration*, 19 FCC Rcd 20356, 20359 ¶ 9 (2004) (“The Commission has a long-standing practice of not addressing matters related to private contractual agreements”); Loral Satellite, Inc., *Order and Authorization*, 19 FCC Rcd 2404, 2420 ¶ 37 (2004) (“absent a showing of a violation of the Commission’s rules or federal statute, the Commission is not the proper forum to raise private contractual disputes”).

<sup>36/</sup> See Sec. IV, *infra*.

<sup>37/</sup> Petition at 14.

<sup>38/</sup> See Orszag-Wilkie Declaration ¶ 30 (“It is important to emphasize that competition is not necessarily enhanced by maximizing the total number of competitors in a market. Rather, consumers benefit from the intensity of competition in a market, rather than a raw count of active competitors.”).

<sup>39/</sup> In this regard it does not matter whether the Commission considers the relevant market to be the MVPD market or a discrete DBS submarket. In either case, Rainbow DBS has never been an effective competitor. It is worth noting, however, that Petitioners misstate the relevant market, see Michael Bauman, Analysis of EchoStar and Rainbow DBS Application at 5-7 (March 28, 2005) (defining the DBS service as the relevant product market), which the Commission has previously found to be the MVPD market and not just the DBS market. See EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, *Hearing Designation Order*, 17 FCC Rcd 20559, 20605-09 ¶¶ 106-116 (2002) (“*EchoStar-DIRECTV Order*”) (concluding that the Commission’s analysis

Rainbow DBS was never able to attract more than a very small number of subscribers; nor has it ever achieved marketplace success. Cablevision invested approximately \$1 billion over a six year period in building and launching a state-of-the-art DBS satellite, developing consumer equipment, constructing uplink facilities, acquiring programming and introducing the VOOM<sup>SM</sup> service. Other MVPD competitors already had a big head start and multimillion subscriber bases, however, and Rainbow DBS was only able to attract some 40,000 subscribers,<sup>40/</sup> and then only through the use of substantial discounts or periods of free service.<sup>41/</sup> In addition to only establishing a very small customer base, Rainbow DBS suffered very high churn rates, which further demonstrates that it is not a viable competitor.<sup>42/</sup> Rainbow DBS itself publicly recognized its extremely weak competitive position.<sup>43/</sup>

For the first 15 months that Rainbow DBS was operational, revenues amounted to less than \$15 million while operating losses were over \$750 million.<sup>44/</sup> The Rainbow DBS strategy of developing a unique and robust HDTV product, while innovative, was insufficient to secure a profitable market niche as few subscribers were willing to pay the premium price for the

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should be based on the MVPD market rather than simply the DBS market); MCI Telecommunications Corporation, *Order and Authorization*, 16 FCC Rcd 21608, 21614-15 ¶¶ 11-12. (1999) (“*MCI Assignment Order*”).

<sup>40/</sup> Cablevision Systems Corporation, SEC Form 10-K, at 12 (filed March 16, 2005) (“Cablevision 2005 10-K”).

<sup>41/</sup> Rainbow Media Enterprises, Amendment No. 4 to SEC Form 10, at 49-50. In contrast, during the period of Rainbow DBS’s operations, EchoStar added 40,000 net new subscribers every ten days. *See* Orszag-Wilkie Declaration ¶ 28.

<sup>42/</sup> Rainbow Media Enterprises, Amendment No. 4 to Form 10, at 21 (reporting that approximately 39 percent of VOOM<sup>SM</sup> subscribers who signed up for the service during the period between October 2003 and September 2004 subsequently terminated their service or were 90 or more days past due in payment); *see also* Orszag-Wilkie Declaration ¶ 29.

<sup>43/</sup> Rainbow Media Enterprises, Amendment No. 4 to Form 10, at 24-25 (listing a variety of factors giving DirecTV and EchoStar a competitive advantage including operational sophistication, highly developed sales and distribution systems, market entry, programming, and possibly, access to volume discounts for programming offers).

<sup>44/</sup> Cablevision 2005 10-K at 58.

product<sup>45/</sup> and not enough HDTV television sets were purchased by consumers.<sup>46/</sup> As other MVPDs have rolled out their own HDTV services,<sup>47/</sup> moreover, the unique value proposition of VOOM<sup>SM</sup> has now been lost.

Since VOOM is not an effective competitor, the proposed transaction cannot be deemed to have any meaningful competitive effect in any market,<sup>48/</sup> even in the artificially narrow market

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<sup>45/</sup> On April 1, 2005, Rainbow's VOOM service advertised its basic package of 26 HDTV and approximately 80 SDTV channels for \$54.90 per month. *See* VOOM Pricing and Offers at [http://www.voom.com/get\\_it/compare\\_offers.shtml](http://www.voom.com/get_it/compare_offers.shtml). In comparison, DIRECTV offered a 135-channel basic package for \$41.99 per month. *See* DIRECTV Packages at <http://www.directv.com/DTVAPP/packages/base.dsp>. EchoStar's DISH network offered its 60-channel basic package for \$26.99 per month. *See* Dish Network Basic Packages at <http://www.dishnetwork.com/content/programming/packages/>.

<sup>46/</sup> Through March 2005, only about 4 million American households had purchased HD television sets. *See* Press Release, In-State, High-Definition TV Service (March 28, 2005), available at [http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news\\_view&newsId=2005032805204&newsLang=en](http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=2005032805204&newsLang=en).

<sup>47/</sup> DIRECTV has developed a five-channel HD programming package for \$10.99 per month. *See* The DIRECTV HD Package at [http://www.directv.com/DTVAPP/imagine/HDTV\\_package.dsp](http://www.directv.com/DTVAPP/imagine/HDTV_package.dsp). In addition, DIRECTV "promises more than 1,500 local HD stations and 150 national HD networks by 2007." *See* Three Ways to Get HD Programming at [http://www.cnet.com/4520-7874\\_1-5108854-4.html](http://www.cnet.com/4520-7874_1-5108854-4.html). EchoStar's Dish Network also offers a five-channel HD package for \$9.99 per month, The Dish Network HD Package at [http://www.dishnetwork.com/content/programming/hdtv/hdtv\\_prog/index.shtml](http://www.dishnetwork.com/content/programming/hdtv/hdtv_prog/index.shtml). EchoStar is also planning expanded HD service. *See* Three Ways to Get HD Programming at [http://www.cnet.com/4520-7874\\_1-5108854-4.html](http://www.cnet.com/4520-7874_1-5108854-4.html). As an example of a cable company's interest in expanding into HDTV service, Comcast Cable offered HD programming to more than 93% of its 21.5 million customers in more than 60 markets as of the end of 2004. In January 2005, the company announced that it has deployed more than one million HD-capable Digital Cable set-top boxes in customers' homes, adding more than 800,000 of them in 2004 alone. Comcast offers an average of 8-15 channels of HDTV programming including the local affiliates of most major broadcast networks that satellite companies don't offer, as well as HBO, Cinemax, Showtime, STARZ!, Discovery HD Theater, ESPN, INHD, INHD2 and regional sports networks. *See* National Cable and Telecommunications Association, Cable Operators at <http://www.ncta.com/Docs/PageContent.cfm?pageID=103>.

<sup>48/</sup> *See* Orszag-Wilkie Declaration ¶¶ 20-23. The proposed acquisition of Rainbow DBS assets by EchoStar, at most, would produce a minimal change in the Herfindahl-Hirschman Index in both the MVPD and the DBS markets, which suggests that the proposed transaction is unlikely to have any adverse competitive consequences without any further analysis. Even this overstates the effect of the proposed acquisition of Rainbow DBS assets by EchoStar because EchoStar is *not* acquiring Rainbow DBS's customers.

Petitioners propose.<sup>49/</sup> Indeed, there is no evidence that VOOM's<sup>SM</sup> pricing and programming have factored into the pricing or other important business decisions of any MVPD.<sup>50/</sup>

### **C. Another Viable Nationwide DBS Provider Is Extremely Unlikely**

As the Commission is aware, this is not the first time that an attempt to launch a third national DBS service has met with failure. In 1996, MCI acquired the rights to 28 DBS channels at 110° W.L. (a full CONUS slot) in hopes of becoming the third facilities-based DBS provider in the United States.<sup>51/</sup> At the time, MCI possessed the financial strength to finance a \$682.5 million bid for the DBS channels, and it was the second largest U.S. carrier of long distance telecommunications services, holding FCC domestic common carrier microwave licenses, international facility authorizations, cable landing licenses, as well as authorizations in other services.<sup>52/</sup> In addition, MCI was partnering with News Corporation Limited ("News Corp") to leverage News Corp's experience in video programming.<sup>53/</sup>

Despite its financial strength and business acumen, MCI never launched a satellite or developed a video programming service. MCI made the business determination that its proposed business plan for the DBS service simply was not viable, and the Commission allowed MCI to exit the business by selling its satellite authorization to EchoStar.<sup>54/</sup> Rainbow DBS went further than MCI by launching a satellite and commencing service, but, like MCI, it has concluded that

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<sup>49/</sup> Further supporting the conclusion of no competitive harm, as noted above, the Department of Justice reviewed the transaction under its Hart-Scott-Rodino ("HSR") authority and took no action prior to the expiration of the HSR waiting period.

<sup>50/</sup> Orszag-Wilkie Declaration ¶ 26.

<sup>51/</sup> MCI Telecommunications Corporation, *Order*, 11 FCC Rcd 16275, 16290 ¶ 36 (1996) (granting authorization for MCI to construct, launch and operate a DBS satellite over 28 channels at 110° W.L.).

<sup>52/</sup> *Id.* at 16275-76 ¶¶ 2-3.

<sup>53/</sup> *Id.* at 16277 ¶ 7.

<sup>54/</sup> *MCI Assignment Order*, 16 FCC Rcd at 21630 ¶ 46.

being the third DBS provider is not a sustainable business proposition. As in the case of MCI, the Commission should permit the transfer of the third DBS provider's assets to EchoStar.<sup>55/</sup>

**D. The Eligibility Restrictions for Auction No. 52 Do Not Preclude Grant of the Assignment Applications**

In an effort to bolster their arguments, Petitioners misstate the findings and significance of the Commission's decision to temporarily prohibit incumbent DBS providers with full-CONUS orbital assignments from participating in the auction or later acquiring the remaining two unassigned DBS channels at 61.5° W.L.<sup>56/</sup> Petitioners mistakenly claim that approval of the Applications would run counter to what they characterize as a determination by the Commission in the *Auction No. 52 Order* that "it would disserve the public interest for EchoStar to acquire additional capacity at 61.5° W.L."<sup>57/</sup> They also incorrectly assert that the *Auction No. 52 Order* represented a Commission conclusion that "EchoStar's acquisition of additional capacity through this proposed transaction would, in fact, undermine MVPD competition."<sup>58/</sup>

Petitioners' efforts to expand the narrow scope of the *Auction No. 52 Order* are unavailing. First, the restrictions contained in that order are applicable only to DBS channels 23

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<sup>55/</sup> In fact, the Commission foresaw the difficulty that Rainbow DBS would have in achieving success with VOOM<sup>SM</sup> a year before the service was launched:

Even if Rainbow 1 DBS is successfully launched on schedule, it is highly unlikely that the operator could roll-out this new service and acquire a significant customer base sufficient to offset the likely competitive harms of the proposed merger within two years. There are simply too many uncertainties associated with the launch of a new satellite, operation of associated ground facilities, acquisition of distribution agreements with local equipment retailers and installers, and deployment of a new DBS service to assume that Rainbow DBS could have a significant competitive impact within the relevant two-year timeframe. This may be particularly true under today's difficult market conditions.

*EchoStar-DIRECTV Order*, 17 FCC Rcd at 20617 ¶ 143.

<sup>56/</sup> Auction of Direct Broadcast Satellite Licenses, *Order*, 19 FCC Rcd 23849, 23859-65 ¶¶ 22-31 (2004) ("*Auction No. 52 Order*").

<sup>57/</sup> Petition at 15. As noted below, the Commission *specifically did not* reach this conclusion.

<sup>58/</sup> Petition at 17.

and 24 at 61.5° W.L. They do not apply to the transfer of an existing satellite license for other DBS channel capacity at 61.5° W.L. or any other orbital location. Moreover, contrary to Petitioners' assertions, the Commission specifically did *not* apply the competitive harm standard for Auction No. 52 because it found it “unnecessary . . . to determine whether there would be ‘a significant likelihood of substantial harm to competition’ if [the Commission] imposed no eligibility restrictions on the license.”<sup>59/</sup>

A determination of harm to competition was unnecessary in the *Auction No. 52 Order* because the Commission found that the “unique circumstances of the 61.5° W.L. license provide us with an opportunity to encourage the development of an additional provider of DBS service.”<sup>60/</sup> Those “unique circumstances,” as demonstrated by the record in that proceeding, were that Rainbow DBS had just launched a state-of-the-art satellite and had begun offering an innovative yet nascent service that could better use the two remaining DBS channels at that location. Rainbow DBS, however, was unable to make its business plan work. Consequently, the “unique circumstances” cited by the Commission have demonstrably changed. It is clear that no other provider will launch a satellite with such limited capacity (two DBS channels) because, as the Commission has consistently noted, a successful DBS business requires the aggregation of many channels at an orbital position. Realistically, just 2, 11 or 13 channels are not sufficient for a viable, competitive service.<sup>61/</sup>

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<sup>59/</sup> *Auction No. 52 Order*, 19 FCC Rcd at 23865-66 ¶ 34.

<sup>60/</sup> *Id.*

<sup>61/</sup> See Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd 9712, 9764 ¶ 134 (1995) (“1995 DBS Auction Order”); United States Satellite Broadcasting Co., Inc., and DIRECTV Enterprises, Inc., *Order and Authorization*, 14 FCC Rcd 4585, 4595 ¶ 22 (1999) (declaring it would be “commercially difficult to finance and construct a satellite” designed with just three channels); Advanced Communications Corporation Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite System, *Memorandum Opinion and Order*, 14 FCC Rcd 3399, 3425-26 ¶ 70 (1995) (“four channels may not provide sufficient capacity to operate a viable system,

Again, the Commission’s treatment of the MCI authorizations is instructive. In the auction in which MCI acquired its DBS license, the FCC imposed an eligibility restriction that required entities with an attributable interest in DBS channels at a full-CONUS location (like DIRECTV and EchoStar) to divest that interest if they acquired DBS channels in the auction.<sup>62/</sup> Nonetheless, in the face of changed circumstances, the FCC approved the assignment of MCI’s license to EchoStar despite this restriction,<sup>63/</sup> concluding “on balance the proposed transaction, if approved, would benefit competition in the affected markets more than harm it.”<sup>64/</sup>

The same analysis applies here. While it may have been true upon the launch of service that Rainbow DBS represented the “last opportunity in the near term for entry within the DBS service itself,”<sup>65/</sup> Rainbow DBS, when given the chance, could not make its business model work. Under these circumstances, transfer of the Rainbow DBS assets to EchoStar “will benefit competition in the affected markets more than harm it.”

### **III. APPROVAL OF THE APPLICATIONS IS IN THE PUBLIC INTEREST BECAUSE IT WILL PROMOTE RATHER THAN HARM COMPETITION**

The proposed transaction will serve the public interest by increasing the bandwidth and satellite capacity available to EchoStar, thereby allowing it to compete more effectively in the MVPD market. The Commission recognized in the *MCI Assignment Order* that increased system capacity would allow EchoStar to become a more effective competitor in the MVPD

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[and] such piecemeal assignment of channels could render ... [an] orbital location ... unusable by any single permittee”).

<sup>62/</sup> *1995 DBS Auction Order*, 11 FCC Rcd 9712, 9732-9743 ¶¶ 52-79.

<sup>63/</sup> *MCI Assignment Order*, 16 FCC Rcd at 21617-19 ¶ 17-21.

<sup>64/</sup> *Id.* at 21617, 19 ¶ 17.

<sup>65/</sup> Petition of R/L DBS Company, L.L.C. for Extension of Its Direct Broadcast Satellite Construction Permit, *Memorandum Opinion and Order*, 16 FCC Rcd 9, 16 ¶ 19 (2000) (“*Rainbow DBS Extension Order*”).

market.<sup>66/</sup> Similarly, the proposed transaction will allow consumers to benefit from increased competition in the MVPD market.

EchoStar expects to be able to use this increased capacity to provide more HDTV, local channels and other enhanced programming to its customers. It also could use the Rainbow 1 satellite and related assets to help transition to a one-dish solution for local channels, as mandated by recent legislation.<sup>67/</sup> However EchoStar specifically deploys such additional bandwidth, it will have every incentive to deploy these resources to maximize its ability to compete with other MVPD providers.<sup>68/</sup>

Currently, for instance, the *2004 MVPD Competition Report* states that the “cable industry has upgraded almost 91 percent of its plant to 750 MHz capacity or higher.”<sup>69/</sup> EchoStar has significantly lower bandwidth capacity to supply programming to its customers. As a result, cable operators have been able to offer digital tiers and advanced services not offered by DBS providers.<sup>70/</sup>

The additional bandwidth capacity afforded by this transaction will enable EchoStar to provide a similar range of offerings. The Commission has recently noted that while increased competition in the MVPD market has led to improvement in cable service, it has not led to lower

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<sup>66/</sup> See *MCI Assignment Order*, 16 FCC Rcd at 21618-19, 26 ¶¶ 20-21, 36.

<sup>67/</sup> The recently passed Satellite Home Viewer Extension and Reauthorization Act requires that satellite carriers allow all local programming to be received by subscribers by means of a single satellite dish within 18 months of enactment. See *Satellite Home Viewer Extension and Reauthorization Act of 2004*, Pub. L. No. 108-447, § 203, 118 Stat. 2809, 3414-16 (2004).

<sup>68/</sup> See Orszag-Wilkie Declaration ¶ 14.

<sup>69/</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, *Eleventh Annual Report*, FCC 05-13 ¶ 14 (rel. Feb. 4, 2005) (“*2004 MVPD Competition Report*”).

<sup>70/</sup> See *id.* ¶ 6 (“Cable operators in response to the growth of DBS have made upgrades and advances in their offerings. The number of cable subscribers selecting digital tiers and advanced services not offered by DBS continues to grow.”).

prices for cable services.<sup>71/</sup> With greater satellite resources and more DBS channels at its disposal, the resulting enhancements to MVPD service and price competition will allow consumers to realize even greater benefits from competition in the MVPD market.<sup>72/</sup>

#### **IV. PETITIONERS IMPROPERLY ASK THE COMMISSION TO DETERMINE THAT RAINBOW 1 SHOULD BE SOLD TO VOOM HD RATHER THAN ECHOSTAR**

Finally, a review of the Petition leads to the unmistakable conclusion that what the Petitioners are really seeking is to have VOOM HD substituted as the assignee in this transaction for EchoStar. Section 310(d) of the Act, however, makes clear that this is impermissible. Section 310(d) provides that, in connection with the review of applications for assignment or transfer of FCC licenses, “the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”<sup>73/</sup> As noted above, that is precisely what the Petitioners are asking the Commission to do. Section 310(d) requires the Commission to reject this request.<sup>74/</sup>

Even if the FCC could consider other assignees, there is no evidence that VOOM HD would be any more of an effective competitor going forward than VOOM<sup>SM</sup> has been over the past 18 months, especially without the financial resources of Cablevision as its parent company.

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<sup>71/</sup> See *id.* ¶ 4 (“Increased competition in the market for the delivery of video programming since our first *Report* has led to improvements in cable television services, including more channels of video programming and more service options, but generally not lower prices.”).

<sup>72/</sup> See Orszag-Wilkie Declaration ¶ 19.

<sup>73/</sup> 47 U.S.C. § 310(d).

<sup>74/</sup> See MMM Holdings, Inc., *Memorandum Opinion and Order*, 4 FCC Rcd 6838, 6839 ¶ 8 (1989) (“The legislative history of this part of Section 310(d) thus appears to indicate that Congress intended the Commission . . . should not indulge in comparative analyses between the transferee and others, including the existing licensee. This interpretation comports with the fundamental purpose underlying the 1952 amendments to Section 310, to avoid ‘an unwise invasion by a governmental agency into private business practice . . . and undue delay in passing upon transfers of licenses.’ S. Rep. No. 44, 82d Cong., 1st Sess. 8, 8 (1951).”).

Any prospect of VOOM HD, with the same management structure as Rainbow DBS, offering competitive DBS service is speculative at best and does not change the competitive analysis. If anything, as noted above, the new HD initiatives of the established DBS and cable companies would render VOOM HD an even less effective competitor in the market going forward.

### **CONCLUSION**

The Board of Directors of Cablevision made a prudent business decision, based on the lack of success in the market after a significant effort, to shut down the VOOM<sup>SM</sup> service and to assign certain Rainbow DBS assets and the FCC licenses for the Rainbow 1 satellite and the Black Hawk earth station to EchoStar. The Commission should not attempt to revisit this decision by failing to approve the proposed transaction. Doing so would not save the VOOM<sup>SM</sup> service, it would not improve the competitive landscape, and it would not serve the public interest. Consequently, the Petition should be summarily dismissed or denied and the Applications for the assignment of the licenses should be approved by the Commission.

Respectfully submitted,

ECHOSTAR SATELLITE L.L.C.

\_\_\_\_\_/s/\_\_\_\_\_  
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*Counsel for Cablevision Systems  
Corporation and Rainbow DBS Company  
LLC*

Dated: April 12, 2005

**CERTIFICATE OF SERVICE**

I, Christopher R. Bjornson, hereby certify that on this 12th day of April 2005, I caused copies of the foregoing “Joint Opposition to Joint Petition to Deny” filed by VOOM HD, LLC and the Association of Consumers to Preserve and Promote DBS Competition to be sent to the following by email, facsimile, or by first-class mail(\*):

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\_\_\_\_\_  
/s/ Christopher R. Bjornson

**Exhibit 1**  
**Declaration of Hank J. Ratner**  
**Rainbow DBS Company LLC**

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

In the Matter of	)	
	)	
Rainbow DBS Company LLC, Assignor	)	IB Docket No. 05-72
	)	
and	)	File No. SAT-ASG-20050128-00017
	)	
EchoStar Satellite L.L.C., Assignee	)	File No. SES-ASG-20050131-00117
	)	
Consolidated Application for Consent to	)	File No. SAT-STA-20030623-00122;
Assignment of Space and Earth Station	)	SAT-STA-20040319-00081; SAT-
Licenses and Special Temporary Authority	)	STA-20040924-00191 (renewal
	)	pending SAT-STA-20050329-00078)
	)	
	)	Call Signs DBS 8808 and E020248
	)	

**DECLARATION OF HANK J. RATNER**

I, Hank J. Ratner, hereby declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on April 12, 2005.



Name: Hank J. Ratner  
Title: Vice Chairman & Secretary  
Rainbow DBS Company LLC

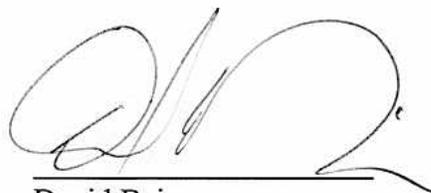
WDC 363131v1

**Exhibit 2**  
**Declaration of David Bair**  
**EchoStar Satellite L.L.C.**

**DECLARATION OF DAVID BAIR**

I, David Bair, hereby declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on April 12, 2005.

A handwritten signature in black ink, appearing to read 'DB', written over a horizontal line.

David Bair  
Senior Vice President,  
Space Programs and Operations  
EchoStar Satellite L.L.C.

**Exhibit 3**  
**Declaration of**  
**Jonathan M. Orszag and Simon J. Wilkie**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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 Station 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. SAT-ASG-20050131-00117:

IB File Nos. SAT-STA-20030623-00122;  
SAT-STA-20040318-00081; and SAT-  
STA-20040824-00191

**DECLARATION  
OF  
JONATHAN M. ORSZAG  
AND  
SIMON J. WILKIE**

**April 12, 2005**

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## I. Qualifications

### A. Jonathan M. Orszag

1. My name is Jonathan M. Orszag. I am a Managing Director of Competition Policy Associates, Inc. (“COMPASS”), an economic consulting firm based in Washington, DC. I have served as a consultant to a variety of public-sector entities and private-sector firms ranging from small businesses to Fortune 500 companies, including a number of major telecommunications and media companies. I have testified numerous times before administrative agencies (including the Federal Communications Commission) and the U.S. Congress on a range of issues, including competition policy, industry structure, and fiscal policy. In 2004, I was named by the *Global Competition Review* as one of “the world’s 40 brightest young antitrust lawyers and economists” in its “40 under 40” survey.

2. Previously, I served as the Assistant to the U.S. Secretary of Commerce and Director of the Office of Policy and Strategic Planning, as an Economic Policy Advisor on President Clinton’s National Economic Council, and an economic aide to the Secretary of Labor. For my work at the White House, I was presented the Corporation for Enterprise Development’s 1999 leadership award for “forging innovative public policies to expand economic opportunity in America.” I have also served as an adjunct faculty member of the University of Southern California’s School of Policy, Planning, and Development. I received a M.Sc. from Oxford University, which I attended as a Marshall Scholar. I graduated *summa cum laude* in economics from Princeton University, was elected to Phi Beta Kappa, and was named a *USA Today* Academic All-American.

### B. Simon J. Wilkie

3. My name is Simon J. Wilkie. I am a Senior Research Associate in Economics at the California Institute of Technology. I am also an academic affiliate of ERS Group, an economic and financial consulting firm. Prior to joining the faculty at the California Institute of Technology, I was a Member of Technical Staff at Bell Communications Research. I have also held the positions of Affiliated Scholar of the Milken Institute, and Visiting Assistant Professor at Columbia University. Over the past fifteen years, my academic research has focused on the areas of industrial organization, regulation, and game theory or business strategy, with a particular emphasis on the telecommunications industry. I received a Bachelor of Commerce degree in Economics from the University of South Wales, and an M.A. and Ph.D. in Economics from the University of Rochester.

4. From 2002 to 2003, I served as Chief Economist at the Federal Communications Commission (“FCC” or “Commission”). In that capacity, I oversaw the economics analysis by the Commission staff, and advised the Chairman and other Commissioners on issues involving economic analysis, including the major transactions reviewed by the Commission.

## II. Introduction

5. We have been asked by counsel for EchoStar Satellite L.L.C. (“EchoStar”) and Rainbow DBS Company, LLC (“Rainbow”) to assess the potential competitive effects of EchoStar’s proposed acquisition of certain Rainbow assets,<sup>1</sup> and respond to the recent submission by Dr. Michael Baumann of Economists Incorporated.<sup>2</sup>

6. Based on the information available to us, we have reached the following conclusions about EchoStar’s proposed acquisition of certain assets from Rainbow:

- Regardless of whether the relevant product market for analyzing the proposed asset acquisition is the Multi-Channel Video Programming Distributor (“MVPD”) market or whether the relevant product market for this transaction is inappropriately defined to be much narrower to include only Direct Broadcast Satellite (“DBS”) companies, EchoStar’s proposed acquisition of Rainbow’s assets would serve the public interest.
- EchoStar’s acquisition of certain Rainbow assets offers the possibility of efficiency improvements, especially in radio spectrum use, which would directly benefit EchoStar’s subscribers by allowing EchoStar to offer an expanded array of services. While EchoStar has not decided precisely how it would use the additional spectrum capacity, the increased bandwidth would allow EchoStar to expand its provision of local broadcast programming to more Designated Market Areas (“DMAs”) – especially in rural areas; enable EchoStar to more rapidly comply with the “one-dish” rule in the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”); increase the number of High-Definition Television (“HD”) channels it offers; and/or provide more specialized programming. Such additional services would benefit an even broader group of consumers than EchoStar subscribers by helping EchoStar compete more effectively against cable providers and DIRECTV.
- EchoStar’s acquisition of certain Rainbow assets would not significantly harm competition in any relevant market. A simple structural analysis – guided by the U.S. Department of Justice and the

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<sup>1</sup> EchoStar has proposed buying assets from Rainbow that include, among other things, a direct broadcast satellite located at 61.5° W.L. (Rainbow 1); ground facilities and related assets at Black Hawk, South Dakota; and rights to transmit signals at 11 frequencies from the 61.5° W.L. orbital slot. EchoStar also seeks Special Temporary Authority (“STA”) to operate on two additional frequencies at the 61.5° W.L. orbital slot. *See* Application of EchoStar Satellite LLC, IB Docket No. 05-72 (filed January 28, 2005) at 1-2 (“Application”).

<sup>2</sup> Michael G. Baumann, “Analysis of EchoStar and Rainbow DBS Application, March 28, 2005 (“Baumann Report”).

Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”) – suggests that the proposed transaction is unlikely to have “adverse competitive consequences.” Moreover, going beyond the simple structural analysis shows that VOOM is not an effective competitor today and that an MVPD with a similar business model is unlikely to impose an effective competitive constraint on EchoStar (or any other MVPD) in the foreseeable future – despite Dr. Baumann’s unsupported and unsubstantiated statements to the contrary.<sup>3</sup>

- While Rainbow launched its VOOM service with the goal of being a significant provider of MVPD services, VOOM has not succeeded in the marketplace and recently announced that it will cease providing service to existing customers on April 30, 2005.<sup>4</sup> In part due to its limited programming and its niche product offering of HD content, VOOM acquired only 40,000 net new subscribers between its launch in October 2003 and February 2005.<sup>5</sup> Over that same time period, EchoStar has increased its subscriber base by roughly 1.9 million – or an average of 40,000 net new subscribers every 10 days!<sup>6</sup> Given VOOM’s anemic subscriber growth and high customer churn rates, it is implausible that VOOM constrained the pricing or other important business decisions of EchoStar (or any other MVPD).
- As a result, EchoStar’s acquisition of the Rainbow assets will not have a significant negative effect on competition in any relevant market – and will likely enhance competition in relevant markets by allowing scarce assets to be put to more effective use. EchoStar’s proposed acquisition of certain Rainbow assets would therefore serve the public interest by increasing consumer welfare without any concomitant harm to competition.

### **III. The Relevant Market for the Proposed Transaction**

7. A key step in the competitive analysis of a merger is often the delineation of the relevant market. Relevant market definition and the delineation of participants in that market for the purpose of competition analysis depend critically on demand substitution considerations (*i.e.*, the degree to which consumers view products as

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<sup>3</sup> Baumann Report at 11-12.

<sup>4</sup> See <http://www.voom.com>

<sup>5</sup> VOOM launched on October 15, 2003. See Cablevision Press Release, “Cablevision’s Rainbow DBS Introduces VOOM – Nation’s First Television Service Designed to Meet Demand of Growing, Underserved HDTV Market,” October 15, 2003.

<sup>6</sup> On September 30, 2003, EchoStar had 9.085 million subscribers. See EchoStar Communications Corporation, Form 10-Q, November 10, 2003. On January 31 2005, EchoStar reported that it had passed the 11 million subscriber mark. See EchoStar Press Release, “DISH Network Passes 11 Million Customer Milestone; Company Now Third Largest Pay-TV Provider,” January 31, 2005. That means that over 489 days, EchoStar’s subscriber base has grown by 1.915 million – or an average of 3,900 net new subscribers per day.

substitutable). The ability of a firm to raise product prices profitably is a function of the degree to which consumers view other products as providing similar services or benefits (*i.e.*, the degree that products are substitutable from the standpoint of buyers). If consumers do not view other products as substitutable, the firm could implement a small but significant and nontransitory increase in the price of the first product without concern that consumers would switch away their demand. In that case, the other products would not be in the relevant market of the first product to other products. The Merger Guidelines incorporate this definition of the relevant market by stating that an antitrust product market is the smallest group of products such that a hypothetical monopolist controlling these products would be able to implement profitably a small but significant, nontransitory price increase.<sup>7</sup>

8. While the definition of the relevant product market for assessing EchoStar's proposed acquisition of certain Rainbow assets does not alter the fundamental conclusion that the proposed transaction would not harm competition, Dr. Baumann's report attempts to suggest that the appropriate relevant product market for assessing the EchoStar-Rainbow transaction is a separate DBS-only market.<sup>8</sup> Dr. Baumann is misguided.

9. The economic evidence indicates that the appropriate relevant market for assessing this proposed transaction is the MVPD product market, which includes cable television distributors, DBS companies, and other multi-channel programming distributors.<sup>9</sup> While these MVPDs each offer differentiated products (*e.g.*, VOOM offered a large number of HD channels), Federal regulators have determined that DBS firms compete in a broadly defined MVPD product market.

10. In particular, VOOM offered a niche product: HD programming with relatively few other programming channels. To determine the scope of the relevant market for this transaction, we must determine which product in the market is the "next best alternative" to VOOM in the eyes of consumers. Given the products offered, and the market history, digital cable with HD programming is the likely closest substitute to VOOM. We reach this conclusion because many cable providers offer a larger number of HD channels than either DBS company; for example, Cablevision's digital cable package contains 16 HD channels, while Time Warner offers 14 HD channels.<sup>10</sup> Moreover, digital cable often carries local broadcast channels in HD (in comparison to EchoStar and DIRECTV, which are currently limited in their ability to offer broadcast networks in HD). Thus, based on the product offerings, it appears as though digital cable

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<sup>7</sup> See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, April 8, 1997 at Section 1.1 ("Horizontal Merger Guidelines").

<sup>8</sup> Baumann Report at 5-7.

<sup>9</sup> See Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227 (released February 4, 2005) at ¶ 3 ("Eleventh Annual Report").

<sup>10</sup> See, *e.g.*, <http://www2.twnyc.com/index2.cfm?c=hdefvtv/hdtv>, <http://www.io.tv/index.jhtml;jsessionid=I3BJCR4MEWASWCQLASDCFEQ?pageType=hdtv>; [http://www.directv.com/DTVAPP/imagine/HDTV\\_package.dsp](http://www.directv.com/DTVAPP/imagine/HDTV_package.dsp); and <http://www.dishnetwork.com/content/programming/hdtv/index.shtml>.

would serve as a closer substitute for VOOM than either EchoStar or DIRECTV. Furthermore, as we indicate below, the presence of VOOM in the marketplace does not appear to have influenced the pricing of MVPDs nor impacted the growth of EchoStar. Thus, the product offerings and market history are consistent with a conclusion that MVPD is the appropriate market definition for this transaction.

11. Furthermore, when the Department of Justice (“DOJ”) determined the relevant market affected by the proposed merger of EchoStar and DIRECTV (two DBS firms, just like EchoStar and VOOM are both DBS firms), DOJ concluded that the relevant product market was the MVPD market.<sup>11</sup> Indeed, DOJ stated that, “Cable television and DBS are both MVPD products. Although the programming services are delivered via different technologies, and there are important differences between cable and DBS, consumers view the services as similar and to some extent substitutable. Cable and DBS compete by offering similar packages of basic and premium channels for a monthly subscription fee.”<sup>12</sup>

12. While we conclude that a broadly defined MVPD market is a far more appropriate relevant product market for assessing the proposed transaction than is a narrowly tailored DBS-only market, we consider both the MVPD market and a hypothesized DBS-only market below in assessing the competitive effects of EchoStar’s proposed acquisition of certain Rainbow assets and whether the transaction serves the public interest.

#### **IV. Transaction-Specific Efficiencies from Proposed Asset Acquisition**

13. EchoStar’s acquisition of certain Rainbow assets offers the possibility of significant consumer benefits, which would not be available without the proposed transaction.<sup>13</sup>

14. It is important to emphasize that EchoStar has not decided precisely how it would utilize the additional spectrum capacity that it would acquire as part of this transaction. However, given the intense competition that EchoStar faces from MVPDs throughout the United States, EchoStar would have every incentive to deploy its newly acquired spectrum assets in a way that would help it gain market share by luring customers away from other MVPDs. In other words, market forces will drive EchoStar to deploy the assets acquired in this transaction to their most productive uses. Deploying assets to their most productive uses creates substantial benefits, such as a higher rate of

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<sup>11</sup> See Department of Justice, *United States of America et al. v. EchoStar Communications Corporation et al.*, Complaint, October 31, 2002, available at <http://www.usdoj.gov/atr/cases/f200400/200409.htm>

<sup>12</sup> *Id.*

<sup>13</sup> Dr. Baumann appears to suggest that the public interest would be better served if the Rainbow assets were sold to an alternative owner. See Baumann Report at 12. But Dr. Baumann does not present any evidence that any alternative owner could achieve what Cablevision – with its financial and programming resources and extensive experience in the MVPD market – was unable to do: create a viable stand-alone DBS entity. From a competition policy perspective, the public interest is served if assets – such as spectrum – are deployed by an effective competitor (such as EchoStar), rather than an ineffective competitor (such as VOOM).

innovation, lower production costs, better quality of output, and availability of more products. These efficiency benefits are normally passed onto consumers through lower prices, higher quality, and a greater variety of products and services.

15. There are a number of ways in which EchoStar could choose to deploy the Rainbow assets proposed to be acquired by EchoStar. First, EchoStar could provide local broadcast channels (e.g., ABC, CBS, FOX, and NBC) in more geographic markets, which would serve to benefit rural America. Today, EchoStar provides local broadcast channels in 155 Designated Market Areas (“DMAs”).<sup>14</sup> The 55 DMAs in which EchoStar does not provide local broadcast channels are predominantly rural areas. While EchoStar may ultimately serve these DMAs without the proposed transaction, the proposed transaction may enable EchoStar to provide local service in these rural DMAs sooner than EchoStar could without the additional spectrum capacity.<sup>15</sup> The more rapid introduction of local-into-local service in these DMAs would create significant consumer benefits.<sup>16</sup> The introduction of local service would also serve to enhance competition in the marketplace, which would produce even further consumer benefits: The FCC recently wrote that an expansion of local-into-local service by DBS firms “should increase competition in MVPD markets and should benefit consumers through increased choice, lower prices, or both.”<sup>17</sup>

16. Second, EchoStar could use the additional spectrum to comply with SHVERA, which prohibits certain two-dish offerings of local broadcast stations. The additional spectrum will facilitate EchoStar’s ability to meet its obligations under that law. As noted above, local-into-local service produces significant consumer benefits and enhances competition in the market. To the extent that this proposed transaction helps EchoStar to continue to serve all of the 155 DMAs it currently serves (or serve even more DMAs) while also complying with SHVERA, the transaction produces significant consumer benefits.

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<sup>14</sup> See [http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=dish&script=410&layout=6&item\\_id=681189](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=6&item_id=681189)

<sup>15</sup> As with other possible uses of the spectrum, this could be achieved either by direct use of the additional bandwidth for this purpose or by EchoStar availing itself of the flexibility given by the new bandwidth to redeploy programming.

<sup>16</sup> For example, FCC has stated that, “Local broadcast programming is highly valued by consumers, is critical to MVPDs’ offerings, and entry into the broadcast station market is difficult.” Federal Communications Commission, “Subject to Conditions, Commission Approves Transaction Between General Motors Corporation, Hughes Electronics Corporation and The News Corporation Limited,” Public Notice, FCC 03-328 (released December 19, 2003) at 10. The Department of Justice and the General Accounting Office have reached similar conclusions. See Comments of the U.S. Department of Justice, In the Matter of the Application of MCI Telecommunications Corporation and EchoStar Communications Corporation, File No. SAT-ASG-19981202-00093, January 14, 1999 and General Accounting Office, “Telecommunications: Issues in Providing Cable and Satellite Television Services,” GAO-03-130, October 2002 at 3.

<sup>17</sup> Federal Communications Commission, “Subject to Conditions, Commission Approves Transaction Between General Motors Corporation, Hughes Electronics Corporation and The News Corporation Limited,” Public Notice, FCC 03-328 (released December 19, 2003) at 14.

17. Third, EchoStar could use the additional spectrum to carry additional programming, including HD programming. As noted above, VOOM entered the MVPD market with a niche product: many HD channels. While VOOM was unsuccessful in its effort to offer a niche HD package of channels, there is growing demand for HD content. As the prices of HD continue to decrease, viewer interest in HD programming will likely continue to increase and the amount of video programming content produced in HD will likely continue to rise. Such increases in demand for HD content will put further strains on EchoStar's ability to compete, since EchoStar is limited in its bandwidth and thus limited in its ability to offer HD content to consumers. The proposed transaction will alleviate some of EchoStar's bandwidth limitations. And if EchoStar believes that adding HD channels (or additional specialized channels) were the most effective use of the additional spectrum and the best way to gain MVPD subscribers, the spectrum acquired as part of this transaction will allow EchoStar to adopt such a strategy – to the benefit of competition and consumers.

18. The proposed transaction would also transfer essential spectrum assets from a DBS provider that has struggled to acquire and retain subscribers to a successful DBS service provider that has been able to achieve high rates of growth and offer a wide variety video programming to millions of subscribers. By deploying the spectrum assets that are part of this proposed transaction, EchoStar would achieve greater efficiency and would be in a position to offer an even greater array of viewing choices to its subscribers.

19. Furthermore, EchoStar's increased capacity to deliver video programming would impose even greater competitive pressure on other major MVPDs to improve their product offerings. Such an enhancement in the intensity of MVPD competition would not occur without EchoStar's deployment of the Rainbow assets proposed to be acquired by EchoStar. Therefore, rather than harming competition as suggested by Dr. Baumann, the proposed transaction is likely to enhance the level of competition among MVPDs, which would benefit MVPD consumers.<sup>18</sup>

## **V. Competitive Effects of Proposed Asset Acquisition**

20. EchoStar's acquisition of certain Rainbow assets would not significantly harm competition in any relevant market.

21. As a starting point, a simple structural analysis of the proposed transaction shows that it is not likely to harm significantly competition – regardless of whether the relevant product market is the more appropriately defined MVPD market or a putative DBS-only market.

22. Government regulators often examine changes in market concentration – as measured by the Herfindahl-Hirschman Index (“HHI”) – as an initial assessment of the possible competitive effects of a proposed transaction.<sup>19</sup> Table 1 shows the HHI for the

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<sup>18</sup> Such a perspective is consistent with the FCC's recent conclusion that, “Cable operators in response to the growth of DBS have made upgrades and advances in their offerings.” Eleventh Annual Report at ¶ 6.

<sup>19</sup> See Horizontal Merger Guidelines at Section 1.5.

MVPD market as of June 30, 2004 based on information in the FCC’s Eleventh Annual Competition Report.<sup>20</sup> The HHI pre-transaction is 5452.8. The proposed transaction increases the HHI by only 0.6 and EchoStar’s relative market position would remain unchanged.<sup>21</sup> As the Merger Guidelines state, “Mergers producing an increase in the HHI of less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis.”<sup>22</sup>

<b>Table 1: HHI for MVPD Market, June 30, 2004</b>			
	<b>Market Share on June 30, 2004</b>	<b>Pre-Transaction HHI</b>	<b>Post-Transaction HHI</b>
<b>EchoStar</b>	11.0%	120.2	120.8
<b>VOOM</b>	0.0%	0.0	
<b>Cable Company</b>	71.6%	5129.1	5129.1
<b>DIRECTV</b>	14.1%	199.6	199.6
<b>Broadband Service Providers</b>	1.5%	2.3	2.3
<b>SMATV Providers</b>	1.2%	1.4	1.4
<b>C-Band</b>	0.4%	0.1	0.1
<b>MMDS Providers</b>	0.2%	0.0	0.0
	<b>HHI</b>	<b>5452.8</b>	<b>5453.4</b>
	<b>Change in HHI</b>		<b>0.6</b>

Source: Eleventh Annual Report at Table B-1 and ¶ 55.

23. Table 2 presents the HHI if one were to assume that the relevant market were a DBS-only market. The HHI for a putative DBS-only market pre-transaction equaled 4845.9. Again, the change in the HHI due to the proposed transaction is less than 10 points and EchoStar would continue to be the second largest DBS provider. Such a small change in the HHI suggests that the proposed transaction is “unlikely to have adverse competitive consequences and ordinarily require[s] no further analysis.”<sup>23</sup>

<sup>20</sup> We assume that relevant geographic market is a local area, although we do not necessarily agree that that is the correct relevant geographic market for assessing this transaction. We also assume that the “local cable company” has a market share consistent with the share of MVPD subscribers who are customers of cable companies. One could view the HHIs in Tables 1 and 2 as stylized HHIs for the average local area.

<sup>21</sup> It is important to note that EchoStar is not acquiring VOOM’s subscribers. Therefore, this calculation – if anything – overstates the change in the HHI as a result of the transaction.

<sup>22</sup> See Horizontal Merger Guidelines at Section 1.5.

<sup>23</sup> See Horizontal Merger Guidelines at Section 1.5.

<b>Table 2: HHI for Hypothesized DBS-Only Market, June 30, 2004</b>			
	<b>Market Share on June 30, 2004</b>	<b>Pre- Transaction HHI</b>	<b>Post- Transaction HHI</b>
<b>EchoStar</b>	42.6%	1814.9	1823.9
<b>VOOM</b>	0.1%	0.0	
<b>DIRECTV</b>	54.9%	3013.3	3013.3
<b>Sky Angel</b>	4.2%	17.7	17.7
	<b>HHI</b>	<b>4845.9</b>	<b>4854.9</b>
	<b>Change in HHI</b>		<b>9.0</b>

Source: Eleventh Annual Report at ¶ 55.

24. While the changes in the HHI suggest that “no further analysis” may be necessary, it is often sound competition policy to go beyond the simple structural analysis.<sup>24</sup> In particular, we now consider whether the proposed transaction will create any unilateral and/or coordinated price effects.<sup>25</sup> For this analysis, the key question is what disciplining effect VOOM has, if any, on the prices or product offerings of MVPDs, including EchoStar.

25. Dr. Baumann asserts that VOOM is an “effective competitor.”<sup>26</sup> Dr. Baumann’s assertion is made without any real foundation or economic analysis; his only support for his conclusion about VOOM’s competitive force is a quote from a digital electronics magazine. Dr. Baumann writes that 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.’”<sup>27</sup> A simple quote from CE Tips Magazine from over a year ago – before VOOM was revealed to have anemic growth and high churn – is not evidence that VOOM is an effective competitor or would be an effective competitor in the foreseeable future.<sup>28</sup>

26. An examination of the MVPD market or even making the assumption of a narrowly defined DBS-only market shows that VOOM is not an effective competitor. In particular, we are not aware of any evidence that VOOM’s pricing and programming

<sup>24</sup> One reason it is important to go beyond the simply structural analysis in this case is that the DBS firms have been growing. Moreover, as the Merger Guidelines note, “market share and concentration data provide only the starting point for analyzing the competitive impact of a merger.” Horizontal Merger Guidelines at Section 2.0.

<sup>25</sup> See Horizontal Merger Guidelines at Section 2.

<sup>26</sup> Baumann Report at 11-12.

<sup>27</sup> Baumann Report at 12.

<sup>28</sup> Moreover, the quote its elf does not suggest that VOOM is an effective MVPD competitor. It just states that VOOM offers more HD content than other MVPDs, which does not mean that VOOM is an effective competitor.

have factored into the pricing or other important business decisions of any other MVPD.<sup>29</sup>

27. One reason that VOOM may be such an inconsequential player in the MVPD market is that it has suffered from anemic growth and high churn rates.

28. In part due to its limited programming, VOOM acquired only 40,000 net new subscribers since it launched service in October 2003. Over that same time period, EchoStar's has increased its subscriber base by roughly 1.9 million – or an average of 40,000 net new subscribers every 10 days! Importantly, such slow growth suggests that VOOM or any other firm with a similar business model is unlikely to be in a position to be an effective MVPD competitor in the foreseeable future.

29. Moreover, VOOM suffered from astoundingly high customer churn rates. Approximately 39 percent of VOOM subscribers who signed up with VOOM during the period between October 2003 and September 2004 subsequently terminated their service or were 90 or more days past due in payment.<sup>30</sup> When accounts more than 90 days past due are treated as customer defections, VOOM's churn rates (*i.e.*, the rate of customer defections as a percent of total customers) were 16 percent and 13 percent in August 2004 and September 2004, respectively.<sup>31</sup> Such high rates of customer losses shortly after the launch of VOOM service suggest a low likelihood of viability in the near or medium term, and make it implausible that VOOM constrained EchoStar's pricing or other important business decisions.

30. It is important to emphasize that competition is not necessarily enhanced by maximizing the total number of competitors in a market. Consumers benefit from the intensity of competition in a market, rather than a raw count of active competitors. The intensity of competition induces market participants to cut prices, improve the quality of goods and services sold, and invest in more productive capacity and innovation. Although the proposed transaction would result in a reduction in the number of MVPDs, it may actually enhance the level of competition in the provision of MVPD services. Indeed, in markets with differentiated products, the post-merger firm may offer products that increase, rather than diminish, consumer welfare. Such an observation, that a merger of smaller firms can enhance competition, has been recognized in academic literature and has been adopted by the FCC in the context of broadcast television.<sup>32</sup> The reason why

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<sup>29</sup> For example, we are not aware that pricing trends in the MVPD market changed when VOOM entered in October 2003.

<sup>30</sup> Application at 2.

<sup>31</sup> Application at 2-3.

<sup>32</sup> See R. Preston McAfee and Michael Williams, "Horizontal Mergers and Antitrust Policy," *The Journal of Industrial Economics*, Vol. XL, June 1992, at 181-187; Luke M. Froeb, Gregory J. Werden, and Timothy J. Tardiff, "The Demsetz Postulate and the Effect of Mergers in Differentiated Product Industries," Working Paper EAG 93-5, Economic Analysis Group, U.S. Department of Justice Antitrust Division, August 1993; and Gregory Werden and Luke M. Froeb, "The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy," *Journal of Law Economics and Organization*, 1994, Vol. 10, No. 2 at 407-416. See, also, Federal Communications Commission, *2002 Biennial Regulatory Review-Review of the Commissions Broadcast Ownership Rules*, Report and Order and Notice of Proposed Rule Making, MB Docket No. 02-277 (released February 4, 2003) at ¶ 194 ("Third Biennial Review").

this may be true is that the assets in the hands of VOOM have been deployed in such a way that competition among MVPDs has not been significantly affected. However, upon completion of the proposed transaction, EchoStar would be in a position to deploy the assets in a way that would enhance competition (see above). Therefore, rather than harming competition, the proposed transaction is likely to produce significant improvements in the level of competition among MVPDs. The improvement in the level of competition would create substantial benefits for consumers of MVPD services.

31. We feel impelled to respond to one other point raised by Dr. Baumann. He suggests that the proposed transaction may harm competition in areas that are not passed by cable or passed by a cable system with low capacity levels.<sup>33</sup> In order for such a perspective to be correct, VOOM would have to have a strong presence in such areas. We have examined VOOM's subscriber data by DMA. The data suggest that VOOM's subscriber base is heavily concentrated in urban areas. Such a result is not surprising. We would expect that early adopters of HD products are mostly upper-income individuals living in urban areas. Therefore, Dr. Baumann's argument that the proposed transaction may harm competition in rural America is misguided – especially in light of the fact that EchoStar may use the additional spectrum to provide local service to smaller DMAs more rapidly than it would without the proposed transaction.

32. For the reasons identified throughout this section, EchoStar's acquisition of certain Rainbow assets will not have a significant negative effect on competition in any relevant market – and will likely enhance competition in relevant markets by enhancing EchoStar's product offering.

## **VI. Conclusions**

33. We conclude that the proposed acquisition of the Rainbow assets by EchoStar is unlikely to result in a substantial lessening of competition in the provision of MVPD services. In fact, we believe that the proposed transaction is likely to generate consumer benefits through enhanced product offerings at EchoStar and more robust competition in the relevant markets. Therefore, we conclude that the proposed transaction is in the public interest and should be approved by the Commission.

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<sup>33</sup> See, e.g., Baumann Report at 8.

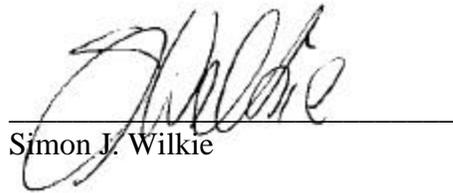
I declare under penalty of perjury that the foregoing is true and correct.  
Executed on April 12, 2005



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Jonathan M. Orszag

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on April 12, 2005



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Simon J. Wilkie

**Exhibit 4**  
**Notice to Rainbow Subscribers**  
**Shut Down of VOOM<sup>SM</sup> Service**

>>> "VOOM" <voom\_ob@mailnj.rmmk.com> 4/12/2005 3:20:43 PM >>>

Please do not respond to this e-mail. For assistance, please call 1-800-438-VOOM.



Dear ,

As we recently notified you on-screen and as you may have also read in the newspapers or on our website, the VOOM service is being terminated on April 30th. The notice period is designed to provide you an opportunity to transition to another television service provider. We are currently reviewing customer accounts in preparation for final statement delivery and service termination.

There is no action you need to take at this time, other than to contact a new service provider. We have valued our relationship, and thank you for being a loyal VOOM customer.

Sincerely,  
VOOM Customer Service

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VOOM, 200 Jericho Quadrangle, Jericho NY 11753.

4/12/2005