IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. ECHOSTAR COMMUNICATIONS CORP., HUGHES ELECTRONICS CORP., GENERAL MOTORS CORP., and DIRECTV ENTERPRISES INC. Defendants.	Civil No.: 1:02CV02138 (EVH) Filed: Oct. 31, 2002

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SCHEDULING ORDER

Plaintiffs request a scheduling order that will provide a prompt and reasonable schedule for resolving the important issues presented by this case. Defendants approached Plaintiffs on Friday, Nov. 1, 2002, and requested a meet-and-confer on scheduling and informed us that they intended to approach the Court immediately to seek an extraordinarily abbreviated schedule for resolution of this case if the parties could not agree. Defendants' proposed schedule would be unreasonable, unfair, and unworkable. It would deprive Plaintiffs of a full and fair opportunity to obtain and present evidence to show the consumer harm that this merger would inflict; in addition, it would deprive the Court of the opportunity to resolve the issues after full consideration. Moreover, the schedule Defendants seek is not justified by the situation or by the arguments Defendants advanced during the meet-and-confer process.

Plaintiffs propose instead an aggressive, but reasonable, pretrial schedule in which all pretrial matters would be completed in May and the case would then be ready for trial on the merits. No preliminary injunction is being sought.

I. Background

Plaintiffs filed this case to prevent a merger that would leave millions of consumers facing a monopoly and tens of millions of consumers facing a duopoly. The merger would eliminate the vigorous competition between Echostar and DirecTV that has brought consumers lower prices and better products.

II. Plaintiffs' Proposed Schedule Is Aggressive But Reasonable

Plaintiffs propose an aggressive schedule that provides adequate time to prepare this case for an efficient trial before this Court. The proposed schedule provides time (1) to resolve confidentiality claims by any of the 50-some third parties who provided information as well as outstanding discovery disputes with Defendants; (2) to conduct pretrial discovery (including discovery of changes to the transaction that have not even been finalized yet); (3) to conduct expert discovery; and (4) to engage in pretrial motions practice to narrow and clarify issues. Because this case will affect tens of millions of American consumers and billions of dollars of commerce, there is every reason to fully develop the issues for the Court, on an aggressive, but reasonable, schedule that reflects the importance of the matter.

III. Defendants' Arguments Do Not Justify an Extraordinarily Abbreviated Schedule

Defendants, we understand, will claim that deadlines in their own merger agreement justify asking the Court to resolve this Complaint on the merits with an extraordinarily abbreviated schedule for a deal of this significance. A review of Defendants' claims shows that they fall far short.

A. Self-Created Deadline

Defendants' claim of urgency should be disregarded because it is self-created. Defendants claim that particular terms of the transaction, which Defendants themselves negotiated, should cause the court to abbreviate its consideration of the merger. The merger contract provides substantial incentives for termination -- but does not require it -- within the period January 7-20, 2003.

But Defendants' self-created deadline can be changed with the stroke of a pen. If it is in Defendants' interest to extend the deadline, it will be extended. Faced with similar arguments that a transaction would be abandoned, the Court of Appeals for this Circuit, in *FTC v. H.J. Heinz Co.*[1] said:

> [A]lthough the appellees state that if an injunction pending appeal is granted they *may* abandon the merger, they do not unequivocally state that they *will* do so. . . . Moreover, even if the current merger plans were abandoned, the evidence does not establish that the efficiencies the appellees urge could not be reclaimed by a renewed transaction following success on appeal.

Id. at *2. If the benefits of the transaction were actually as substantial as Defendants claim, it would obviously be in their interest to agree to such an extension. Rather than work out an amendment to extend their deal for a reasonable period of time, Defendants have chosen to focus on negotiating a separate "remedy" deal with a third party that they expect to finalize and litigate in the space of a few weeks. Defendants have the keys to their claimed problem in their own pockets; the Court should disregard their self-created crisis.

Indeed, Defendants' sense of urgency with respect to their deadline is a sudden shift in position. As recently as last week, Defendant Echostar asked the Department of Justice to slow

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[1] 2000-2 Trade Cases ¶ 73,090; 2000 WL 1741320 (D.C.Cir.).

down its decisional process ("we urge you to provide . . . breathing space").[2] And Defendants' new-found sense of urgency could even be substantially driven by jockeying for position concerning the transaction's $600 million "break-up fee" that can be evaded by a claim that one party has not used "best efforts."[3] As one market analyst observed, "Both parties are obliged to go through this kabuki dance of putting a full-court press on to get this deal done."[4] Wise judicial policy suggests caution: if courts were to permit themselves to be rushed by merging firms' self-created crises, then firms planning antitrust-problematic mergers would have an incentive to create transactions with artificial deadlines in order to obtain abbreviated review.

B. There Is No Crisis

Moreover, Defendants' claimed sense of urgency is based on an unrealistic premise. This transaction cannot be completed by the Defendants' self-imposed deadline -- regardless of what this Court does -- because they need Federal Communications Commission (FCC) approval to complete their transaction. But they do not have FCC approval and are unlikely to obtain it any

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[2]Letter of Robert Silver, Esq. to Assistant Attorney General Charles James, Oct. 30, 2002.

[3]*See* Demetri Sevastopulo, *Hughes and EchoStar may contest block on $ 19 bn tie-up*, FIN. TIMES, Oct. 31, 2002, *available in* 2002 WL 102373033 ("In weighing whether to challenge the ruling, EchoStar and Hughes will have to consider the terms of their contract, which requires both sides to do their utmost to win approval for the deal. If Hughes shows any signs of wavering, it could allow Mr. Ergen [Echostar CEO] to challenge the $600 million break-up fee he has agreed to pay if the merger is blocked. Most observers expect Mr. Ergen to challenge the fee . . . ."); Penelope Patsuris, *Ergen-nomics: Fighting the Breakup Fee*, (visited Nov. 1, 2002) <http://www.forbes.com/2002/11/01/cx_pp_1101echostar.html> (". . . if [Hughes] fails to devote its best efforts to [pursuing the merger], according to the contract, EchoStar would be off the hook for the $600 million . . . . EchoStar already may have a shot at not paying out at least $300 million of the fee, which was tied to DirecTV's cooperation. . . . 'As long as he [Ergen] fights, he doesn't have to pay the breakup fee.'").

[4]Robert Gehrke, *U.S. Sues to Block Satellite Merger*, AP Online, Oct. 31, 2002 *available in* 2002 WL 102133568.

time soon, if ever. The FCC ordered a hearing under its regulatory authority[5] because it found, "based on the record evidence, that there is a significant likelihood that the proposed merger will substantially increase concentration in an already concentrated market, substantially reduce competition and harm consumers." [6] An administrative law judge has yet to be appointed for the hearing, and no schedule has been set. Seventeen industry participants have been permitted to appear and present evidence at the hearing. *Id*. at ¶ 297. After the hearing, there will be an initial decision by the administrative law judge followed by a final decision by the Commission; after a Commission decision, there can be appeal to the courts. Defendants cannot represent to the Court that the FCC process is likely to be concluded before next summer, much less on anything close to the extraordinary schedule they ask this Court to undertake.[7]

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[5]Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq.

[6]Hearing Designation Order, ¶ 104, *In re: Application of EchoStar Communications Corporation, et al.*, FCC 02-284, (Rel. Oct. 18, 2002), *available at* 2002 WL 31364465 (F.C.C.). A copy of the FCC's Order is attached for the Court's convenience at Ex. 1.

[7]Defendants may suggest that they can remedy the transaction at the FCC, but there is no reason to think that this outcome is likely. *FCC Cites Staggering Harms in Rejecting DBS Merger*, 14 SATELLITE BUSINESS NEWS 1, 21 (Oct. 23, 2002) ("FCC Media Bureau Chief Ken Ferree appeared to all but rule out any possibility EchoStar and Hughes could offer concessions that would persuade the FCC to reverse its decision. 'It's clear that there's no quick or easy quick fix for this,' he said . . . ."); Jennifer Beauprez & Anne Mulkern, *Justice Dept. sues to bar EchoStar merger, 23 States join in, dooming DirecTV deal*, DENVER POST (Nov. 1, 2002), 2002 WL 6579463 ("On Wednesday, FCC Chairman Michael Powell told The Denver Post that he gave little chance of approval for an altered proposal."); Separate Statement of Commissioner Michael J. Copps, *In re: Application of EchoStar Communications Corporation, et al.*, FCC 02-284, (Rel. Oct. 18, 2002), *available at* 2002 WL 31364465 (F.C.C.) (An effective remedy proposal is an "impossible dream" with likelihood "so tiny as to be almost invisible.")

C. Inappropriate Analogy to *U.S. v. Sungard*

Defendants' likely analogy to the *SunGard* case litigated before this Court ignores the critical differences between that case and this one.[8] In *SunGard*, there was a firm providing critical business continuity services supporting the nation's commercial infrastructure (this was shortly after September 11, 2001) that was operating in bankruptcy, threatened with the loss of personnel, and forcing companies to make critical choices during this period about where to get these services. In this case, there is no business failure,[9] no externally-imposed deadline from the bankruptcy process, no inability to provide service, no imminent loss of substantial value to the DirecTV business, and no critical infrastructure ramifications in the short term. Indeed, even Defendants' proposed schedule indicates that they recognize that this matter is significantly more complex than *SunGard*; they propose ten days of trial testimony instead of one; eighteen witnesses instead of three.[10]

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[8] *See United States v. SunGard Data Systems, Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001). In *Sungard*, the acquired company was in bankruptcy and it was undisputed that the competitive significance of the assets at issue were under serious threat. The single plaintiff (the United States) and defendants consequently agreed on an extraordinarily abbreviated schedule. The *SunGard* merger was a $825 million transaction; this merger is 20 times larger at $18 billion, which may make it the largest merger transaction ever litigated, and it raises vastly more complex issues.

[9] *Hughes Third Quarter 2002 Results Driven By Continued Strong DIRECTV U.S. Financial Performance*, Hughes Electronics Corporation Press Release, Oct. 14, 2002) <http://www.hughes.com/ir/releases/2002_results/q3_2002/default.xml>.

[10] What *SunGard* does teach is that Plaintiff United States will agree to a hasty schedule, where the need is real. Here the need is not real. Additionally, *SunGard* displays what a tremendous burden it is to proceed so hastily. The defendants ought to have a significant and valid reason (not a self-imposed one) before they ask that the Court inconvenience itself to such a great extent on their behalf.

D. Pre-filing Investigation

Defendants claim that Plaintiffs have had a year-long pre-filing investigation of the merger, and thus that little pretrial discovery should be allowed. In fact, however, the significance of the pre-filing investigation is overstated because it has been marked by Defendants' sluggish responses, shifting arguments, and absence of urgency.

Defendants reached a merger agreement October 28, 2001, and they knew that serious antitrust issues were raised. Yet they followed a desultory course of responding to investigative requests. Defendants received a standard statutory "second request" for information and documents[11] on December 17, 2001. The average recipient of such a second request in 2001-02 took 54 days to comply. Defendants, however, took 308 days to comply -- until October 25, 2002. Indeed, after 54 days had passed, Defendants had produced only 10 of an eventual 1600 boxes of documents.[12] Defendant Echostar had produced none.[13]

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[11]Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, mergers of a certain size require notification and observation of certain waiting periods. The Department of Justice may request additional information, which tolls the waiting period until the merging parties have complied with the request. Thus if Defendants were in a rush to complete their transaction, they had a strong incentive to comply with the second request quickly.

[12]In addition, despite Defendants' claims of an unprecedented volume of material and cooperation, there was nothing at all unusual about the volume of material produced or the cooperation given for a merger of this size -- except for the slow pace at which it was produced.

[13]Moreover, Defendants' failure to expeditiously pursue this merger is illustrated by their overbroad and careless treatment of privilege issues: they withheld some 85,000 relevant documents on claims of privilege, many patently improper (e.g., a letter from the Department of Justice to defendant Hughes; a letter from Echostar copied to Senators Hollings and McCain and four Congressmen; a DirecTV copy of a letter from two Senators to FCC Chairman Michael Powell; an e-mail sent to someone identified on Echostar's privilege log as "former Channel 2 news anchor"). Defendants already have been forced to produce thousands of such documents as a result of our review. And there are hundreds more such documents for which we expect that we will have to seek the assistance of a magistrate judge (or the Court) to rule that those documents should have been produced. Then we will need to review those documents, and

Defendants claim that various synergies and efficiencies would result from the transaction, but the information they have provided on this subject has been a moving target. Despite repeated requests from Plaintiff United States, Defendants did not provide their initial explanation of synergies until June 20, 2002. When Plaintiffs sought backup for some of the claims and assertions, Defendants provided it only in August 2002, changing many of their estimates, explanations, and support for their claims.[14]

Moreover, while the pre-filing investigation allows the United States to propose an aggressive seven-month schedule, it is no substitute for the ordinary pre-trial processes. Pre-complaint discovery designed to determine whether a case should be filed is not the same as post-complaint discovery. *See SEC v. Saul*, 133 F.R.D. 115, 118-19 (N.D. Ill. 1990) ("the Court finds considerable merit in the [agency]'s contention that once it has completed its investigation and filed suit, it is entitled to review its investigation and avail itself of its discovery rights in order to prepare its case for trial. . . . Once the complaint has been filed and the defendants have answered, the issues requiring resolution have been clarified, and all parties must be afforded the opportunity to conduct discovery and prepare for trial with those issues in mind.").[15]

Defendants have signaled that they intend to defend the case substantially on the grounds a partial divestiture remedy that they intend to propose -- but which has not even been finalized

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follow up with deposition questioning as to the most important of those documents.

[14]Defendants presented their "model" in a document dated June 20, 2002, a presentation June 24, 2002, and a backup document dated Aug. 14, 2002.

[15] Interrogatories provide another illustration of how unrealistic is Defendants' extraordinarily abbreviated schedule. Defendants' proposed schedule would allow at most a week for interrogatories. Yet, during the pre-filing investigation, it took them over three months to answer interrogatories, presumably at a time when it was in their own interest to move quickly.

yet. Moreover, the proposed remedy, to the extent it has been revealed to us, creates new anticompetitive problems itself that must be considered. We also anticipate that Defendants will rely on claimed synergies/efficiencies.[16] Both are complicated issues, on which Defendants carry the burden, and as to which Plaintiffs have had limited pre-complaint discovery.

In addition, Defendants' proposed schedule places substantial burdens on third parties as well as the parties to the lawsuit. It is unavoidable to place some burdens on third parties, but the more abbreviated the schedule, the more significant the burden placed on third parties.

E. Significant Harm to Consumers Is At Issue

Defendants claim that the transaction will bring benefits to consumers, in essence claiming that they are likely to prevail at trial on the merits, and urge this as a reason for abbreviating the schedule. Defendants' arguments face a steep uphill climb; they have so far failed to convince the FCC, which voted 4-0 not to approve the necessary license transfers. The proposed merger threatens tens of millions of consumers with monopoly or near-monopoly. As the Court of Appeals for this Circuit said in *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001),

> [T]he high market concentration levels present in this case [a three-to-two merger] require, in rebuttal, proof of extraordinary efficiencies . . . . *See* . . . Horizontal Merger Guidelines, *supra,* § 4 (stating that "[e]fficiencies almost never justify a merger to monopoly or near-monopoly") . . . . Moreover, given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those "efficiencies" represent more than mere speculation and promises about post-merger behavior.

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[16]For example, Defendants' synergies "models" contain over 1300 line items. Moreover, late in October, 2002, Defendants presented a suggestion of a small, partial divestiture as a "remedy" for the anticompetitive harm of the transaction. Plaintiffs received a description of this divestiture plan October 22, 2002, and had meetings to elaborate it as recently as October 28 and 29, 2002. Defendants admitted in a "white paper" submitted October 21, 2002 that they had not even recalculated efficiencies claims to reflect the effect of their proposed "fix."

Defendants' merger deserves "rigorous analysis," not the extraordinary rush to judgment that Defendants seek.

IV. Conclusion

Plaintiffs propose an aggressive pretrial schedule. But Plaintiffs oppose Defendants' attempt to rush this Court and to avoid a full and fair exploration of the harm that their proposed merger would inflict on American consumers.

Dated this 4th day of November, 2002.

Respectfully submitted,

/s/

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