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

In the Matter of the Application of MCI TELECOMMUNICATIONS CORPORATION and ECHOSTAR 110 CORPORATION	))))	 File No. SAT-ASG-19981202-00093

COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE

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MCI Telecommunications Corporation has requested approval to transfer its license to operate 28 channels at the 110° West Longitude DBS slot to EchoStar Communications Corporation. This proposed transaction does not pose any significant risk to competition in the distribution of multichannel video programming. Rather, the transaction will greatly increase EchoStar's capacity to transmit video programming and, in so doing, will enhance its ability to compete aggressively and effectively against other distributors of multichannel video programming, including the cable companies that dominate these distribution markets. Prompt approval of this application by the Commission will provide important competitive benefits to the millions of households that purchase multichannel video programming services.

I. DOJ Recently Brought an Antitrust Enforcement Action to Protect Competition In the Distribution of Multichannel Video Programming.

The United States Department of Justice ("DOJ" or "the Department") has devoted substantial antitrust enforcement resources to ensure that the 110° DBS channels can and will be used to bring more choices, lower prices and better services to consumers of video programming. In May, 1998, the Department sued to block The News Corporation, Ltd. ("News

Corp.") and MCI from transferring the 110° license to Primestar, a satellite television provider owned and controlled by five of the largest cable companies in the nation, alleging that the transaction would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.[1] The Department concluded that Primestar would be unlikely to use the scarce full-CONUS DBS capacity at 110° to compete vigorously in the multichannel video programming distribution ("MVPD") market, because doing so would "cannibalize" the existing subscriber base of Primestar's cable owners.[2] By blocking Primestar's acquisition of the 110° channels, the Department sought to ensure that these channels would be available for use by some other firm that would have incentives to compete aggressively. The complaint specifically noted that:

> [U]se of the 110° slot by either of the DBS firms already in the market, DirecTV or EchoStar, would also result in increased competition in the MVPD market. DirecTV and EchoStar would have every incentive to use the additional capacity to attract as many additional subscribers as possible, regardless of whether they come from cable. Acquisition of the 110° slot by these firms therefore would likely have a significant procompetitive effect in the MVPD market.[3]

Five months after DOJ sued, the defendants decided to abandon the deal. This decision cleared the way for News Corp., MCI and EchoStar to reach an agreement involving the transfer of the 110° license -- the transaction now before the Commission.

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[1] United States v. Primestar Inc., et al., No. 1:98CV01193 (D.D.C.) (filed May 12, 1998) (Complaint attached as Exhibit A).

[2] DOJ similarly opposed allowing large cable firms to control DBS channels in its Comments to the Commission during the 1995 DBS Auction Rulemaking. See Comments of the United States Department of Justice, In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service, at 5, 9, 11 F.C.C.R. 1297 (Oct. 1995).

[3] Complaint at ¶ 83.

II. The Commission Should Approve the 110° License Transfer to EchoStar.

DOJ's antitrust action against Primestar was predicated on the competitive concerns that would arise if scarce high-power DBS capacity were acquired and controlled by Primestar's cable company owners -- firms that dominate the MVPD market. By stark contrast, in this proceeding the company seeking approval to acquire the 110° license, EchoStar, has only a small share of the overall MVPD market. When examined in the context of the relevant product market, and taking into account the structure and characteristics of that market, it is clear that EchoStar's application presents no significant competitive concerns. Rather, approval of EchoStar's request promises to facilitate new and potentially significant competition between DBS and cable providers, thereby benefitting consumers of MVPD services.

A. The relevant market is the provision of MVPD services.

The relevant product market in which to analyze this transaction is the distribution of multiple channels of video programming directly to the home. The programming can be delivered by various methods, including cable, satellite and wireless technologies. The Commission has consistently taken the view that MVPD is the proper product market for evaluating competitive issues relating to cable television and DBS.[4] DOJ's extensive investigation in connection with the Primestar litigation uncovered considerable evidence to validate this market definition.

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[4] See, e.g., In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 F.C.C.R. 9712 at ¶ 36 (Dec. 1995) [hereinafter DBS Auction Order]; In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, FCC 98-335 at ¶ 123 (Dec. 1998) [hereinafter Fifth Annual Competition Report]; In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 13 F.C.C.R. 1034 at ¶ 123 (Adopted Dec. 1997).

Under the DOJ Horizontal Merger Guidelines, on which the Commission has relied in the past,[5] cable and DBS are considered to be in the same product market if they are close substitutes for one another, such that consumers would switch from one to the other in response to a price increase in either.[6] The DOJ's investigation of the distribution of multichannel video programming indicates that consumers view DBS and cable as similar and to a large degree substitutable.

First, both cable and DBS technologies provide essentially the same service to customers: (1) the delivery of multiple channels of video, typically anywhere between 35 and 175; (2) programming that includes a mixture of "basic" services (such as ESPN, CNN, USA and TNT), as well as premium services (such as HBO, Showtime and Cinemax) that are not available "over-the-air"; in exchange for (3) a monthly subscription fee. One initial point of differentiation between the two services, the large initial cost of DBS equipment, has been all but eliminated as DBS firms, led by EchoStar, have attracted consumers by offering deeply discounted receiving equipment and installation rates.

Second, DOJ found extensive evidence of customer switching from cable to DBS. More and more new DBS subscribers in recent years are former cable subscribers who either stopped buying cable or downgraded their cable service once they purchased a DBS system. This trend contrasts with the early days of DBS, when new subscribers most often came from uncabled areas. Indeed, competition from DBS is particularly important to cable firms because the cable customers most apt to switch to DBS are profitable "premium" customers, attracted by the extensive programming choices that DBS offers. These customers account for a disproportionate share of cable's subscription revenues, a fact well-recognized by cable providers.

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[5] See, e.g. In the Matter of Application of WorldCom, Inc. and MCI Communs. Corp. for Transfer of Control of MCI Communs. Corp. to WorldCom, Inc., FCC 98-225 at ¶ 120 (Sept. 1998); In the Matter of the Merger of MCI Communs. Corp. and British Telecomms. plc, 12 F.C.C.R. 15351 at ¶ 35 (adopted Aug. 1997).

[6] See 1992 Horizontal Merger Guidelines at § 1.1.

DOJ found additional evidence to support an MVPD product market definition in the fact that cable television companies have developed business plans that specifically counter the perceived competitive threat from DBS. Cable firms spend considerable time and money monitoring advances made by DBS, and have devised "anti-DBS" marketing strategies. For example, cable firms established a "1-888-DISH-HEL[P]" hotline through which consumers interested in DBS are discouraged from purchasing it and steered back to cable. Cable companies have also run anti-DBS advertising, just as DBS firms have attacked cable in their own marketing efforts. On a more positive note, cable firms have spent hundreds of millions of dollars upgrading their systems in order to stay competitive with the channel selection and picture quality of DBS. Leo Hindery, Jr., president of Tele-Communications, Inc., the country's second-largest cable system operator, testified before a Senate subcommittee that "more than any other non-cable MVPD, DBS has fundamentally changed the video distribution landscape and the competitive dynamics of the marketplace. It has altered the way that cable operators package and price their services and the way that we serve our customers."[7]

The reaction of the cable industry in 1997 to an earlier EchoStar/News Corp. alliance, to have been called American Sky Broadcasting ("ASkyB"), also demonstrates that cable and DBS compete in the same product market. Before News Corp. and MCI announced the Primestar deal, they had planned to partner with EchoStar to use the 110° slot to launch a high-power DBS service. Cable executives immediately treated ASkyB as a formidable potential competitor. In the days that followed the unveiling of ASkyB, cable executives suggested that a massive battle between ASkyB and cable would ensue.[8]

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[7] Antitrust and Competition Issues in the Cable and Video Markets: Hearings Before the Subcomm. on Antitrust of the Senate Judiciary Comm. (Oct. 8, 1997).

[8] Complaint, ¶¶ 49-50. See also Mark Robichaux, News Corp. To Buy 50% of EchoStar, Wall St. J., Feb. 25, 1997, at A3; Mark Robichaux and Bryan Gruley, Cable: Critics Target Murdoch's 'DeathStar,' Wall St. J., Mar. 17, 1997, at B; Turner: It's time to end US West pact,

In short, the views and actions of consumers, statements and strategic behavior by cable firms, and the views of other industry participants convincingly demonstrated that DBS and cable compete against each other in local MVPD markets throughout the country.

B. The proposed license transfer will enhance competition in MVPD markets by eliminating capacity restraints that limit EchoStar's ability to compete with cable.

Cable television providers continue to dominate MVPD markets, even though DBS providers have experienced rapid growth in recent years. According to the Commission's Fifth Annual Competition Report, cable firms serve approximately 85% of all MVPD customers, roughly 65.4 million subscribers.[9] The franchised cable operator's market share is even higher in many local markets. EchoStar, though it has steadily grown in size, is the smallest of the DBS providers as measured by number of subscribers. EchoStar serves approximately 1.9 million customers, representing merely 2.5% of all MVPD subscribers.

To date, EchoStar has operated with only 21 full-CONUS DBS channels, hampering its ability to compete with cable and with the leading DBS firm, DirecTV. With additional capacity at the 110° slot, EchoStar will be able to offer more programming. This capacity will also enable EchoStar to take advantage of any legislative reform that makes it easier for DBS firms to transmit local broadcast channels to subscribers. To the extent that DBS cannot offer subscribers local broadcast channels, it has a competitive disadvantage relative to cable because many viewers demand local news and weather and popular network programming. In addition, the chief technical issue thwarting local signal delivery has been the limited number of high-power DBS channels available

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Denv. Post, Mar. 20, 1997, at D1.

[9] Fifth Annual Competition Report, FCC 98-335 at ¶¶ 6, 8.

for use by a single firm. There are over 1,500 local television signals in the United States, and providing DBS carriage to a meaningful number of markets would require a great deal of spectrum.

Allowing EchoStar to use 28 channels at 110° along with its 21 channels at 119° would, for the first time, give a DBS operator sufficient capacity to deliver local signals on a widespread basis. The marketplace will ultimately decide how much consumers would value a DBS service that includes local programming, but DOJ believes that such an offering would be likely to inject more competition into the MVPD market by making DBS service a closer substitute for cable, thereby increasing the likelihood of meaningful price competition. Regardless of whether DBS carriage of local signals becomes a reality in the immediate future, DOJ is convinced that providing additional full-CONUS capacity to the smallest home satellite firm will enhance competition in local MVPD markets.

III. The Commission Should Not Require EchoStar to Divest Its Holdings at 119° as a Condition of Approving the License Transfer.

The Commission should reject any suggestion that EchoStar must relinquish its license to 21 DBS channels at 119° West Longitude as a condition of receiving approval to use those at the 110° slot. MVPD competition is best served by the emergence of a strong high-power DBS competitor with enough capacity to compete effectively with cable. The cable owners of Primestar, which has publicly advocated such divestiture,[10] are those most threatened by the creation of a second formidable DBS service. The Commission should reject any proposal that would limit the ability of EchoStar to compete more effectively, or that would further delay procompetitive use of the 110° slot.

[10] Monica Hogan, With New Slots, EchoStar Eyes 500 Channels, Multichannel News, Dec. 7, 1997, at 124.

In the same vein, the Commission should reject any suggestion that approval of this application be conditioned so as to preserve Primestar's opportunity to acquire EchoStar's channels at the 119° slot. Giving this capacity to Primestar would negatively affect MVPD competition because it would allow the large cable companies that control Primestar to control a major share of the limited full-CONUS DBS spectrum currently available. Indeed, it would create at the 119°slot the situation DOJ sued to prevent at 110° -- scarce high-power DBS orbital capacity being controlled by firms that lack the incentives to deploy it in a fully competitive manner. Any future effort by Primestar to acquire full-CONUS high-power DBS channels would be subject to careful review by the Department in light of these competitive concerns.

In its 1995 DBS Auction Order, the Commission foresaw that the public interest might be served by allowing one DBS firm to control capacity at more than one full-CONUS orbital location.[11] In that Order, the Commission adopted a "one-time auction rule" requiring any entity that acquired the 110° channels at auction to divest any other channels it might hold at 101° or 119°.[12] However, the Commission explicitly rejected a permanent rule that would prevent firms from holding spectrum at two full-CONUS locations, observing that it did "not believe that the public interest would be furthered by freezing this industry structure through a rule permanently precluding future channel combinations at multiple full-CONUS locations."[13] The one-time rule that was adopted left the Commission the "flexibility to consider a different configuration in the future if warranted by then-prevailing market conditions."[14]

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[11] DBS Auction Order, 11 F.C.C.R. 9712 at ¶¶ 55, 65.

[12] Id. at ¶28.

[13] Id. at ¶ 31.

[14] Id. at ¶ 55.

Market conditions have indeed changed since that time. At the time of the Order, the Commission sought to encourage the emergence of a new DBS competitor in order to increase competition in the MVPD market.[15] The Commission observed that because DBS and cable were differentiated products, price competition was not likely to occur between the two.[16] Since then, however, DBS and cable have become closer substitutes for each other. DBS equipment prices have dropped, while many cable systems have upgraded to provide more channels and digital pictures to their subscribers. A key differentiating factor identified by the Commission, the lack of local programming on DBS, may also be eliminated soon, if legislative reform occurs and if EchoStar is given the additional spectrum necessary to carry local channels. Central goals articulated in the Commission's Order -- the deconcentration of the MVPD market and promotion of price competition between DBS and cable -- will best be served by allowing EchoStar to acquire the 28 channels at the 110° slot while retaining its current 21 channels at 119°. Prohibiting one DBS firm from aggregating enough full-CONUS capacity to make local channel delivery feasible would only delay the emergence of DBS as a full-fledged competitor to cable.

IV. Conclusion: The Commission's Swift Approval of the License Transfer Will Best Promote MVPD Competition.

The Commission auctioned the 110° slot license in January 1996 -- fully three years ago. It did so in hopes that this scarce full-CONUS spectrum would be a source of significant additional competition in a market long dominated by cable incumbents. Primestar's attempt to acquire control of the 110° channels (eventually blocked by DOJ) significantly delayed the procompetitive use of this spectrum. To date, the 110° capacity has not carried a single channel of programming to

[15] Id.

[16] Id. at ¶¶ 46-49

American consumers, while cable operators have maintained their dominant position in the distribution of multichannel video programming.

DOJ believes that EchoStar's ability to use the 110° slot to improve its satellite television service could play a critical role in expanding consumers' choices in MVPD services, leading to better service, quality and lower prices for both DBS and cable. DOJ thus urges the Commission to approve the proposed license transfer and to do so expeditiously.

Respectfully Submitted,

_________/s/_________
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