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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rainbow DBS Company LLC, Assignor	)	IB Docket No. 05-72
	)	
and	)	
	)	
EchoStar Satellite L.L.C., Assignee	)	File No. SAT-ASG-20050128-00017
	)	File No. SES-ASG-20050131-00117
Consolidated Application for Consent to	)	Call Signs: S2653 and E020248
Assignment of Space Station and Earth Station	)	
Licenses, and related Special Temporary	)	
Authorization.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 2005 **Released: October 12, 2005**

By the Commission:

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I. INTRODUCTION

1. In this Order, we grant the applications of Rainbow DBS Company LLC (Rainbow DBS) and EchoStar Satellite L.L.C. (EchoStar) (collectively, the Applicants) for consent to assign from Rainbow DBS to EchoStar authority to operate a direct broadcast satellite (DBS) space station at the 61.5° W.L. orbital location on 11 odd numbered channels from 1-21. We also grant the Applicants' request to assign special temporary authority (STA) to operate on two additional channels, 23 and 24, at the 61.5° W.L. orbital location, as well as the license to operate the associated earth station facility in Black Hawk, South Dakota.[1]

[1] File No. SAT-ASG-20050128-00017 (requesting approval to assign the license and authorizations for the 11 DBS channels held permanently, and the 2 DBS channels held under STA, by Rainbow DBS to EchoStar at 61.5 W.L.); and File No. SES-ASG-20050131-00117 (requesting approval to assign the Black Hawk earth station facilities, (continued....)

2. We find that the proposed assignment is in the public interest, pursuant to our review under Section 310(d) of the Communications Act of 1934, as amended (the Communications Act or Act).[2] Our approval will allow EchoStar to augment its programming offerings from the 61.5° W.L. orbital location, including adding high definition television (HDTV) and additional local television broadcast channels to certain markets.

II. BACKGROUND

A. The Assignor: Rainbow DBS

3. Rainbow DBS is a limited liability company organized under the laws of Delaware and is an indirect, wholly-owned subsidiary of Cablevision Systems Corporation (Cablevision). In 1989, the Commission authorized Continental Satellite Corporation (Continental) to launch and operate a DBS satellite at the 61.5° W.L. orbital location.[3] The International Bureau (the Bureau) later assigned eleven DBS channels at that location to Continental.[4] In 1997, the Bureau authorized Continental to assign the licenses to R/L DBS, the corporate predecessor of Rainbow DBS.[5] In 2003, the Bureau granted Rainbow DBS special temporary authority to operate on two unassigned channels at the 61.5° W.L. orbital location for a period of 180 days.[6] The special temporary authority has subsequently been extended to September 29, 2005.[7]

4. Rainbow DBS successfully launched its Rainbow 1 satellite on July 18, 2003. Rainbow DBS provided services marketed under its VOOM™ brand (VOOM) on a subscription basis to consumers over its authorized DBS channels on the Rainbow 1 satellite at the 61.5° W.L. orbital location from October 15, 2003 through April 30, 2005, when it voluntarily discontinued the VOOM service.

B. The Assignee: EchoStar

5. EchoStar is a limited liability company organized under the laws of Colorado and is an indirect wholly-owned subsidiary of EchoStar Communications Corporation (ECC), a Nevada

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associated with the operations of the Rainbow 1 satellite, from Rainbow DBS to EchoStar). Unless otherwise specified, we refer to these filings as the "Consolidated Application" or "Application."

[2] 47 U.S.C. § 310(d).

[3] Continental Satellite Corp., et al, *Memorandum Opinion and Order*, 4 FCC Rcd 6292 (1989).

[4] Application of Continental Satellite Corp. For Assignment of Direct Broadcast Satellite Orbital Positions and Channels and For Consent To Transfer Of Control To Loral Aerospace Holdings, Inc., *Memorandum Opinion and Order*, 10 FCC Rcd 10473 (Int'l Bur. 1995). The International Bureau twice extended the date on which the licensee was required to commence service. *See* Application of Continental Satellite Corporation for Extension of Construction Permit, *Memorandum Opinion and Order*, 11 FCC Rcd 1157 (Int'l Bur. 1995); 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 (Int'l Bur. 2000).

[5] Application of R/L DBS Company for Assignment of Continental Satellite Corporation's Direct Broadcast Satellite Construction Permit, *Memorandum Opinion and Order*, 12 FCC Rcd 24325 (Int'l Bur. 1997).

[6] EchoStar Satellite Corporation and Rainbow DBS Company LLC, *Order and Authorization*, 18 FCC Rcd. 19825, 19827 (Int'l Bur. 2003).

[7] *See* File Nos. SAT-STA-20030623-00122, SAT-STA-20040319-00081, SAT-STA-20040924-00191, and SAT-STA-20050329-00089.

corporation.[8] Charles W. Ergen holds approximately 53% of the equity interest and approximately 92% of the voting interest in ECC. Fidelity Management and Research Corporation, a Massachusetts corporation, holds 17% of the equity and a 1% voting interest in ECC.[9]

6. EchoStar, through its DISH Network™ brand, is a provider of advanced digital television services by satellite.[10] EchoStar, through its wholly-owned direct and indirect subsidiaries, holds several DBS authorizations to operate in orbital locations that are capable of serving customers in all contiguous 48 states (*i.e.*, the contiguous United States or CONUS) as well as Alaska and Hawaii. EchoStar is authorized to operate 21 channels at the 119° W.L. orbital location,[11] 29 channels at the 110° W.L. orbital location,[12] all 32 channels at the 148° W.L. orbital location,[13] and 11 channels at the 61.5° W.L. orbital location.[14] In addition, EchoStar leases six channels at the 61.5° W.L. orbital location from Dominion Video Satellite, Inc. (Dominion).[15]

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[8] Application, Exhibit E, Response to Question 20.A and Response to Question 40.

[9] *Id.*

[10] Application, Exhibit F at 3.

[11] *See* EchoStar Satellite Corporation, Assignment of Direct Broadcast Satellite Orbital Position and Channels, *Memorandum Opinion and Order*, 7 FCC Rcd 1765 (1992) (authorizing EchoStar to use 11 odd-numbered channels 1-21 at the 119° W.L. orbital location); Directsat Corp. for Assignment of Direct Broadcast Satellite Orbital Positions and Channels, *Memorandum Opinion and Order*, 8 FCC Rcd 7962 (Mass Media Bur., Video Services Div. 1993) (authorizing Directsat, EchoStar's predecessor-in-interest, to use 10 even-numbered channels 2-20 at the 119° W.L. orbital location and channel 24 at the 110° W.L. orbital location); Application of Directsat Corp. and EchoStar Communications Corp. for Commission Consent to Transfer of Control of Direct Broadcast Satellite Construction Permit, *Memorandum Opinion and Order*, 10 FCC Rcd 88 (1995) (transferring control of license to EchoStar).

[12] Application of MCI Telecommunications Corporation for Authority to Construct, Launch and Operate a Direct Broadcast Satellite, *Order*, 12 FCC Rcd 12538 (Int'l Bur. 1996) (authorizing MCI, EchoStar's predecessor-in-interest, to use 16 odd-numbered channels 1-31, 11 even-numbered channels 2-22, and channel 26); Application of MCI Telecommunications Corp., and EchoStar 110 Corp., 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 21608 (1999) (assigning license to EchoStar); EchoStar Satellite Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 6727 (Int'l Bur., Sat. Div. 1999) (authorizing EchoStar to operate on channel 24).

[13] *See* Application of EchoStar DBS Corporation For Authority to Construct Launch and Operate a Direct Broadcast Satellite System at 148° W.L., *Order*, 12 FCC Rcd 11946 (Int'l Bur. 1996) (authorizing EchoStar to use 24 channels -- specifically, channels 1-17, 19, 21, 23, 25, 27, 29, and 31 -- at the 148° W.L. orbital location); EchoStar Satellite Corporation Application for Assignment of Direct Broadcast Satellite Orbital Position and Channels, *Order*, 18 FCC Rcd 9396 (Int'l Bur. 2003) (authorizing EchoStar to use remaining 8 channels at the 148° W.L. orbital location).

[14] *See* Application of Direct Broadcasting Satellite Corp. for Assignment of Direct Broadcast Satellite Orbital Positions and Channels, *Memorandum Opinion and Order*, 8 FCC Rcd 7959 (Mass Media Bur., Video Services Div. 1993) (authorizing use of 11 even-numbered channels 2-22 at the 61.5° W.L. orbital location); Application of Direct Broadcasting Satellite Corporation for Assignment of Direct Broadcast Satellite Orbital Positions and Channels, *Order*, 11 FCC Rcd 10494 (Int'l Bur. 1996) (assigning license to EchoStar).

[15] Dominion Video Satellite, Inc. Application for Minor Modification of Authority to Construct and Launch and to Continue Construction and Launch of Planned Satellite at 61.5° W.L., *Order and Authorization*, 14 FCC Rcd. 8182 (Int'l Bur. 1999).

C. The Proposed Transaction

7. On January 20, 2005 and January 27, 2005, respectively, the Applicants entered into a Satellite Sale Agreement and a Letter Agreement whereby EchoStar agreed to purchase certain assets from Rainbow DBS for $200 million in cash subject to several conditions, including Commission approval of the transaction.[16] The assets to be sold include the Rainbow 1 satellite, an associated earth station facility located at Black Hawk, South Dakota, related Commission authorizations to operate 11 DBS channels and two DBS channels under special temporary authority at the 61.5° W.L. orbital location, and operating authority for the Black Hawk earth station facility. EchoStar intends to use the Rainbow 1 satellite to complement its existing fleet of satellites, including EchoStar 3, also at the 61.5° W.L. orbital location, to allow it to provide additional programming, including high definition programming and some local broadcast channels, thereby aiding EchoStar's compliance with the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA).[17]

8. On January 28 and 31, 2005, EchoStar and Rainbow DBS filed applications seeking consent to assign the authorizations held by Rainbow DBS to EchoStar.[18] The Satellite Division issued a Public Notice describing the transaction and seeking comment on February 25, 2005.[19] A petition to deny was filed on March 28, 2005, by VOOM HD, LLC and the Association of Consumers to Preserve and Promote DBS Competition (Association of Consumers) (together, the Petitioners).[20] Comments were also filed by more than 300 individual satellite television consumers.[21] Rainbow DBS and EchoStar opposed the petition to deny.[22] A reply to the opposition was filed by the Association of Consumers on April 18, 2005.[23] VOOM HD, LLC and the Association of Consumers withdrew the joint petition to deny on April 29, 2005.[24]

9. Consumers filing in support of EchoStar (filing before VOOM ceased providing service) claim that EchoStar's operation of the Rainbow DBS satellite might improve VOOM's inconsistent service, poor management, substandard technology and consumer support services. In addition, these

[16] *See* Application, Exhibit F at 4, and Attachments 1 and 2.

[17] *See* Application, Exhibit F at 4. SHVERA requires that satellite carriers allow all local television broadcast stations in the same market to be received by subscribers by means of a single satellite dish within 18 months of the act's enactment. *See* Section 203 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-477, Title IX, Sec. 203 (*to be codified as* 47 U.S.C. § 338(g)).

[18] *See supra* note 1.

[19] Rainbow DBS Company LLC (Assignor) and EchoStar Satellite L.L.C. (Assignee) Seek Approval for the Assignment of FCC Licenses and Authorizations Held by Rainbow DBS Company LLC to EchoStar Satellite L.L.C., *Public Notice*, DA 05-501 (rel. Feb. 25, 2005).

[20] Joint Petition to Deny Application for Consent to Assignment of Licenses (filed March 28, 2005) (Joint Petition).

[21] Brief electronic comments were filed by more than 300 individual satellite television consumers. The complete record, containing all filings submitted in this proceeding, is publicly available at http://www.fcc.gov/e-file/ecfs.html in IB Docket No. 05-72.

[22] Rainbow DBS Company LLC and EchoStar Satellite L.L.C. Opposition to Joint Petition to Deny (filed April 12, 2005) (Opposition).

[23] The Association of Consumers to Preserve and Promote DBS Competition, Reply to Opposition to Joint Petition to Deny (filed April 18, 2005).

[24] April 29, 2005 Letter from Charles F. Dolan, VOOM HD, LLC and Jerome J. Sandler, President, the Association of Consumers to Preserve and Promote DBS Competition, to Marlene H. Dortch, Secretary, FCC.

consumers argue that the assignment would allow EchoStar to provide more high definition channels, improve EchoStar's competitiveness and keep service offerings at low prices.[25] Consumers opposing the transaction (also filing before VOOM ceased providing service) contend that VOOM is the only company fully committed to providing high definition television programming, is an innovator in the high definition market and provides high quality satellite service offerings and customer service at reasonable prices.[26] The majority of consumers opposing the transaction assert that the loss of VOOM through this acquisition would greatly reduce available high definition programming, thereby rendering their expensive VOOM equipment useless. They also contend that the acquisition of Rainbow DBS's VOOM service by EchoStar would lessen competition, thereby leading to higher prices for DBS service.[27]

III. STANDARD OF REVIEW

10. Pursuant to section 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the proposed assignment of Rainbow DBS's licenses and authorizations to EchoStar will serve the public interest, convenience, and necessity.[28] In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules.[29] If the transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing process weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.[30] The Applicants

[25] Thirteen individuals filed comments in support of the assignment to EchoStar, with several expressing expectations that high definition service would be offered by EchoStar, but with greater technical support service. *See, e.g.*, comments filed by William R. Schoren, and Luis Larco.

[26] Approximately 90 individuals filed comments expressing support for continuity of VOOM service. *See, e.g.*, comments filed by Richard Visco, Ronald Lapointe, Andy Wong, Teresa York, and Thelma King.

[27] Two hundred individuals filed comments supporting additional competition in DBS service. *See, e.g.*, comments filed by Amanda Bright, Chris Duncan, Ken Fried, Chris Bennet, Wayne D. Sabin, and Todd & Nellie Carpenter.

[28] 47 U.S.C. § 310(d).

[29] *See, e.g., Cingular-AT&T Wireless Order,* 19 FCC Rcd at 21543 ¶ 40; Applications for Consent to the Assignment of Licenses Pursuant to section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in Possession, to Subsidiaries of Cingular Wireless LLC, *Memorandum Opinion and Order*, 19 FCC Rcd 2570, 2580-81 ¶ 24 (2004) (*Cingular-NextWave Order*); General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, *Memorandum Opinion and Order*, 19 FCC Rcd 473, 484 ¶ 16 (2004) (*GM-News Corp. Order*); Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee), *Hearing Designation Order*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) (*EchoStar-DirecTV HDO*); AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C, Violet License Co. LLC, and TNV [Bahamas] Limited Applications, *Memorandum Opinion and Order*, 14 FCC Rcd 19140, 19150 ¶ 20 (1999) (*AT&T Corp.-British Telecom. Order*); Applications to Assign Wireless Licenses from WorldCom Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 6232, 6241 ¶ 23 (WTB, MB 2004) (*Nextel-WorldCom Order*); Application of TeleCorp PCS, Inc., Tritel, Inc., and Indus, Inc. and TeleCorp Holding Corp. II, L.L.C., TeleCorp PCS, L.L.C., ABC Wireless, L.L.C, Polycell Communications, Inc., Clinton Communications, Inc., and AT&T Wireless PCS, LLC, *Memorandum Opinion and Order*, 16 FCC Rcd 3716, 3721-22 ¶ 12 (WTB 2000); GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, 14045 ¶ 20, 14046 ¶ 22 (2002) (*Bell Atlantic-GTE Order*).

[30] *See, e.g., Cingular-NextWave Order*, 19 FCC Rcd at 2580-81 ¶ 24 (2004); *GM-News Corp. Order*, 19 FCC Rcd at 483 ¶ 15; WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee,

(continued....)

bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[31] If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing.[32]

11. Our public interest evaluation encompasses the "broad aims of the Communications Act,"[33] which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest. Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.[34] In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.[35]

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Memorandum Opinion and Order, 18 FCC Rcd 26484, 26492 ¶ 12 (2003) (*WorldCom Order*); Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, *Memorandum Opinion and Order*, 17 FCC Rcd 23246, 23255 ¶ 26 (2002) (*AT&T-Comcast Order*); *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20574 ¶ 25; VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd 9779, 9789 ¶ 17 (2001) (*Deutsche Telekom-VoiceStream Order*); *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14045 ¶ 20, 14046 ¶ 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd at 3347 ¶ 12; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19150 ¶ 20; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 10; *Nextel-WorldCom Order*, 19 FCC Rcd at 6241-42 ¶ 23; *SBC-BellSouth Order*, 15 FCC Rcd at 25464 ¶ 13, 25467 ¶ 18; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd at 16512 ¶ 13, 16517 ¶ 25.

[31] *See, e.g., Sprint-Nextel Order* at ¶ 20; *Cingular-NextWave Order*, 15 FCC Rcd at 2581 ¶ 24; *GM-News Corp. Order*, 19 FCC Rcd at 483 ¶ 15; *AT&T-Comcast Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20574 ¶ 25; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14046 ¶ 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd at 3347 ¶ 11; *SBC-BellSouth Order*, 15 FCC Rcd at 25464 ¶ 13; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd at 16512 ¶ 13; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, *Memorandum Opinion and Order*, 14 FCC Rcd 3160, 3169 ¶ 15 (1999) (*AT&T-TCI Order*); *WorldCom-MCI Order*, 13 FCC Rcd at 18,031-32 ¶ 10.

[32] 47 U.S.C. § 309(e). *See also Sprint-Nextel Order* at ¶ 20; *GM-News Corp. Order*, 19 FCC Rcd at 483 n.49; *AT&T-Comcast Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20574 ¶ 25; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14231 ¶ 435; *WorldCom-MCI Order*, 13 FCC Rcd at 18139-40 ¶ 202. Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies, *i.e.*, radio station licenses. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, *see ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979), but of course may do so if we find that a hearing would be in the public interest.

[33] *Sprint-Nextel Order* at ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 41; *GM-News Corp. Order*, 19 FCC Rcd at 483 ¶ 16; *AT&T-Comcast Order*, 17 FCC Rcd at 23255 ¶ 27; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575 ¶ 26; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 99-251, *Memorandum Opinion and Order*, 15 FCC Rcd 9816, 9821 ¶ 11 (2000) (*AT&T-MediaOne Order*); *VoiceStream-Omnipoint Order*, 15 FCC Rcd at 3346-47 ¶ 11; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19146 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd at 18030 ¶ 9.

[34] *See Sprint-Nextel Order* at ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 41; *AT&T-Comcast Order*, 17 FCC Rcd at 23,255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

[35] *See Sprint-Nextel Order* at ¶ 21; *AT&T-Comcast Order*, 17 FCC Rcd at 23,255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

12. In determining the competitive effects of the transaction, our analysis is informed by, but not limited to traditional antitrust principles.[36] The Commission and the Department of Justice (DOJ) each have independent authority to examine telecommunications mergers and transactions, but the standards governing the Commission's review differ from those of DOJ.[37] DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to lessen competition substantially in any line of commerce.[38] The Commission, on the other hand, is charged with determining whether the assignment or transfer of control of licenses serves the broader public interest, as stated above. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.[39] In addition to considering whether the transaction will reduce existing competition, therefore, we also must focus on whether the transaction will accelerate the decline of market power by dominant firms in the relevant communications markets and the transaction's effect on future competition.[40] We also recognize that the same consequences of a proposed transaction that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the resulting entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.[41]

13. Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.[42] These conditions may include the divestiture of certain licenses along with associated facilities and customers, for example. Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law that may be necessary to carry out the provisions of

[36] *Sprint-Nextel Order* at ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 42; *GM-News Corp. Order*, 19 FCC Rcd at 484 ¶ 17; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575 ¶ 26; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14046 ¶ 23; *AT&T-Comcast Order*, 17 FCC Rcd at 23256 ¶ 28; *AT&T-TCI Order*, 14 FCC Rcd at 3168-69 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd at 18033 ¶ 13. *See also Satellite Business Systems*, 62 F.C.C.2d 997, 1088 (1977), *aff'd sub nom United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply).

[37] *Sprint-Nextel Order* at ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 42; *GM-News Corp. Order*, 19 FCC Rcd at 484 ¶ 17; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575 ¶ 26; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14046 ¶ 23; *AT&T-Comcast Order*, 17 FCC Rcd at 23256 ¶ 28; *AT&T-TCI Order*, 14 FCC Rcd at 3169 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd at 18033 ¶ 12.

[38] 15 U.S.C. § 18.

[39] *Sprint-Nextel Order* at ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 42; *AT&T-Comcast Order*, 17 FCC Rcd at 23256 ¶ 28; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 10.

[40] *Sprint-Nextel Order* at ¶ 22; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 23; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19,150 ¶ 15; *AT&T-Comcast Order*, 17 FCC Rcd at 23256 ¶ 28.

[41] *Sprint-Nextel Order* at ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 42; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and American Online, Inc. Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd 6547, 6550 ¶ 5, 6553 ¶ 15 (2001) (*AOL-Time Warner Order*).

[42] *Sprint-Nextel Order* at ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19150 ¶ 15. *See also WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (conditioning approval on the divesture of MCI's Internet assets); *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd 9779 (2001) (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

the Act.[43] Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits.[44] Despite the Commission's broad authority, we have held that we will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)[45] and that are fairly related to the Commission's responsibilities under the Communications Act and related statutes.[46] Thus, we do not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.

IV. PUBLIC INTEREST ANALYSIS

A. Qualifications of the Applicants

14. As a threshold matter, we must determine whether the Applicants meet the requisite qualifications to hold and assign licenses under section 310(d) of the Act and Commission rules. In general, when evaluating assignments under section 310(d), we do not re-evaluate the qualifications of the assignor.[47] The exception to this rule occurs where issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.[48] This is not the case here.

15. Section 310(d) also requires that the Commission consider the qualifications of the proposed assignee as if the assignee were applying for the license directly under section 308 of the Act.[49] Thus, we must examine EchoStar's qualifications to hold Commission licenses. As noted above,

[43] 47 U.S.C. § 303(r). *See Sprint-Nextel Order* at ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (*citing FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) authority).

[44] *See, e.g., Sprint-Nextel Order* at ¶ 23; *Cingular-AT&T Wireless Order* , 19 FCC Rcd at 21543 ¶ 43; *GM-News Corp. Order*, 19 FCC Rcd at 477 ¶ 5; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047-48 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18034-35 ¶ 14. *See also Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

[45] *See Sprint-Nextel Order* at ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *GM-News Corp. Order*, 19 FCC Rcd at 534 ¶ 131; *AT&T-Comcast Order*, 17 FCC Rcd at 23302 ¶ 140; *AOL-Time Warner Order*, 16 FCC Rcd at 6550 ¶ 5-6.

[46] *See Sprint-Nextel Order* at ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *AOL-Time Warner Order*, 16 FCC Rcd at 6610 ¶¶ 146-47.

[47] *See Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd at 9790 ¶ 19.

[48] *Id.*

[49] Section 308 requires that applicants for Commission licenses set forth such facts as the Commission may require as to citizenship, character, and financial, technical, and other qualifications. *See* 47 U.S.C. § 308; Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion* (rel. Aug. 8, 2005) (*Sprint-Nextel Order*); Applications of AT&T Wireless Services, Inc., Transferor, and Cingular Wireless, Corp., Transferee, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21543 ¶ 40 (2004) (*Cingular-AT&T Wireless Order*). Our rules implementing the provisions of section 308 regarding an applicant's qualifications to hold the Commission licenses involved in this assignment are set forth in Parts 25 and 101 of the Commission's rules. *See* 47 C.F.R. Parts 25, 101.

EchoStar is already a Commission licensee. No party has challenged the basic qualifications of EchoStar, and our independent review finds no evidence to suggest that EchoStar lacks financial, technical, legal, or other basic qualifications necessary to be a Commission licensee. We therefore find that EchoStar possesses the requisite basic qualifications as the assignee.

B. Competitive Analysis of Space Station and Earth Station License Assignments

1. Background

16. Rainbow DBS began providing MVPD services under its VOOM brand in October 2003. The Applicants argue that despite the expertise of Rainbow DBS's parent, Cablevision, in programming and program distribution, VOOM was not a commercial success. As of September 2004, there were approximately 26,000 activated subscribers. Rainbow DBS experienced very high levels of subscriber loss, and a large portion of its accounts were 90 days or more past due. For the nine months ended September 2004, Rainbow DBS reported net operating losses of $211.6 million.[50]

17. In December 2004, the Cablevision Board of Directors decided to pursue "strategic alternatives" for the Rainbow DBS assets. In January 2005, Cablevision reached an agreement with EchoStar to sell the assets at issue here, and Cablevision continued to explore uses for VOOM's remaining assets.[51] On February 10, 2005, in an attempt by Cablevision's Chairman, Charles F. Dolan (Dolan), to keep the VOOM service operating, Rainbow DBS and VOOM HD, LLC, a new company headed by Dolan, signed a letter of intent by which VOOM HD would acquire the business, assets and liabilities of Rainbow DBS not included in Cablevision's agreement with EchoStar, subject to the parties executing a definitive agreement by February 28, 2005.[52] On February 28, 2005, however, Cablevision announced that it had not reached an agreement with VOOM HD and would shut down its VOOM service.

18. On March 8, 2005, Cablevision announced that it had entered into an agreement with Dolan pursuant to which the parties agreed to work cooperatively to finalize the separation from Cablevision of its Rainbow DBS operation. The agreement allowed Rainbow DBS to remain in operation and to continue to provide its VOOM service to subscribers while Dolan sought to arrange an alternate transaction that would avoid a shutdown of Rainbow DBS. That agreement terminated on March 31, 2005, without an alternate transaction having materialized.[53] On April 30, 2005, Rainbow DBS ended its VOOM service.

19. On April 29, 2005, Rainbow DBS announced that it was launching a new HD programming service with 21 channels, and that EchoStar had agreed to carry 10 of the 21 channels, with all 21 being available by 2006.

2. Product and Geographic Market Definitions

20. The Applicants contend that the Commission should evaluate this transaction by examining competition within the market for multichannel video programming distribution (MVPD).[54]

[50] Application at 2-3. Press reports stated that Rainbow DBS lost almost $1 billion in total during its existence, including costs for design and construction of the Rainbow 1 satellite, in addition to operating losses. *In Apparent End to Family Showdown, Cablevision to Shut Its VOOM Satellite Service*, New York Times, April 9, 2005, at C2

[51] Application at 4.

[52] Cablevision News Release, Business Wire, Feb. 10, 2005.

[53] Cablevision News Release, Business Wire, March 8, 2005.

[54] Application at 6.

The Petitioners argue that market may be as broad as MVPD, but may include only DBS in geographic areas where the only other MVPD service comes from low capacity cable systems.[55]

21. In both the *GM-News Corp. Order* and the *EchoStar-DirecTV HDO,* the Commission determined that the relevant product market that includes services offered by DBS providers was no broader than the entire MVPD market, but may well be narrower.[56] There is no evidence in this record that would contradict that determination. Accordingly, for the purpose of analyzing the competitive effects of the transaction before us, we presume that the relevant product market is no broader than the MVPD market, recognizing that this relevant product market involves differentiated products.[57] While all MVPDs transmit video programming networks to customers for a fee, there are clear, and significant, differences in the specific product characteristics of the service bundles offered by different MVPD providers and among service bundles offered by the same MVPD provider. In particular, Applicants contend that Rainbow DBS's VOOM service was a niche product that did not compete fully with other MVPD services and may have been closest to cable providers' digital offerings.[58]

22. We have previously held that the correct geographic market for analyzing cable and DBS transactions is local, and have found it useful to aggregate consumers who face the same MVPD choices into larger geographic markets.[59] Thus, in analyzing a proposed merger of EchoStar-and DIRECTV Enterprises LLP (DIRECTV), the Commission found it reasonable to classify the geographic markets into three broad categories: (1) markets not served by any cable system; (2) markets served by low-capacity cable systems; and (3) markets served by high-capacity cable systems.[60] Neither the Applicants nor the Petitioners disagree with this analysis, and there is no evidence in the record to suggest it is incorrect. Accordingly, we will adopt it for the purpose of evaluating the current transaction. We note that increased competition in DBS is most likely to be important in the first two geographic market categories, where cable systems do not operate or do not provide close substitutes to DBS service. We further note that competition in the MVPD market generally can be enhanced by an increase in the number of DBS competitors or by an increase in the capacity available to DBS providers, making DBS providers more effective competitors in the markets served by high-capacity cable systems.

3. Competitive Effects of Transaction

23. The Applicants contend that the assignment at issue here will result in benefits to competition in the MVPD market.[61] The Applicants assert that cable providers maintain a greater than 73% share of the MVPD market nationwide.[62] The Applicants state that DIRECTV is currently the largest DBS provider, with approximately 14 million subscribers, and that EchoStar has approximately

[55] Joint Petition to Deny at 14, Attachment 4 at 5-7.

[56] *GM-News Corp. Order*, 19 FCC Rcd at 501 ¶ 53; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20609 ¶ 115. The United States Department of Justice identified this same MVPD product market in its complaint against the proposed merger of EchoStar and DIRECTV. *DOJ/EchoStar Complaint* ¶ 24.

[57] Differentiated products are products whose characteristics differ and which are viewed as imperfect substitutes by consumers. *See* Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 281 (2d ed. 1991).

[58] Application, Declaration of Orszag and Wilkie at 5.

[59] *GM-News Corp. Order*, 19 FCC Rcd at 505 ¶ 62.

[60] *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20609 ¶ 120.

[61] Application at 6.

[62] *Id. But see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 20 FCC Rcd 2755, 2869 (2005) (market share for cable providers is 71.626%).

10.4 million subscribers, which they describe as a small fraction of the overall MVPD market. If Rainbow DBS's entire VOOM subscriber base as of June 30, 2004 were added to EchoStar's subscriber base, the Applicants claim that the proposed transaction would result in no appreciable increase in EchoStar's overall MVPD market share and that the change in market concentration would be small, leading to the conclusion that the transaction is unlikely to have an adverse impact on competition.[63]

24. The Applicants also argue that approval of the assignment application would help reduce a constraint on effective competition between DBS providers and cable providers, namely, the limited bandwidth available to DBS providers. Allowing EchoStar to acquire additional spectrum at the 61.5° W.L. orbital location, the Applicants argue, should allow EchoStar greater flexibility in its service offerings, and enhance its ability to compete in the MVPD market.[64] In addition, the Applicants argue that grant of the application will permit EchoStar to offer additional local broadcast television stations and will assist it in complying with SHVERA's requirement to provide all local television broadcast stations in the same market through one satellite earth station antenna.[65] Finally, the Applicants state that the addition of EchoStar channels at the 61.5° W.L. orbital location will enhance competition in the relevant market to a greater degree than any third competitor is likely to be able to in the foreseeable future.

25. *Discussion.* Because of Rainbow DBS's continuing losses and the actions of the Cablevision board of directors (Rainbow DBS's parent corporation), we find that it is highly unlikely that Rainbow DBS would re-start operations if this transaction were denied. Rainbow DBS never achieved more than a relatively small number of subscribers for its VOOM service. In addition, VOOM had high rates of subscriber loss and non-payment, and lost hundreds of millions of dollars during its operation.[66] Despite high interest within the company for continuing to provide DBS service, ultimately Cablevision's board of directors decided that Rainbow DBS could not become a profitable business and it was unwilling to continue funding hundreds of millions of dollars of losses. Even after that decision was made, however, Cablevision's chairman personally attempted to find a way to continue the VOOM service, founding VOOM HD LLC, and funding Rainbow DBS's continuing operations until funding could be secured for VOOM HD. That funding never materialized, and VOOM HD's letter of intent to purchase Rainbow DBS expired. Furthermore, the record contains no evidence of any other offers to purchase Rainbow DBS's operations, and we are aware of none. Nor has any other party filed comments in this proceeding saying that it was interested in continuing Rainbow DBS's service or using its assets and authorizations to provide DBS service.[67] We therefore conclude that under the circumstances described

[63] *Id.* at 7. *See, also,* Opposition to Joint Petition to Deny, Exhibit 3, Declaration of Jonathan M. Orszag and Simon J. Wilkie, pp. 9-13. Orszag and Wilkie calculate the market concentration as measured by the Herfindahl-Hirschman Index (HHI) and the changes in the HHI assuming an MVPD market, and in the alternative, assuming a DBS-only market. For an MVPD market, they find a post-transaction HHI of 5453.4, with an increase of 0.6, and for a DBS-only market, they find a post-transaction HHI of 4854.9, with an increase of 9. They cite the Horizontal Merger Guidelines, noting that the increase in the HHI in each instance is less than 50, leading to the conclusion that the proposed transaction is "unlikely to have adverse competitive consequences and ordinarily require[s] no further analysis." These calculations were based on June 30, 2004 data, prior to Rainbow DBS's recent termination of service.

[64] *See* Application, at 7-8, and Declaration of Orszag and Wilkie, at 2-3, 9, 12-13.

[65] Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-477, Title IX, Sec. 203 (*to be codified as* 47 U.S.C. § 338(g)).

[66] Application, Exhibit F at 3.

[67] Dominion filed a letter in this proceeding stating its continued interest in Channels 23 and 24 and asking that the Commission take no action here that is inconsistent with or would have an adverse effect on the *Eligibility Order,* which imposed certain restrictions on eligibility for ownership or transferability of these two channels, as further discussed below. *See* Auction of Direct Broadcast Satellite Licenses, *Order*, 19 FCC Rcd 23849, 23856 ¶ 16 (2004) (*Eligibility Order*). (EchoStar has requested reconsideration of this decision. EchoStar Satellite LLC Petition for (continued....)

above, and based on the record before us, the proposed assignment of the assets at issue will not eliminate any actual or potential competition in any relevant markets; indeed, absent the assignment, the assets will lie fallow.[68]

26. On the other hand, we find that allowing EchoStar to purchase these assets may increase competition by creating a more effective competitor both to other MVPD providers in general and to the other major DBS provider. EchoStar could use the capacity to become a more effective competitor in markets served by both low-capacity and high-capacity cable systems, and to provide a higher quality product in markets that are not served by any cable system. According to the Applicants, the addition of Rainbow 1 will permit EchoStar to offer additional programming including, among other things, some local broadcast channels that will assist EchoStar in complying with SHVERA.[69] For geographic areas served by cable, an increase in the number of designated market areas (DMAs) that can receive local television broadcast channels through satellite would increase competition in MVPD. For geographic areas that are not served by cable, an increase in the number of DMAs that can receive local television broadcast channels through satellite would increase the quality of services available. Furthermore, increasing the number of HDTV channels or the number of specialized channels offered can increase competition in markets served by cable and increase the quality of service available in areas not served by cable.

27. Accordingly, for the reasons expressed above, we find that allowing the assignment to EchoStar of the Rainbow 1 satellite, authorizations for the 11 DBS channels, and the earth station facility in Black Hawk, South Dakota and its associated authorizations serves the public interest. By permitting the proposed transaction, we are allowing continued use of the assets and capacity and because that capacity will be available to EchoStar for the provision of local-into-local service in more DMAs, as well as additional program offerings, we find that this may lead to increased competition both within the MVPD market and with EchoStar's major DBS competitor.

C. Assignment of STA to Operate on DBS Channels

28. In this section, we address the Applicants' request to assign Rainbow DBS's special temporary authority to operate the additional two unassigned DBS channels at the 61.5° W.L. orbital location, channels 23 and 24. In 1998, the International Bureau granted special temporary authority to

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Reconsideration, filed in Auction AUC-03-52 (filed May 20, 2005) (pending)). Letter to Kevin J. Martin, Chairman, Federal Communications Commission from Marvin Rosenberg, Holland & Knight, LLP, Counsel for Dominion Satellite Video, Inc. (June 23, 2005). As stated above, Dominion is the licensee of eight channels at the 61.5° W.L. orbital location. Dominion did not, however, indicate that it sought Rainbow's 11 DBS channels for itself, that the Commission should deny the transfer of those channels to EchoStar, or that the Commission should impose conditions on its approval of the transfer.

[68] We also note that there are presently no specific restrictions on the ownership or transferability of the licenses for these 11 DBS channels. Under the *Eligibility Order*, the Commission imposed eligibility restrictions only in connection with the two unassigned DBS channels at issue there. The Commission did not address the question of whether it would be appropriate to extend such restrictions to the assignment or transfer of DBS licenses that it had previously granted, and it made it clear that the decision was "based on unique circumstances" that would not "constitute a precedent for other situations." *Eligibility Order*, 19 FCC Rcd at 23863 ¶ 28. Moreover, at this point, we need not decide whether the principles of the *Eligibility Order* can or should be extended to limit the transferability of the licenses for the DBS channels at issue here, because the relevant facts have mooted this issue. Specifically, as discussed in detail above, we have determined that the current state of the market makes it unlikely that restricting transferability here would accomplish the goal of the eligibility restrictions in the *Eligibility Order* – *i.e.*, to promote the development of an additional provider of DBS services.

[69] Application, Exhibit F at 7.

EchoStar to operate over all frequencies at the 61.5° W.L. orbital location until Rainbow DBS or Dominion was licensed to begin service.[70] Dominion was licensed to begin service on its eight assigned channels in 1999.[71] Rainbow DBS was licensed to begin service on its assigned channels in 2000.[72] EchoStar continued to use the two channels at issue here, under special temporary authority, until October 2003, when the International Bureau granted authority for Rainbow DBS to use those two channels under another STA.[73]

29. In March 2003, the Commission sought comment on the auction of DBS licenses located at the 175° W.L., 166° W.L., 157° W.L., and 61.5° W.L. orbital locations, including a license for the two DBS channels at issue here, which EchoStar was then operating under STA.[74] Both EchoStar and Rainbow DBS filed comments regarding eligibility to acquire the license for the two channels at the 61.5° W.L. orbital location. In December 2004, the Commission restricted the eligibility of certain parties to acquire licenses for channels 23 and 24 at the 61.5° W.L. orbital location, which the Commission described as "unique" because they are the only two remaining unassigned DBS channels in the 12 GHz band that are assigned to the United States that can provide service to most of the contiguous United States.[75] The Commission found that the availability of those two channels could be important to increasing the number of options and choices available to subscribers of DBS or MVPD services. Although not full-CONUS channels, channels 23 and 24 at the 61.5° W.L. orbital location have a sufficiently high look angle to provide service to most parts of the contiguous United States. Thus, the Commission found that the availability of these two channels might allow a new DBS provider to offer robust service offerings, either similar to those offered by EchoStar and DirecTV or a different product. The Commission concluded that it would be in the public interest to provide an additional DBS provider an opportunity to acquire the license for these two channels to increase competition with the existing major DBS providers and with other MVPD providers. It therefore prohibited "firms currently operating satellites at orbit locations capable of providing DBS service to the 50 U.S. states ... from acquiring, owning, or controlling" the licenses for the two channels at the 61.5° W.L. orbital location for a period of four years after the award of the initial license.[76] The Commission understood that Rainbow DBS was the most likely licensee for channels 23 and 24 and believed that the additional channels would make Rainbow DBS a more effective competitor, although it declined to limit eligibility to Rainbow DBS. A license for the two channels has not yet been assigned.

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[70] *See* Direct Broadcasting Satellite Corporation Application for Special Temporary Authority to Operate a Direct Broadcast Satellite over Channels 1-21 (odd) and 23-32 (odd and even) at 61.5 W.L., *Memorandum Opinion and Order*, 13 FCC Rcd 6392 (Int'l Bur. 1998).

[71] Dominion Video Satellite, Inc., *Order and Authorization*, 14 FCC Rcd 8182 (Int'l Bur. 1999).

[72] 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 (Int'l Bur. 2000).

[73] *See* EchoStar Satellite Corporation, 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, and Rainbow DBS Company L.L.C., Application for 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 19825 (Int'l Bur. 2003).

[74] *See* Auction of Direct Broadcast Satellite Service Licenses Scheduled for August 6, 2003, *Public Notice*, Report No. AUC-03-52-A, 18 FCC Rcd 3478 (2003).

[75] Auction of Direct Broadcast Satellite Licenses, *Order*, 19 FCC Rcd 23849, 23856 ¶ 16 (2004) (*Eligibility Order*). EchoStar has requested reconsideration of this decision. EchoStar Satellite LLC Petition for Reconsideration, filed in Auction AUC-03-52 (filed May 20, 2005) (pending).

[76] *Id.* at 23874 ¶54.

30. The Applicants contend that the restrictions in the *Eligibility Order* relate only to the permanent authority to operate channels 23 and 24. Thus, the Applicants argue that the Eligibility Order does not act as a bar against assignment of the STA held by Rainbow DBS to operate on the two DBS channels. The Applicants also maintain that given that Rainbow DBS has made the business decision to dispose of its DBS assets at the 61.5° W.L. location, the circumstances on which the Commission based its decision to grant Rainbow DBS an STA for these channels have changed.[77]

31. We agree with the Applicants' argument that the *Eligibility Order*, by its terms, relates only to permanent authority for the two channels at the 61.5° W.L. orbital location.[78] The eligibility restriction adopted by the Commission does not, therefore, act as a bar against the assignment of special temporary authority to operate on the channels. EchoStar is qualified to operate the two channels, and has done so in the past. Indeed, as the Applicants observe, when the Bureau assigned the STA for the two channels to Rainbow DBS in 2003, it noted that it had previously found that EchoStar's operation of the then-unoccupied two channels would serve the public interest.[79] The Bureau also found that both EchoStar and Rainbow DBS made compelling cases for use of the two channels in 2003.

32. The Bureau re-assigned the STA for the two DBS channels at the 61.5° W.L. orbital location from EchoStar to Rainbow DBS because use of the two channels would allow Rainbow DBS, then a new entrant in the DBS business, the opportunity to use expanded capacity for a limited period of time, in order to help initiate its DBS service.[80] The Applicants argue that the unique circumstances that led to the grant of the STA to Rainbow DBS were altered by Cablevision's decision to shut down Rainbow DBS's VOOM service and sell Rainbow DBS's assets. EchoStar also makes a similar argument in its petition for reconsideration of the *Eligibility Order*,[81] and thus, the Commission will consider in a separate proceeding whether to revisit the eligibility restriction adopted in the *Eligibility Order*. We conclude that the *Eligibility Order* relates only to permanent authority and not to the special temporary authority to operate channels 23 and 24 at the 61.5° W.L. orbital location. Our decision here to permit EchoStar to acquire Rainbow DBS's STA for those two channels is without prejudice to our reconsideration of the *Eligibility Order*.[82]

33. Considering our grant of the assignment of 11 other Rainbow DBS channels to EchoStar in this decision, we find that the addition of special temporary authority on the two unassigned channels will further EchoStar's flexibility and thus its program offerings to the public from the 61.5° W.L. orbital location. Given that the alternative is for the two unassigned channels to lie fallow, we find that the public interest is better served by permitting EchoStar to make temporary use of the channels until they are regularly authorized. Thus, we grant approval for the assignment of the existing STA for channels 23 and 24 at the 61.5° W.L. orbital location from Rainbow DBS to EchoStar for the remaining period of the STA or until such time as the Commission assigns these channels to the regularly authorized licensee whichever is sooner.

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[77] Application at 9-10.

[78] Application at 9.

[79] EchoStar Satellite Corporation and Rainbow DBS Company LLC, *Order and Authorization*, 18 FCC Rcd. 19825, 19827 (Int'l Bur. 2003).

[80] *Id.*

[81] EchoStar Satellite LLC, Petition for Reconsideration, AUC-03-52 (filed May 20, 2005).

[82] Dominion, in its letter filed in this proceeding and cited above, expresses an interest in eventually obtaining these two authorizations, but does not object to their being temporarily assigned to Echostar, as long as that assignment does not prejudice the eligibility reconsideration or the permanent assignment decision.

V. CONCLUSION

34. Upon review of the application and the record in this proceeding, we find that grant of the assignment application will serve the public interest. We also find that the comments in opposition to the assignment application do not provide persuasive arguments to either deny or dismiss the application, or to delay our action on this application. Based on the foregoing reasons, we approve the assignment of authorizations for the operation of 11 channels, and special temporary authority for operation of two channels, at the 61.5° W.L. orbital location, and the license to operate the associated earth station located at Black Hawk, South Dakota, from Rainbow DBS to EchoStar.

VI. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED that, pursuant to Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), the applications for assignment of licenses and special temporary authority held by Rainbow DBS Company LLC to EchoStar Satellite L.L.C., File No. SAT-ASG-20050128-00017, Call Sign S2653, File No. SES-ASG-20050131-00117, Call Sign E020248, and File No. SAT-STA-20050329-00078, Call Sign S2653, ARE GRANTED to the extent specified in this Memorandum Opinion and Order.

36. IT IS FURTHER ORDERED , pursuant to Sections 4(i) and (j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Joint Petition to Deny filed by VOOM HD, LLC and The Association of Consumers to Preserve and Promote DBS Competition, is denied.

37. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary