

From *Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee), Hearing Designation Order, 17 FCC Rcd 20559. (2002).*

88. This Commission has a long-standing policy of promoting competition in the delivery of spectrum-based communications services and has implemented numerous measures to foster entry and ensure the availability of competitive choices in the provisioning of such services. For instance, in the DARS proceeding, the Commission established a licensing approach that provided for two DARS licensees because it determined that more than one DARS licensee was necessary "to ensure competitive rates, diversity of programming voices, and other benefits of a competitive DARS environment."²⁷⁴ Similarly, in the initial provisioning of the radio cellular service, the Commission determined that the licensing of two systems for every cellular service area would best serve the public interest as it would "foster important public benefits of diversity of technology, service and price, which should not be sacrificed absent some compelling reason."²⁷⁵ Consistent with this policy, the Commission determined that a competitive market was also the best way to introduce personal communication services ("PCS") to the public and adopted various measures to ensure that PCS licenses would be disseminated to a wide variety of applicants.²⁷⁶ Later, the Commission took actions to further its competitive policies by establishing a spectrum cap for CMRS.²⁷⁷ In doing so, the Commission found that such action would promote pro-competitive ends in the CMRS markets and "discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency."²⁷⁸ The initiatives adopted by the Commission in the CMRS markets have resulted in a strong growth of competition in those markets, leading to the Commission's recent action to sunset the spectrum cap rule, and rely instead on case-by-case analysis of the competitive effects of particular transactions to protect the public interest.²⁷⁹

89. The Commission has also employed measures to ensure competition in the provision of DBS service. For instance, in the DBS spectrum auction in 1995, the Commission limited applicants to having an attributable interest in no more than one full-CONUS orbital location.²⁸⁰ The Commission recognized that reducing concentration of full-CONUS DBS resources would promote competition and thereby benefit the public. Thus, the Commission implemented a one-time auction rule to ensure that each of the three full-CONUS DBS orbital locations would initially be controlled by entities that did not share interests with DBS operators at the other two orbital locations, and thus, permit the development of fully competitive DBS services.²⁸¹ Since that time, the Commission has carefully considered changes in DBS ownership, and has fashioned an approach which has resulted in no fewer than two DBS licensees to operate in the full-CONUS DBS spectrum.²⁸² Under this approach, competition between the two licensed facilities-based DBS providers, both with roughly balanced DBS spectrum resources, has resulted in significant consumer benefits, including increased satellite-delivered programming and services, competitive prices, innovative advanced technologies and improvements in overall quality of service to consumers.

74. See Establishment of the Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, 12 FCC Rcd 5754, 5786 (1997).

275. See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Report and Order, 86 FCC 2d 469, 476, 478 (1981).

276. See Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957 (1994). The Commission stated that its actions were designed "to enable PCS providers

to compete effectively with each other and with other wireless providers so that the American public can enjoy the greatest benefit from the delivery of these new services." Id. at 4960.

277. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC Rcd 7988, 8100-01 (1994). To ensure that competition would shape the development of the CMRS market, the Commission took a number of steps, including adoption of a rule to cap at 45 MHz the total amount of combined broadband PCS, cellular, and Specialized Mobile Radio (SMR) spectrum in which an entity may have an attributable interest in any geographic area. Id. at 7995.

278. Id. at 8105, 8100.

279. See 2000 Regulatory Review of Spectrum Aggregation Limits for Commercial Mobile Radio Services, Report and Order, FCC 01-328, 67 Fed Reg 1626 ("CMRS 2000 Biennial Review"). The Commission found that the spectrum cap had achieved its purpose as consumers have realized the benefits of competition in the form of increased output, lower prices, and increased diversity of service offerings. Id. at ¶ 35. Thus, the Commission has determined to replace spectrum caps with other regulatory mechanisms, including case-by-case review of spectrum aggregation and enforcement of other safeguards applicable to such carriers based on evidence of misconduct, to ensure that absent the spectrum cap, the benefits of competition in CMRS markets continue to be realized. Id. at ¶ 6.

280. See 1995 DBS Report and Order, 11 FCC Rcd at 9723.

281. Id.

282. In April and May of 1999, the Commission issued three decisions that resulted in placing all current U.S. allotted full-CONUS DBS authorizations under the control of two DBS operators: USSB-DirecTV; MCI-EchoStar; and Tempo-DirecTV, n.39, 40, supra.. In doing so, the Commission recognized that such consolidation would improve the ability of the DBS operators to compete in the MVPD market stating that additional full-CONUS spectrum would increase both companies' channel capacity, which was necessary for DBS operators to remain competitive, particularly with cable operators, in the MVPD market. See Tempo- DirecTV, 14 FCC Rcd at 7955. In none of these cases was it necessary for the Commission to analyze the competitive effects of a merger of the only two full-CONUS DBS providers. As the Commission recognized, the two DBS providers would compete with each other, and thus, the only relevant issue to resolve was whether allowing each individual DBS competitor to become a stronger competitor against other providers in the MVPD market would be in the public interest. Tempo - DirecTV, 14 FCC Rcd at 7955.

283. See 2002 DBS Report and Order, n. 16, supra.

284. Id. The Commission revised its rules and policies governing DBS service by, inter alia, incorporating its DBS service rules (Part 100) into other satellite service rules (Part 25) to eliminate inconsistencies, reduce confusion and uncertainty for users, lessen regulatory burdens on licensees, and simplify the development of advanced services. Id. at 11341-43. The Commission took these steps in an effort to promote competition in the MVPD market and thereby benefit the public by maximizing consumer choice, as well as better quality of service to the public, and to promote efficient and expeditious use of spectrum and orbital resources while maximizing flexibility for DBS operators. Id. at 11322.

From An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Report and Order, 86 FCC 2d 469 at ¶ 15 (1981).

...[W]e have concluded that the licensing of two 20 MHz systems would best serve the public interest, convenience and necessity. [citation omitted] In our view, this approach affords the public the benefits of some facilities-based competition in cellular service, while also taking into account the convincing record evidence before the Commission that, from a technical standpoint, cellular systems should be allocated no less than 20 MHz each. Each commenter who addressed the spectrum requirements of cellular design agreed that a cellular system based on either the AT&T or the Motorola design could not be efficiently operated in a mature cellular configuration in a major market with any allocation substantially less than 20 MHz. [citation omitted] This minimum spectrum requirement is based on the fact that a mature cellular system in a high density market requires multiple frequencies at each cell site to achieve the efficiencies of trunking necessary to accommodate the demand for service. In addition, since the number of frequencies available at each site is limited, several sets of frequencies are required to provide adequate co-channel separation for frequency reuse. A 20 MHz allocation is therefore necessary to provide sufficient voice channels as well as the required dedicated group of set-up or control channels. Specifically, as set forth in Telocator's Comments, each mature cellular system requires either 309 or 273 channels to have the necessary 21 set-up channels and either 24 or 21 sets of 12 trunked voice channels, using the Motorola and AT&T configurations respectively. Dividing the existing 40 MHz allocation into two blocks of 333 channels would meet these channel demands; dividing the 40 MHz allocation into three blocks of 222 channels, for instance, would not. Given this substantial technical evidence that cellular systems as currently developed require approximately 20 MHz of spectrum to achieve minimum trunking efficiency gains, we have concluded that, within a 40 MHz total allocation, efforts to increase the number of competitive systems beyond two would not be warranted.

From Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957 at ¶¶ 4-6 (1994).

4. We are amending the broadband PCS spectrum allocation and regulatory structure to better achieve what have been and continue to be our four primary goals in this proceeding: competitive delivery, a diverse array of services, rapid deployment, and wide-area coverage. [citation omitted] Furthermore, our PCS rules as modified will partner with our competitive bidding procedures to meet Congressional objectives that include promoting economic growth and competition, enhancing widespread access to telecommunications services offerings, and ensuring that PCS licenses are disseminated to a wide variety of applicants. [citation omitted]

5. The actions we take are designed to enable PCS providers to compete effectively with each other and with other wireless providers so that the American public can enjoy the greatest benefit from the delivery of these new services. To promote competitive delivery, we have modified the band plan to ensure there is an opportunity for a sufficient number of competitors to offer PCS services. Further, providers will have the flexibility to determine the amount of spectrum needed for their particular service or services. However, we have also set

limits on the total amount of spectrum that can be acquired by new entrants and by incumbent cellular providers. This ensures that there will be a significant number of competitors in each area.

6. We have purposely adopted a broad definition of PCS to encourage a variety of firms with their own visions of PCS to bid for various combinations of licenses and to provide a diverse array of new services. Firms will compete not only on price, but also on quality and the types of new products and services they offer. We have allocated spectrum both in different sized blocks and in different sized service areas because we want to encourage businesses to be able to acquire the spectrum and service areas that best suit their business plans. This additional flexibility will result in a greater diversity of products and services for consumers.

From Establishment of the Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754 at ¶¶ 77-78 (1997).

Although spectrum constraints limit us to licensing just two satellite DARS systems at this time, our licensing approach nonetheless provides the opportunity for a competitive DARS service. Our goal is to create as competitive a market structure as possible, while permitting each DARS provider to offer sufficient channels for a viable service. In the Notice, we pointed out that "satellite DARS will face competition from terrestrial radio services, CD players in automobiles and homes, and audio services delivered as part of cable and satellite services," and asked whether these delivery media, coupled with fewer than four DARS providers, could ensure an effectively competitive audio services market.

Other audio delivery media are not, of course, perfect substitutes for satellite DARS. These media and satellite DARS all differ with respect to the programming menu (terrestrial radio can provide local programming and satellite DARS cannot), the sound quality, the cost of equipment, and the presence or absence of a subscription fee, but they all can provide music. The availability of these media, terrestrial radio in particular, varies across populated areas. Given our conclusion that satellite DARS can provide new and valuable service to the public, and given the overall competitive environment within which it will operate, we are satisfied that licensing two satellite DARS providers will serve the public interest.

We agree with commenters, that there should be more than one satellite DARS license awarded. Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices. The two DARS licensees will compete against each other for satellite DARS customers and will face additional competitive pressure from the other aural delivery media mentioned above. Accordingly, eligible auction participants may acquire only one of the two licenses being auctioned. One license will be for the use of spectrum between 2320 and 2332.5 MHz and the other for 2332.5 through 2345 MHz.

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In summary, we find that the proposed transaction is not consistent with this Commission's long-standing spectrum policies, the bulk of which have been aimed at creating competitive spectrum-based communications services within and among the voice, video and data services markets. We have consistently found that from the perspective of spectrum policy, the public interest is better served by the existence of a diversity of service providers wherever possible. Today we have such diversity in the DBS service, and Applicants have presented no compelling reason, from a spectrum policy standpoint, why we should approve license transfers that would effectively replace facilities-based intramodal DBS service competition with a monopoly on full-CONUS DBS licenses. This is particularly true given our assessment of the likely significant competitive harms the merger poses to the MVPD market. We will take account of this inconsistency with the Commission's pro-competitive spectrum policy in our balancing of the potential public interest harms and benefits of the proposed transaction.

Thus, the record before us indicates that the combination of EchoStar and DirecTV would eliminate the viable facilities-based intramodal competition that exists in a market with high barriers to entry. In its place of this viable competition, the Applicants offer a scheme of national pricing, to be administered by regulatory authorities. Our analysis, however, indicates that the Applicants' proposed national pricing plan is unlikely to be an adequate or effective remedy for the competitive harms likely to flow from the proposed merger. National pricing does not mean low pricing and the plan as proposed would leave Applicants free to price discriminate on a targeted basis, particularly with respect to promotions, installation and equipment offers and to discriminate with respect to service quality. The degree of regulatory oversight that would be needed to monitor such a plan to ensure against abuse would be substantial.

Thus, even if the national pricing plan were likely to be an effective competitive safeguard, its implementation would not be consistent with the Communications Act or with our overall policy goals. In essence, what Applicants propose is that we approve the replacement of viable facilities-based competition with regulation. This can hardly be said to be consistent with either the Communications Act or with contemporary regulatory policy and goals, all of which aim at replacing, wherever possible, the regulatory safeguards needed to ensure consumer welfare in communications markets served by a single provider, with free market competition, and particularly with *facilities-based* competition. Simply stated, the Applicants' proposed remedy is the antithesis of the 1996 Act's "procompetitive, de-regulatory" policy direction. The merger would likely produce a more capable, but less effective, competitor to cable and would totally eliminate what appears to be a very healthy level of intramodal competition among the two facilities-based DBS providers.