to protect. Thus, its incentives were strongly to be a maverick and it played that role, as detailed above. The merger will change EchoStar's incentive to favor cartel-like behavior with the cable incumbents: "acquisition of a maverick firm is one way in which a merger may make coordinated interaction more likely, more successful or more complete."[199] The national pricing plan proposed by Mr. Ergen will make that coordination much more feasible and higher prices for both cable and DBS customers even more certain.

V. THE PROPOSED MERGER WILL HAVE ANTICOMPETITIVE EFFECTS ON LOCAL BROADCASTERS AND CONSUMERS

Regardless of whether the post-merger EchoStar possesses monopoly power in a relevant market or participates in an MVPD duopoly, this merger poses a significant threat of both unilateral and coordinated anticompetitive effects for local broadcasters and consumers.

A. The Merger Will Have Anticompetitive Effects On Broadcasters

In the large sections of the country where this would be a merger to monopoly, EchoStar, post-merger, will have little incentive to carry additional local broadcast signals because it will no longer need to fear that DIRECTV will "jump it" by doing so. The incentive to innovate and extend local-to-local services beyond the top 100 DMAs, to areas which are uncabled or have weak cable systems, will vanish with the end of the rivalry between EchoStar and DIRECTV – which has seen the two "leapfrogging" one another into successive markets. Even in cabled areas, the incentive to carry local-to-local will lessen. The merger will reduce the need to find new techniques (or to improve current ones) to maximize satellite capacity for local-to-local. For example, EchoStar already lags both in the

[199] *Id.*

timing of its launch of spot-beam satellites and in its skill in squeezing out more capacity by good engineering.[200] With a better frequency reuse rate, DIRECTV's first spot-beam satellite delivers almost 50 percent more capacity per frequency than EchoStar's spot beam satellites were designed to provide. As a result, DIRECTV can offer many more local signals than EchoStar, within a given frequency.

Ending rivalry will result in less carriage of local broadcast stations – exactly the type of reduction in output to be expected in monopoly markets and against which the antitrust laws guard. The effect of this output reduction will be less viewership for local broadcast stations, which will translate into lower advertising revenues. In turn, lower revenues will ultimately mean local broadcasters will be forced to reduce their output by limiting the quality and quantity of news and local programming they can produce. In addition, less local programming represents a decline in diversity and localism, core values of the public interest.[201] Concerns over the fate of diversity and localism are well founded, as EchoStar's recent improper relegation of many small and niche television stations, including Spanish language, African American and religious channels to a remote "wing slot" satellite demonstrates. [202]

---

[200] *See* Joint Engineering Statement at 5-6.

[201] In the Matter of 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35, FCC 00-191, 15 F.C.C.R. 11,058, ¶ 106 (2000) ("our core concern with respect to diversity is news and public affairs programming especially with regard to local issues and events").

[202] *See, e.g.*, Comments of Univision Communications, Inc., *In the Matter of the Satellite Home Viewer Improvement Act of 1999 Broadcast Signal Carriage Issues*, CS Docket No. 00-96, at 2 (filed Jan. 23, 2002) ("EchoStar's actions serve to frustrate viewers' access to local Spanish-language programming via satellite, while tilting the local competitive playing field even further against stations that serve a minority audience."); Comments of Brunson Communications, Inc. at 7-8 ("Ironically enough, Brunson is a minority owned and operated company. EchoStar is clearly discriminating against WGTW and forcing it to the 'back of the bus'").

Broadcasters will also be harmed because in monopoly markets they will face a monopsonist purchaser in retransmission consent negotiations for their local signals. Obviously, broadcasters will not fare as well as they might if they had two rival DBS companies with which to negotiate. There will also be an anticompetitive effect on retransmission rights negotiations in cabled duopoly markets because of the loss of EchoStar's closest competitor.

B. The Merger Will Have Anticompetitive Effects On Consumers

Consumers in the many local markets where this will be a merger to monopoly will experience increased prices and a reduction in output. Post-merger, EchoStar, as a profit-maximizing monopolist MVPD, will have the incentive to raise its prices and lower the quality (i.e., the costs to EchoStar) of its service in non-cabled areas and areas with antiquated cable systems by offering reduced program choice and variety. With no competing MVPD, EchoStar will have the power to control price and output in many local markets to the detriment of consumers across the country. In these predominantly rural monopoly markets the price of DBS is estimated to increase from an average of $46.76 today to $62.35.[203] The total consumer welfare loss is estimated to be nearly $2.3 billion in rural markets over the next five years on a net present value basis.[204]

Even if a uniform national price were instituted and could be enforced (which it could not be, as discussed below), consumers in monopolized MVPD markets will pay somewhere between a monopoly price and a duopoly price. EchoStar will logically sacrifice some subscription revenue in

---

[203] Sidak Decl. ¶¶ 36-37 and Table 3.

markets where it competes with a cable substitute in order to raise prices, and reap monopoly profits, in markets with no competition.

In the rest of the country, where the merger will result in an EchoStar-DBS duopoly, there will be both unilateral and coordinated anticompetitive effects. The unilateral effects will result from the elimination of consumers' ability to choose EchoStar's closest substitute for MVPD services. As EchoStar recently stated in its litigation, "EchoStar is DIRECTV's closest competitor."[205] This position is supported by a recent DBS industry study which found that DBS households were more likely to switch to a different DBS provider than to any other MVPD provider.[206] In such circumstances, EchoStar will be able profitably to raise its prices to consumers above the premerger level and/or reduce the quality and quantity of its product offerings and customer service to below the premerger level even in markets where there is a viable cable competitor. Combining the effects in monopoly and duopoly markets, Dr. Sidak has estimated that the acquisition will result in a consumer welfare loss of from approximately $3 billion to $7.6 billion (assuming perfect collusion with cable providers) over the next five years on a net present value basis.[207]

In addition, the merger will augment the potential harm to consumers that EchoStar has constantly sought to inflict on subscribers by limiting their access to some stations in local to local markets it serves. Virtually since SHVIA was enacted, EchoStar has sought through constitutional

---

[204] "Consumer welfare loss" represents (i) 'deadweight loss', *i.e.*, the loss of value by consumers who forego DBS service as a result of the post-merger price increase plus (ii) the incremental wealth transfer from consumers who will pay higher prices post-merger. Sidak Decl. ¶¶ 49-50 Table 3."

[205] Rule 56(f) Motion, at 7.

[206] *See Competitive Market Study*, at 30.

challenges, bogus claims of inadequate signal strength and duplicative programming and, most recently, its two-dish ploy to deny consumers access to smaller and niche television station programming in their markets.[208] Such actions are harmful to consumers who will be denied access to this local programming.

C. There Will Be Loss Of Innovation Competition

A further competitive harm of the proposed merger for both broadcasters and consumers would be the loss of the intense degree of innovation spurred on by the rivalry of the two DBS operators. This loss would particularly harm broadcasters, who have benefited from the companies' competitive race to innovate in the provision of local-to-local service.

As discussed above, the DBS companies have moved quickly to outdo each other in the development of technology to deliver local-to-local to consumers. EchoStar pushed for enactment of local-to-local legislation starting in 1997, and actually began offering customers local-to-local (via a second dish) starting in 1998, while DIRECTV strenuously advocated an antenna solution. After the passage of SHVIA, DIRECTV leapfrogged its rival, first by leading the way to a one-dish solution, and then by designing and launching a DIRECTV spot-beam satellite that achieves a frequency reuse rate of 7.33, nearly 50 percent more efficient than EchoStar's design.[209] EchoStar has yet to launch its first spot-beam satellite. When each company launches its next generation spot beam satellite, one may

---

[207] Sidak Declaration ¶¶ 49-51 and Table 3.

[208] *See* Emergency Petition of National Association of Broadcasters and Association of Local Television Stations To Modify or Clarify Rule, *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999 Broadcast Signal Carriage Issues*, CS Docket No. 00-96 (filed Jan. 4, 2002).

[209] Joint Engineering Statement at 5, 6 (reuse rates of 5 vs. 7.33).

expect that the most intense innovator will achieve the most efficient use of spectrum.[210] The current competitive environment has clearly forced each company to compete in offering increased programming while using spectrum more efficiently.

Barring this merger, the companies undoubtedly would offer local-to-local service to an increasing number of local markets, with improved research and development playing an important role in the efficient satellite delivery of stations into their local markets.

The loss of an innovation incentive also will significantly affect the development and deployment of advanced services, like interactive video programming and broadband Internet, via satellite – a primary goal of the Telecommunications Act of 1996.[211] Accordingly, the loss of the incentive to innovate and better compete technologically against a lone DBS rival represents exactly the kind of competitive and public interest harm that the Commission should consider when evaluating a merger. Indeed, "[i]n making a determination about whether a firm is dominant in a relevant market, [the Commission] analyze[s] whether [the firm] can [among other things] ***reduce innovation***."[212] Other

---

[210] See VII.C.1.b. *infra*.

[211] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC 99-5, CC Docket No. 98-146, 14 F.C.C.R. 2398 ¶ 1 (1999) ("One of the fundamental goals of the Telecommunications Act of 1996 (the 1996 Act) is to promote innovation and investment by multiple market participants in order to stimulate competition for all services, including broadband, communications services.").

[212] *In the Matter of Comsat Corp*., Order and Notice of Proposed Rulemaking, CC Docket No. 80-634, FCC 98-78, 13 F.C.C.R. 14,083, at ¶ 67 (1998) (emphasis added); see *In the Matter of Applications of Ameritech Corp, Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, FCC 99-279, 14 F.C.C.R. 14712 ¶ 201

competition authorities have increasingly challenged acquisitions where future innovative activity may be decreased if competition in research and development became less intense.[213]

D. The Merger Proponents Fail To Address Anticompetitive Effects

The merger proponents claim, with no real support, that there will be no anticompetitive effects because of the competition with cable. Neither the parties nor their economic expert provide any empirical data to support any of their claims of market definition, the ability of cable to constrain the merged firm, or reduced costs. At best, Professor Willig repeats anecdotes he has been told by business people at EchoStar and DIRECTV.[214]

(1999) ("Commission must continue to facilitate the development of advanced services competition by reducing barriers to infrastructure investment so that companies in all segments of the communications industry ***have the incentive to innovate*** and invest in broadband technologies and facilities, bringing the benefits of this competition to consumers.") (emphasis added), *rev'd on other grounds, Association of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. Jan 9, 2001).

[213] *In re Ciba-Geigy, Ltd*, 123 F.T.C. 942 (1997) (FTC brought suit against the proposed merger of Ciba-Geigy and Sandoz. The FTC alleged the merger could substantially change their incentive for innovation competition.); *United States v. AT&T*, 94-01555 at 59 FR 44158 (D.D.C. Aug. 26, 1994) (DOJ alleged the merger of the country's largest cellular provider [McCaw] and largest cellular equipment manufacturer [AT&T] would create fewer incentives to innovate for those RBOC's that aggressively competed with McCaw and also purchased equipment from AT&T.) *United States v. Flow Int'l Corp*, No. 94-7132 (E.D. Mich. 1994) (DOJ brought suit against Flow's attempt to acquire Ingersoll-Rand's Waterjet Cutting Systems Division alleging technological innovation for waterjet pumps would substantially lessened as a result.); *In the Matter of Baxter International Inc.*, 123 F.T.C. 90 (1997) (FTC brought suit alleging Baxter's acquisition of Immuno International AG substantially reduced competition in the R&D, manufacture and sale of biologic products derived from human blood plasma.).

[214] Willig Decl. ¶ 10 ("Executives at both EchoStar and DIRECTV confirm that the objective of each firm is to gain market share by luring consumers away from the leading cable providers, and the firms accordingly price their DBS programming services at levels based primarily on the prices charged by cable providers."); *id.* at ¶ 11 ("it appears based on statements by executives of both EchoStar and DIRECTV that a majority of new DBS consumers had previously been cable subscribers.").

The only "evidence" Professor Willig cites for the proposition that EchoStar and DIRECTV do not compete with one another as vigorously as they do with cable is an executive's assertion that DIRECTV failed to respond to an EchoStar promotion. According to Professor Willig, DIRECTV's supposedly failed to respond to EchoStar's "I Like 9" pricing strategy under which customers who purchased EchoStar DBS equipment (rather than accepting an equipment subsidy) could also purchase its "America's Top 100" programming package for $9.99, on a month-to-month basis.[215] Professor Willig was apparently not advised that (1) *EchoStar itself* was responding to a DIRECTV promotion announced the previous day,[216] and (2) at the time (July/August 2001) when the two companies were announcing their dueling promotions, DIRECTV's CEO told the press the real reason that DIRECTV would not match the specific EchoStar offer: because DIRECTV had a "huge differentiator" with EchoStar, the exclusive and extremely popular NFL Sunday Ticket package of all Sunday NFL games.[217]

What *is* significant about the two firm's competing August 2001 promotions is that cable providers – which did not have the NFL Sunday ticket as a "differentiator" – did not respond to either offer. In Comments filed by EchoStar concerning the *Eighth MVPD Competition Report*, EchoStar cited *cable's* failure to respond to "I Like 9" as evidence that "[o]n the whole, cable operators are still

---

[215] Willig Decl. at ¶ 10.

[216] DirecTV Press Release, *DIRECTV Unveils Fall National Promotion and Advertising Campaign* (July 30, 2001).

[217] Multichannel News, *DISH Kicks Off $9 Monthly Plan* (Aug. 6, 2001) ("DirecTV, Inc. has no immediate plans to respond in kind to EchoStar's aggressive programming pricing strategy. 'We have a huge differentiator with the NFL in the third quarter,' DirecTV CEO Eddy Hartenstein said.").

not aggressively competing [with DBS] on price."[218] In fact, EchoStar's comments question cable's positions regarding the causes of its high prices – investment in infrastructure and capacity, as well as programming costs – as hollow and an inadequate justification for the rate of its price increases exceeding inflation.[219] The only conclusion then can be that falling DBS prices are the result of intense *DBS* competition.

Ironically, the parties themselves confirm the anticompetitive effect on consumers of the merger in their application where they highlight that their costs will be lower because the new company will suffer less "customer turnover, or 'churn'" as the EchoStar and DIRECTV customer bases would be consolidated.[220] That is simply another way of saying that customer choice will be reduced and that, because consumers will have only one differentiated alternative or no alternative at all, they will be effectively captive.

---

[218] *See Reply Comments of EchoStar Satellite Corporation In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 01-129 (Sept. 5, 2001) at 2. (The only cable response was that AT&T Broadband offered to reduce the price of basic cable to $19.95 per month through the end of the year. *Id.* at 3.)

[219] *See id.* at 2-3 ("EchoStar's aggressive pricing also exposes as dubious the cable industry's continued incantation of programming costs as justification for high prices") and n. 5 ("The cable industry's lengthy commentary on its investment in programming and infrastructure also sounds like an alternative argument offered to justify or excuse its price hikes") (citing Comments of the National Cable & Telecommunications Association (dated Aug. 2, 2001) at 2-3).

[220] Consolidated Application, at 36; *see also* Salomon Smith Barney, *DBS Industry Update: Valuing the Possiblity of a DISH/GMH Merger* (Jan. 17, 2002) at 16 (predicting a decrease of 20 basis points in the amount of churn faced by the merged company by 2005).

VI. COURTS AND AGENCIES ROUTINELY REJECT MERGERS TO MONOPOLY AND DUOPOLY

Anticompetitive effects are so certain in the type of merger that EchoStar and DIRECTV propose that courts and agencies overwhelmingly condemn such 2-to-1 mergers to monopoly and 3-to-2 mergers to duopoly. This rejection is particularly swift when entry barriers are insurmountable, ensuring that firms with monopoly power or market power will not lose it. With no full-CONUS slots available and cable incumbents firmly entrenched in local franchise areas, consumers cannot turn to alternative suppliers or products post-merger.

A. Mergers To Monopoly Are Universally Condemned

In the words of a leading commentator, "[n]o merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized."[221] Consistent with Professor Areeda's teachings, courts and the agencies have universally condemned mergers to monopoly (and near monopoly):

- ***United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025, 1032 (W.D. Wis. 2000)**: The court enjoined the merger of the only two sources of submersible turbine pumps which would have resulted in "a merger of the only two competitors in the relevant market selling the relevant product." The court found it of particular importance that the pump industry was characterized by high barriers to entry with no effective substitutes.
- ***FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997)**: The court blocked the merger of rival office supply superstores where the merger would have left only one superstore competitor in 15 metropolitan areas (and only two competing superstores in 27 other areas). Notably, the court found it extremely unlikely that a new office superstore will enter the market because of high sunk costs and difficulty in achieving economies of scale in local markets saturated by existing superstores.

[221] 4 AREEDA, ¶ 911a, at 54-55.

? **Varian Medical/IMPAC Medical**: On November 6, 2000, the Antitrust Division announced its intention to block a merger of the only providers of radiation oncology software and the parties abandoned the transaction the next day.[222]

? **Suiza Foods/Dean Foods**: On December 18, 2001, the Antitrust Division announced that Suiza Foods and Dean Foods, the top two milk processors in the country, would divest 11 dairy processing plants from Virginia to Utah because in many school districts the dairies were "the only two – or two of just three – companies that bid to deliver milk to schools."[223] A similar merger involving Suiza in 1999 required a divestiture of a dairy operation where the merger would have created a monopoly school milk provider in 23 school districts (and left only two competitors in 32 school districts) in south central Kentucky.[224]

? **AB Volvo/Renault V.I.**: In December 2000, the Division required AB Volvo to divest a line of heavy duty trucks because the proposed acquisition would have led to an 86 percent market share.[225]

Indeed, so strongly does antitrust abhor mergers to monopoly, that government agencies will challenge transactions below HSR reporting thresholds or well after the initial filing period has passed:

? **Airgas/Puritan Bennett**: In October 2001, the FTC required Airgas to divest the nitrous oxide business that it acquired in January 2000 from Puritan Bennett, which at the time was the only other North American provider of the gas.[226] The agency emphasized the substantial barriers to new entry into the nitrous oxide market that existed.

? **Hearst Trust/Medi-Span**: In April 2001, the FTC charged The Hearst Trust with consummating a merger to monopoly in the integrated drug information database market when it acquired Medi-Span in 1998. On December 21, 2001, Hearst agreed to divest the

---

[222] Press Release, U.S. Dep't of Justice, Antitrust Div., *Justice Department Announces Its Intention to Block Varian Medical Systems' Acquisition of IMPAC Medical Systems* (Nov. 6, 2000).

[223] Press Release, U.S. Dep't of Justice, Antitrust Div., *Justice Department Requires Suiza Foods and Dean Foods to Divest 11 Dairy Processing Plants* (Dec. 18, 2001).

[224] Competitive Impact Statement, *United States v. Suiza Foods Corp.*, No. 99-CV-130 (E.D. Ky. 1999).

[225] Competitive Impact Statement, *United States v. Aktiebolaget Volvo*, No. 00-CV-03006 (D.D.C. 2001).

[226] *In re Airgas, Inc.*, No. 001-0040 (F.T.C. Oct. 26, 2001).

Medi-Span business and disgorge $19 million of unlawful profits (resulting from a price increase after the acquisition).[227]

? **MSC.Software/Universal Analytics**: In 2001, the FTC challenged a two year old transaction that did not meet the HSR threshold filing requirement because MSC.Software Corporation's 1999 acquisitions of two competitors reduced the number of suppliers of advanced computer-aided engineering software from three to one. As a result, the FTC has sought to have MSC create two entrants to restore the competition lost by the acquisition.[228]

B. Mergers To Duopoly Are Virtually Never Permitted

Mergers to duopoly are also universally condemned because of their strong likelihood of anticompetitive effects. The long history of the regulatory agencies fighting – and courts preventing – mergers to duopoly recently culminated in the D.C. Circuit opinion last year in *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001). There, the court rejected the argument that by merging the second and third largest firms in a three-firm jarred baby food market with high barriers to entry the merged firm would be better equipped to compete with a powerful number one firm. The district court first denied the government's injunction request because of strong efficiencies, but the appeals court reversed, finding the evidence of efficiencies insufficient to overcome the likelihood of coordinated effects created by the increased market concentration. Notably, in light of the high entry barriers here, the Heinz court concluded that there have been:

> "[N]o significant entries in the baby food business in decades and . . . [new entry is] difficult and improbable". . . . As far as we can determine, no court has ever approved a merger to duopoly under similar circumstances.[229]

---

[227] Complaint, *FTC v. The Hearst Trust*, No. 1:01CV00734 (FTC Apr. 5, 2001).

[228] FTC Press Release, *FTC Challenges MSC.Software's Acquisitions of its Two Nastran Competitors* (Oct. 10, 2001).

[229] *Heinz*, 246 F.3d at 717.

Heinz has become emblematic of the doctrine that mergers in highly concentrated markets are virtually certain to be rejected. As FTC Commissioner Leary explained the Heinz decision, "there is a broad consensus in the economics community that 2-1 and 3-2 combinations are likely to be particularly troublesome."[230] Similar court cases include:

- ***FTC v. Swedish Match, Inc.*, 131 F. Supp. 2d 151 (D.D.C. 2000)**: The court rejected the merger of the first and third largest sellers of loose leaf chewing tobacco in the United States, where the two remaining competitors would control nearly 90 percent of the market.

- ***United States v. United Tote, Inc.*, 768 F. Supp. 1064 (D. Del. 1991)**: The court blocked a merger to duopoly in the market for manufacture of pari-mutuel betting systems because of the lack of actual or potential entry and significant brand loyalty.

- ***United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1426-28 (W.D. Mich. 1989)**: The merger of the two smallest players in a three-firm market was denied because of the likelihood of coordinated pricing effects and evidence that the merging parties wanted to eliminate their price competition.

- **Georgia-Pacific/Fort James Corp.**: In November 2000, the Division required Georgia-Pacific to divest its commercial tissue business in order to proceed with its $11 billion acquisition of Fort James Corporation to prevent a merger to duopoly.[231]

- **3D Systems/DTM**: In September 2001, the Antitrust Division required the merging firms to license certain patents to a company that would compete in the U.S. industrial rapid prototyping market. The merging parties were essentially asked to remove entry barriers and create a competitor to replace the competition that was lost in the acquisition, thus preventing the ill effects of a 3-2 merger.[232]

---

[230] Commissioner Thomas B. Leary, Three Hard Cases and Controversies: The FTC Looks at Baby Foods, Colas and Cakes, Prepared Remarks before The Association of the Bar of the City of New York's Milton Handler Annual Antitrust Review (Dec. 4, 2001) <http://www.ftc.gov/speeches/leary/learythree.htm>

[231] Competitive Impact Statement, *United States v. Georgia-Pacific Corporation*, No. 00 2824 (RWR) (D.D.C. 2000).

[232] Competitive Impact Statement, *United States v. 3D System Corp.*, No. 1:01CV01237 (GK) (D.D.C. Sept. 4, 2001).

? **General Mills/Pillsbury**: In October 2001, the FTC required the parties in this transaction to divest certain assets that otherwise would have decreased the number of competitors from 3-to-2 or 2-to-1 in various markets including baking mixes, frosting, flour products and pancake mixes. As part of the consent agreement, General Mills agreed to turn over one of its plants after converting it (at General Mills' own cost) into a plant that could make the divested cakes and mixes.[233]

? **Seagram Spirits/Diageo PLC**: On December 19, 2001, the FTC required in part that Diageo divest its Malibu rum business before it allowed Diageo (third largest rum seller in United States) to go forward with its joint purchase of Seagram (second largest rum seller in United States) with Pernod Ricard S.A.[234]

As the facts and the law discussed above demonstrate, this merger clearly lessens competition in many "section[s] of the country." It is particularly noteworthy that there is no question the acquisition will reduce competition in a large number of local markets in broad swaths of the United States. For large numbers of consumers in local markets, this is a merger to monopoly. Millions will have but one choice for MVPD services. They will experience reduced output and increased prices. Service and quality will suffer. For other local markets, the merger will create a duopoly at best. The likelihood of collusion with cable and higher prices will increase significantly. In all local markets, consumers and broadcasters will suffer harm from the loss of the DBS firms' vigorous competition on pricing, programming, innovation, advanced services and local-to-local service. For these reasons, courts and agencies have always rejected mergers that in essence represent brazen attempts to create or enhance market power.

There is no countervailing procompetitive justification for such profound harm. EchoStar and DIRECTV argue that eliminating competition between them would not harm competition in the MVPD market because that market is "dominated by cable operators" and the competitive efforts of DBS

---

[233] FTC Press Release, *In re General Mills*, File No. 001 0213 (FTC Oct. 23, 2001).

operators are focused on competition with cable.[235] This is wrong both in theory and in fact. In such circumstances, it is important to remember the Supreme Court's directive in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) that:

> If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader.[236]

Further, the Merger Guidelines require that to justify anticompetitive effects in one market, the efficiencies in another market must be "great" and "inextricably linked" to an acquisition.[237] Even then, the agencies only state that they may use their prosecutorial discretion to consider the efficiencies. Here there will be anticompetitive effects in innumerable local markets throughout the United State. In addition, as shown below, the claimed efficiencies are not valid and the parties' national pricing plan simply will not work.

VII. THE CLAIMED EFFICIENCIES DO NOT JUSTIFY THIS ANTICOMPETITIVE MERGER

EchoStar and DIRECTV seek to justify their merger, which otherwise clearly would be contrary to the public interest because of its anti-competitive impact in thousands of local markets across the country, on the grounds that it will create efficiencies. In particular, their central public interest claim is that by eliminating duplication, the merged entity will carry the signals from 100 local

---

[234] Analysis to Aid Public Comment, *In re Diageo PLC*, Docket No. C-4032 (FTC Dec. 19, 2001).

[235] Consolidated Application, at 22, 37-41.

[236] 374 U.S. at 370.

[237] *Merger Guidelines*, § 4.

broadcast markets instead of the 51 such markets that one or the other of the parties' has already said it will carry. Thus, by the parties' own admission, the "efficiencies" they claim are limited to DMAs 51-100 and will make no difference to DMAs 1-50 and 101-210.

The parties also ignore central elements of an efficiencies defense to an otherwise anti-competitive acquisition. First, and most tellingly, because of the anti-competitive structure of highly concentrated markets, "[e]fficiencies almost never justify a merger to monopoly or near-monopoly."[238] Here, in a great many local markets, this is a merger to monopoly and at best, a merger to duopoly elsewhere.

Second, absent competition, the claimed efficiencies are at best speculative. Even assuming the efficiencies can be realized, there is no guarantee that a monopolist, or near-monopolist would pass any significant amount of them on to consumers.

Third, any efficiencies must be merger-specific. That is, efficiencies must be achievable only through the acquisition. Here, the parties would ask the Commission to ignore the fact that each party already has sufficient spectrum to carry all broadcast stations from all 210 DMAs in the U.S.[239] In addition, to the extent the parties wish to eliminate duplication, they could do so through a joint venture agreement without the anti-competitive consequences of a merger.

A. Efficiencies Almost Never Justify A Merger To Monopoly Or Near-Monopoly

In 1997, the Department of Justice and Federal Trade Commission revised the Horizontal Merger Guidelines to delineate more precisely their view of efficiencies. In doing so they noted:

---

238 *Id.*

"mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction."[240]

The amount of efficiencies needed to justify a particular transaction is not static. Rather, efficiencies are determined by a "sliding scale" based on the level of concentration of the market. It is well accepted law that the greater the potential adverse effects of a merger (as measured by the increase in HHI), the greater the efficiencies must be to conclude the merger will not have an anti-competitive effect.[241] In highly concentrated industries, for example, when post-merger HHI is well above 1800 and the HHI increase is well above 100, as is the case here in all local markets, both commentators and case law alike require a showing of "extraordinary" efficiencies.[242]

While "extraordinary" efficiencies are necessary to rebut the presumption of illegality in highly concentrated industries, it is well accepted that "[e]fficiencies almost never justify a merger to monopoly or near-monopoly."[243] In fact, no decision has ever relied on efficiencies in rejecting a challenge to an

---

[239] *See* Gould Decl. at 17.

[240] *Merger Guidelines* § 4.

[241] *Id.*

[242] 4A AREEDA, ¶ 971f; *see also Heinz*, 246 F.3d at 720 ("high market concentration levels … require, in rebuttal, proof of extraordinary efficiencies.").

[243] *Merger Guidelines* § 4; *see FTC v. Swedish Match*, 131 F. Supp. 2d 151, 171 (D.C. Cir. 2000) ("the Court finds that the [efficiency] defense is inappropriate in this particular case, in which the acquisition would generate undue market share and increased concentration."). *See also* 4 AREEDA, ¶ 932, at 160 (mergers in highly concentrated industries "should carry a strong presumption of illegality that can be defeated only by a showing of extraordinarily easy entry or truly extraordinary efficiencies."); *id*. at ¶ 976b (in highly concentrated markets the efficiency defense should only be recognized when both firms are inefficient); Robert Pitofsky, *Efficiencies in Defense of Mergers: 18 Months After*, 7

otherwise illegal merger. Indeed, in the recently decided Heinz decision, the court noted that "no court has ever approved a merger to duopoly" where market concentration was high, barriers to entry were high and neither defendant claimed to be a "failing firm."[244]

The concentration of the market in the present case is clearly very high regardless of the product market. If the market is MVPD, there will be a merger to monopoly in many markets and a merger to near-monopoly or duopoly in nearly all other markets. If the market is DBS, then there will be a merger to monopoly in virtually all markets.

B. A Monopolist Or Near-Monopolist Will Not Pass On Efficiency Gains To Consumers

Competition is the engine that drives efficiencies. Without competition, there are no guarantees that any efficiencies may be realized or, if realized, passed on to consumers.[245] The D.C. Circuit stated that, "experience teaches that without worthy rivals ready to exploit lapses in competitive intensity, incentives to develop better products, to keep prices at a minimum, and to provide efficient service over the long term are all diminished to the detriment of the consumers."[246] Even assuming merging firms are

---

GEO. MASON L. REV. 485 (1998) (efficiencies should not be used to overturn what would otherwise be an illegal merger).

[244] *FTC v. H.J. Heinz Co.*, 2000-2 Trade Cas. (CCH) ¶ 73,090, at 89,095 (D.C. Cir. 2000) (order granting injunction pending appeal).

[245] *See* 4A AREEDA, ¶ 971f ("[In cases involving high market concentration] the likelihood of a significant price increase is particularly large and there is less competition present to insure that the benefit of efficiencies will flow to consumers even in the relatively long run.").

[246] *PPG*, 628 F. Supp. at 885.

able to show valid efficiencies, they must also prove these merger-specific efficiencies will be passed on to consumers and that they would overwhelm any possible anticompetitive effects of the merger.[247]

The very nature of highly concentrated markets suggests that efficiencies are unlikely to be passed on to consumers in any significant fashion because there is little competition and thus, little incentive to do so. In the instant case, NAB and its local broadcasters believe that efficiencies are much more likely to be passed on to consumers as a result of continued rivalry between the two DBS companies. The benefits to the public of continuing jousting between the two firms are illustrated by events even in the short period since they filed their application with the Commission: only a month after making the filing, DIRECTV announced in early January 2002 that it had found a way on its own to serve 10 more markets with local-to-local this year, for a total of 51 markets – even though the two firms had solemnly told the Commission again and again in their filing only a few weeks before that "now" DIRECTV can serve only 41 markets.[248] This rivalry is more likely to result in extended local-

---

[247] *See Swedish Match*, 131 F. Supp. 2d at 172 (evidence of efficiencies insufficient to overcome the presumption of illegality where "defendants have not detailed what proportion they will pass on [to consumers]."); *FTC v. Staples*, 970 F. Supp. 1066, 1090 (D.D.C. 1997) (rejecting the merger in part because the projected pass-through rate of the efficiencies were found to be unrealistic); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1084-85 (D. Del. 1991) (rejecting proposed merger in part because there was no guarantee that efficiencies would be passed on "to the consuming public.") According to former FTC Chairman Pitofsky, a 100% pass-on of efficiencies to consumers is not possible in highly concentrated industries. Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy,* 81 GEO. L.J. 195, 207-08 (1992) (a complete pass-on of efficiencies only occurs in a fully competitive market, in which case no efficiency defense would be needed).

[248] DIRECTV Press Release, *DIRECTV to Launch Local Channels in 10 New Markets This Year – Local Channels Will be Available In 51 Markets Representing More Than 67 Percent of U.S. TV Households* (Jan. 8, 2002) ("DIRECTV, Inc., which currently offers local channels in 41 major metropolitan markets via its high-power DIRECTV® digital satellite television service, announced today that it will begin broadcasting local channels in 10 additional markets this year. DIRECTV plans to launch local channels in Hartford, Conn., Las Vegas and Providence, R.I., in the first half of this year,

to-local market coverage than are the promises of a monopolist – which has only promised to extend coverage to DMAs 51-100, saying nothing about DMAs 101-210.[249] In fact, this is precisely the competitive "paranoia" that led to local-to-local service in the first instance, prompted the rapid expansion of that service since the enactment of the SHVIA, and that would continue to cause rapid expansion if the spirited rivalry between the two firms is not killed.

C. Claimed Efficiencies Are Not Merger-Specific Or Cognizable Because They Can Be Achieved Without A Merger Or Through A Joint Venture

Claimed efficiencies "must be merger-specific, and, therefore, efficiencies that could be achieved through means less harmful to the public interest than the proposed merger cannot be considered true benefits of the merger. In addition, efficiencies resulting in reductions in marginal costs – as opposed to fixed or overhead costs – are more likely to offset competitive harms by counteracting the merged firm's incentive to elevate price."[250] If efficiencies can be accomplished absent the merger, they should not be considered, no matter how great.[251] Moreover, efficiency claims that are

---

with seven additional markets by year-end. With the addition of these 10 markets, DIRECTV will offer local channels in 51 markets, representing more than 67 percent of U.S. television households.")

[249] This is a very *low* figure, as discussed below.

[250] *In the Matter of Applications for Consent to the Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License by GTE Corp., Transferor, to Bell Atlantic Corp.*, , CS Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, 14 F.C.C.R. 14,032, 14,141 ¶ 240 (2000); *see* Merger Guidelines § 4 (efficiencies must be "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anti-competitive effects.").

[251] *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 63 (D.D.C. 1998) (even though defendants proved that sufficient efficiencies would result from the proposed merger, the court granted the FTC's preliminary injunction in part because the efficiencies were not merger-specific). *See also Heinz,* 246

speculative, vague or otherwise unsound should not be considered. The merging firms must "substantiate" efficiency claims so that the agencies can "verify" their "likelihood and magnitude," and verify "how and when each would be achieved (and the costs of doing so)."[252]

In addition, the Merger Guidelines advise that in some cases, the regulatory body:

> will consider efficiencies not strictly in the relevant market, but so *inextricably linked* with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies rarely are a significant factor in the Agency's determination not to challenge a merger. They are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small.[253]

In this case, the efficiencies are not inextricably linked to the merger and the likely anticompetitive effects are tremendous. Moreover, the efficiencies result from a reduction in fixed costs (eliminating duplicate facilities) and the parties have neither stated nor demonstrated that these cost savings would be passed through to consumers in the form of lower prices. As Dr. Sidak's Declaration explains, fixed cost efficiencies such as those claimed here are unlikely to affect the prices paid by subscribers.[254]

F.3d at 721-22 (court reversed a lower court's ruling the claimed efficiencies outweighed the merger's anticompetitive effects in part because it did not find asserted efficiencies merger-specific); *United Tote, Inc.*, 768 F. Supp. at 1084 (D. Del. 1991) (defendants failed to show claimed efficiencies could only be achieved with merger).

[252] *Merger Guidelines* § 4; *FTC v. University Health*, 938 F.2d 1206, 1223-24 (11th Cir. 1991) (court rejected defendant's efficiency claims as "speculation" finding as insufficient merely reducing "unnecessary duplication" between the merging parties without specifically explaining how these efficiencies would be created or maintained).

[253] Horizontal Guidelines § 4 n.36 (emphasis added).

[254] Sidak Decl. ¶¶ 96-97.

1. All Of The Benefits Of The Merger Can Be Obtained By Each Company Separately

EchoStar and DIRECTV's central public interest claim is that if the merger is allowed to go forward, the combined company will be able to provide local-to-local carriage of broadcast television stations in approximately 100 markets.[255] *But there is no need for a merger to obtain that benefit:* each company alone is easily capable of doing the same – and much more. EchoStar and DIRECTV never even argue to the contrary. In fact, EchoStar and DIRECTV do not claim that the "100 market" benefit is causally related to the merger. The Commission cannot consider as a public benefit something that the applicants do not even claim the merger is necessary to achieve.

In any event, the firms' own Engineering Statement shows that each firm individually could easily provide local-to-local service in 100 markets – indeed, in all 210 markets. And, to the extent that the two firms wish to eliminate some or all "duplication," they could do so through a joint production venture that would preserve the separate existence of these two fiercely competitive rivals. In fact, the technical solutions the two firms are already developing to operate together as a single company – such as designing a set-top box capable of receiving signals from the satellites of both companies – could equally be used by a joint venture.

a. EchoStar And DIRECTV Have Not Disclosed How Many Markets They Would Serve With Local-To-Local In The Absence Of A Merger

In their application, EchoStar and DIRECTV have studiously avoided asserting that the merger is *necessary* to achieve local-to-local service in 100 markets. Instead of making that claim – which would be essential to any benefit or argument – the two firms tell the Commission only that *if* the merger

occurs, service to 100 markets will be possible. The crucial passage reads as follows: *"New EchoStar will provide* local broadcast programming to far more metropolitan areas – 100 or more – compared to the 36 and 41 metropolitan areas (with an overlap of 35) served respectively by [EchoStar] and DIRECTV *now*."[256] This sentence *does not purport to tell the Commission that "New EchoStar" will be able to serve more markets than EchoStar or DIRECTV will serve individually in the future*.

All of EchoStar's and DIRECTV's descriptions of the "100 market" issue in their Application have been drafted in the same carefully-hedged way, and all contain the same gaping logical hole: they merely compare *current* capacity with *future post-merger* capacity, while omitting any claim about *future capacity without the merger*.[257] Never does EchoStar *assert* that the merger is necessary to obtain the benefit – 100 markets of local-to-local.

---

[255] App. at 4; Joint Engineering Statement at 9.

[256] Consolidated Application at 4 (emphasis added). Elsewhere, EchoStar uses similar language that carefully avoids actually asserting a benefit *resulting from the merger*. *E.g.*, *id.* at 28 ("New EchoStar will provide local broadcast programming to far more communities – 100 or more, including at least one city in each state, compared to the 36 and 41 metropolitan areas that [EchoStar] and DIRECTV each respectively serve now.").

[257] The Joint Engineering Statement (at 9), for example, follows precisely the same formula:

> *Today*, [EchoStar] offers 4-5 local stations in 36 metropolitan areas, whereas DIRECTV offers approximately the same number of local stations in all but one of these metropolitan areas plus an additional 6 metropolitan areas for a total of 41 metropolitan areas. . . . *Post merger*, the combined company will be able to eliminate much of this local channel duplication and free up additional channels to serve upwards of 100 metropolitan areas with local programming, including at least one metropolitan area in each of the fifty states**.**

Professor Willig's statement likewise studiously avoids claiming that the merger is needed to reach 100 markets: *"New EchoStar believes* it can provide local broadcast programming for 100 or more

Since the applicants have not *claimed* that the merger is necessary to achieve the benefit they describe, the Commission obviously should not consider any such "benefit" in evaluating whether EchoStar and DIRECTV have met their burden of showing that a merger to monopoly (or near-monopoly) is in the public interest.

In fact, before announcing plans to merge with one another, both DIRECTV and EchoStar had made plans to launch spot-beam satellites to enable them to provide local-to-local service more efficiently and to *more* markets.[258] DIRECTV, for example, has already launched its first spot-beam satellite, DIRECTV 4-S, which it is already using to deliver local stations in many of the 41 markets to which it currently provides local-to-local.[259] In addition, DIRECTV announced – before the merger – plans to build and launch a second spot-beam satellite, known as D 7-S, which is currently scheduled to be launched in the second half of 2003.[260] EchoStar also plans to build, launch, and use two spot-beam satellites – EchoStar 7 and EchoStar 8 – to provide local-to-local service.[261]

---

communities (while fulfilling the 'must-carry' rules), compared to roughly 40 overlapping communities that the companies serve *now*." Willig Decl. ¶ 23 (emphasis added). EchoStar's December 4, 2002 testimony before the House Commerce Committee contains the same carefully-crafted, question-begging formulation.

[258] Eng. Statement at 4-6.

[259] DIRECTV Press Release, *DIRECTV to Launch Local Channels in 10 New Markets This Year – Local Channels Will be Available In 51 Markets Representing More Than 67 Percent of U.S. TV Households* (Jan. 8, 2002)

[260] Space Systems/Loral, *Space Systems/Loral Awarded Contract To Build High-Power Spot Beam Satellite For DIRECTV* (issued Sept. 6, 2001), <http://www.loral.com/inthenews/010906.html.>

[261] Eng. Statement at 4, 11.

If EchoStar and DIRECTV wished to make a causal claim that the merger is necessary to serve 100 markets, they would, at a minimum, need to disclose how many markets they separately planned to serve with their own satellite fleets (including the new spot beam satellites, D 7-S, EchoStar 7, and EchoStar 8). That is, to make any public interest claim about "100 markets," the DBS firms would need to disclose to the Commission the facts underlying their technical and economic capability to provide future local-to-local service *without* the merger.

In fact, however, EchoStar and DIRECTV have not made any disclosures about how many markets they would serve with their three planned-but-not-yet-launched spot beams satellites, all of which were being readied for deployment before the merger announcement. For all that the two firms have disclosed, they might be planning to serve 70, 80, 90, 100, or even *more* than 100 markets without the merger. *In other words, there might be* ***no*** *net gain, only a very small net gain, or potentially even a net* ***loss*** *in local-to-local service as a result of the merger.* The DBS firms' failure to make this fundamental disclosure forecloses any suggestion that they have shown a relevant public benefit relating to local-to-local service.

b. Each Firm Individually Has The Current Capability To Provide Local-To-Local Service In All 210 Markets

Each firm individually could easily do what the two firms say they would do as a DBS monopoly – namely, provide local-to-local service in 100 markets. Indeed, each firm has the capacity to provide local-to-local service in all 210 U.S. television markets.

The only thing that is notable about the DBS firms' assertion that they will serve 100 markets is how *low* this figure is, when one considers (a) the enormous channel capacity of each firm individually

(without even considering the resources of a combined firm) and (b) the huge number of television markets (DMAs 101 through 210) that the monopoly DBS firm proposes to strand indefinitely *without* local-to-local. The reason the merged firm has such modest ambitions is plain: after the merger, DIRECTV and EchoStar will no longer need to look over their shoulders at the other, worrying that its rival will gain a competitive advantage in a new market by offering local-to-local in that market. (If the merger does not occur, for example, EchoStar will be deeply concerned about the increasingly large number of markets that DIRECTV does – but EchoStar does not – serve with local-to-local, and will surely take prompt and aggressive countermeasures as it has in the past.) As discussed above, it is precisely this competitive "fear" that led to the current level of local-to-local service.[262]

(1) Local-To-Local Service In Remaining Markets Will Require Far Less Capacity

At the outset, we note that, for a reason not discussed by the applicants, future local-to-local deployments will be *easier* in one critical respect than past rollouts. The reason is simple: the markets the two firms are *already* serving are the largest markets in the country, which have the greatest number of local TV stations. For example, stations in the top 50 markets have an average of 12 stations per market (598 eligible stations in 50 markets), while stations in the next 50 markets have only an average of eight eligible stations per market (393 eligible stations in 50 markets).[263] With the same amount of

---

[262] DIRECTV Press Release, *DIRECTV to Launch Local Channels in 10 New Markets This Year – Local Channels Will be Available In 51 Markets Representing More Than 67 Percent of U.S. TV Households* (Jan. 8, 2002).

[263] In the carriage lawsuit in the Eastern District of Virginia, the FCC's expert witness, Dr. Jeffrey Rohlfs, provided a detailed spreadsheet showing the number of eligible stations in each market as well as a running total of the cumulative number of eligible stations. *See* Declaration of Jeffrey H. Rohlfs,

channel capacity, therefore, the DBS firms will be able to serve significantly more small markets than large markets.

(2) The EchoStar/DIRECTV Joint Engineering Statement Shows That Each Firm Could Separately Provide Local-To-Local In All Markets

The Joint Engineering Statement of EchoStar Communications Corporation and Hughes Electronics Corporation, Attachment B to the parties' *Consolidated Application for Authority to Transfer Control* filed with the Federal Communications Commission on December 3, 2001 ("Joint Engineering Statement") confirms that DIRECTV and EchoStar today have more than enough high-power, Ku-band CONUS capacity to offer all local television stations in all markets via satellite.

As the Joint Engineering Statement explains (at 6), DIRECTV has *already* found a way to design a spot-beam satellite that reuses the same frequency an average of 7.33 times when retransmitting local TV stations. And both companies acknowledge that they expect to be able to compress 12 channels into each frequency while maintaining acceptable picture quality. *Id.* at 13. These two statistics, both of which come from the applicants themselves, mean that each company – using its 46 (for DIRECTV) or 50 (for EchoStar) CONUS Ku-band frequencies – could carry all of the eligible local television stations in all 210 U.S. markets, and also carry all of its existing national programming, with ample room to offer still more.[264] And by taking advantage of readily available

---

Satellite Broadcasting & Communications Ass'n of Am. v. FCC, No. 00-1571-A (E.D. Va. 2001).

[264] *See* Gould Decl. at 9-11.

technological advances, each company will be able in the future to greatly expand its ability to deliver even more television programming.[265]

Since the two firms individually have the capacity to provide local-to-local service in *all 210* U.S. markets, *a fortiori*, each of the firms could carry the much smaller number of eligible stations in the top 100 markets – which is all that the proposed monopoly firm has said *it* would do.

c. Satellite Capacity Is Constantly Increasing Through Technological Innovation

Although the analysis above shows that the two firms individually have ample capacity to deliver 100 markets of local-to-local – or 210 markets for that matter – that analysis is only the beginning of the story, because "satellite capacity" is not fixed and finite but elastic and expanding, thanks to the relentless ingenuity of engineers and business people.

NAB's satellite engineering expert, Richard Gould, provides valuable perspective on this point. As Mr. Gould explains:

> I have worked in the field of satellite engineering since the 1960s. At every point during that period, scientists and engineers have been finding ways to use satellites more efficiently and intelligently than in the past. In this respect, the satellite industry is like the computer industry: past performance records are constantly being shattered as engineers design better and better hardware and software."[266]

Indeed, the Commission should hear a familiar ring to the protestations of the satellite industry that present and future capacity constraints will forever limit their ability to expand carriage of local television stations. In its decade-long fight against carriage of local stations, the cable industry made the same factual claims. In 1992, Congress soundly and correctly rejected these self-serving predictions.

---

[265] *Id.* 11-15.

[266] *Id.* at 17.

In doing so, Congress made logical and reasonable predictions that cable's expanding capacity would virtually eliminate what were already minimal capacity issues with the carriage of local stations. In *Turner*, the Supreme Court found these predictions eminently reasonable, and as history as shown, they were correct.[267] The DBS industry's current effort to contend that technological progress has come to an end are no more credible.

Consider the following points, which show that the alleged benefit – increased capacity – is not merger-specific, since it will be achieved through technical innovation in any event.

(1) Spot Beams

EchoStar and DIRECTV have each embarked on launching two satellites fitted with spot beams to enhance their ability to offer local-to-local service. These satellites will enable DIRECTV and EchoStar to deliver far more local stations than could be retransmitted with CONUS satellites – and illustrate how engineering ingenuity stimulated by competition creates new "capacity" where it did not exist before.

The Joint Engineering Statement filed by EchoStar and DIRECTV also shows that engineering techniques evolve over time, and how engineers – in the spirit of rivalry – do better when they compete with each other. As discussed above, one of the critical factors that determines how much capacity can be created by using spot beams is how many times a single frequency is reused in different parts of the country. On this score, the Joint Engineering Statement shows that DIRECTV (or its contractors) have, at least in the first round, been much more successful than EchoStar (or its contractors): DIRECTV

[267] *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622 (1994).

achieved a reuse rate of 7.33 with its first spot-beam satellite[268] – which is almost 50 percent higher than the 5.0 reuse rate that EchoStar originally planned to achieve with its two spot-beam satellites.[269] If the two firms continue to compete with each other – as they should – their engineers will surely continue to play the game of "can you top this," to the benefit both of themselves and the public.

(2) Dishes Capable Of Receiving Signals From Two Or Three Orbital Locations

In addition to use of spot beams, many other techniques are available to enable DBS firms to expand their capacity to deliver local stations (or other programming). For example, although satellite dishes have traditionally been "pointed" at only a single orbital location, both DIRECTV and EchoStar today offer a single dish that can receive signals from two or even three different orbital locations (101° W.L, 110° W.L, and 119° W.L). Simply through use of a single dish that points to multiple satellites, consumers can receive far more programming than with the single-satellite dishes that were the only option until recently.

A few years ago, multi-satellite DBS dishes were unknown, and the prospect of "doubling or tripling satellite capacity" through their use was hard to imagine. Today, for one of the two DBS firms, multi-satellite dishes are ubiquitous: EchoStar states that "[a]pproximately 80 percent of [its] subscribers currently have antenna dishes capable of viewing programming from both the 110º W.L. and 119 º W.L. orbital locations."[270]

---

[268] Eng. Statement at 6.

[269] *Id.* at 5.

[270] Eng. Statement at 5.

(3) Compression Techniques With Existing Equipment

DIRECTV and EchoStar admit that their ability to squeeze more programming onto the same number of frequencies has essentially doubled over the past few years.[271] Although the two firms say that they expect to achieve a 12:1 compression ratio with existing hardware,[272] their Engineering Statement, inexplicably, assumes a much too low compression ratio of only 10:1 when calculating how much capacity each firm has separately.[273] This strange pessimism is unwarranted, for at least three reasons. *First*, DIRECTV told a court more than a year ago that *its* compression ratio *even then* was about 11:1, not 10:1.[274] *Second*, both DIRECTV and EchoStar now state that they "expect" their own compression ratios to be at least 12:1.[275] It is hard to fathom why the two firms do not accept their own compression figure. *Third*, the company that manufactures compression equipment for DIRECTV – a company called Harmonic, Inc.[276] – has stated that using the type of digital compression equipment

---

[271] Eng. Statement at 13 ("Four to five years ago, compression ratios of 6-8 were achievable and the future outlook using existing hardware is only expected to achieve ratios of about 12:1 with acceptable quality.").

[272] *Id.*

[273] *See id.* at 7, 8, 14.

[274] Declaration Under Penalty [of] Perjury of Stephanie Campbell, *SBCA v. FCC*, No. 00-1571-A (E.D. Va. Nov. 2, 2000) (DIRECTV carried approximately 500 channels using its 46 frequencies, which amounts to about 11 channels per frequency).

[275] Eng. Statement at 13.

[276] Harmonic, Inc. Press Release, *DIRECTV Signs Contract for Harmonic's Digital Compression Systems – DIRECTV To Deploy Hundreds of Harmonic MV50 Encoders by Year's End* (May 7, 2001) ("'Harmonic's technology has played an integral role in our ability to provide the widest offering of channels possible to more than 9.8 million DIRECTV customers across the U.S.,' said Dave Baylor, executive vice president, DIRECTV, Inc.").

it has sold to DIRECTV, the compression ratio is actually *between 12:1 and 14:1*.[277] There is no reason to doubt that EchoStar could purchase the same equipment (if it has not already done so). And if the manufacturer of the compression equipment is right that a compression ratio of 14:1 is in fact achievable, that single change (as compared to the low 10:1 ratio that EchoStar and DIRECTV assume in their Engineering Statement) would give DIRECTV four extra channels for each of its 46 frequencies, or 184 total extra channels, and EchoStar four extra channels for each of its 50 frequencies, or 200 total extra channels.

When the Commission evaluates whether all progress in compression has come to an end – as the DBS firms imply in their Engineering Statement – it should consider this: even as DIRECTV has *in fact* doubled its compression ratio from around 6:1 just a few years ago to (by its own admission) 12:1 today, *it has again and again told the Commission, incorrectly, that it had essentially hit a brick wall as far as any further progress in compression technology*:

- July 31, 1998: "DIRECTV has substantially reached current limits on digital compression with respect to the capacity on its existing satellites. Therefore, the addition of more channels will necessitate expanding to additional satellites . . . ."
- Aug. 6, 1999: "DIRECTV has substantially reached current limits on digital compression with respect to the capacity on its existing satellites."
- Sept. 8, 2000: "DIRECTV has substantially reached current technological limits on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."
- Aug. 3, 2001: "DIRECTV has offered digitally compressed signals from its inception, and has substantially reached current technological limits on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible

[277] *See* Gould Decl. at 6-7.

through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."[278]

In other words, as DIRECTV was – no doubt in good faith – repeatedly telling the Commission that further progress was impossible, it (or its vendors) were in fact finding ways to double the number of channels that could be delivered with the same number of frequencies. The lesson here is plain: just as happened with cable, America's satellite engineers are constantly devising fresh ways to expand the capacity of satellites to deliver television programming, and it would be irresponsible to assume that decades of continuous improvements have suddenly, and inexplicably, come to an end.

(4) Expanded Channel Capacity Possible Through 8PSK With New Set-Top Boxes

Everything that DIRECTV and EchoStar say about channel capacity in their Engineering Statement is premised on what can be done "using existing hardware."[279] But that limitation makes no sense. *First*, there is an enormous amount of natural turnover as consumers replace old set-top boxes (or buy new ones with new features, such as personal video recorders). *Second*, if the two companies wish to share frequencies, including through a joint venture, they will need to supply many if not all of their customers with new set-top boxes.

---

[278] *See, e.g.*, Comments of DIRECTV, Inc., [1998] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 98-102, at 5 (filed July 31, 1998); Comments of DIRECTV, Inc., [1999] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, at 9 (filed Aug. 6, 1999); Comments of DIRECTV, Inc. [2000] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 00-132, at 16 (filed Sept. 8, 2000); Comments of DIRECTV, Inc. [2001] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01-129, at 16 (filed Aug. 3, 2001).

[279] Eng. Statement at 13.

If consumers are provided with new set-top boxes, a powerful new capacity-expanding technique becomes available: so-called "higher-order modulation and coding" using a technique called "8PSK" (or potentially 16PSK TCM or 16QAM), which would permit DBS firms to transmit substantially more channels than they do today with QPSK (Quaternary Phase Shift Keying) modulation. As satellite engineer Richard G. Gould explains, simply moving from the current standard of QPSK to the next standard up (8PSK), would *by itself* result in at least a 30% increase in satellite capacity. For the 50 Ku-band CONUS frequencies controlled by EchoStar, for example, this technical improvement alone would result in an increase of at least 180 channels (50 frequencies x 12 channels/frequency x .3).

Of course, because 8PSK requires a new set-top box, a satellite carrier might need to phase it in over a period of a few years, just as driver-side air bags have gradually become ubiquitous in American automobiles. For example, satellite carriers might initially use 8PSK to offer local-to-local service in new cities, expecting that (a) new customers will acquire the 8PSK boxes in the first instance and (b) existing customers will acquire the 8PSK boxes over time. Alternatively, the DBS firms might offer customers free new set-top boxes as part of a production joint venture in which they achieve the "anti-duplication" benefits of the merger while continuing to compete as separate firms. In any event, it would be absurd to ignore this powerful and readily-available technical tool, which DIRECTV and EchoStar do not even mention in their Engineering Statement, but that would undoubtedly be used by competent engineers seeking to maximize satellite capacity.

(5) MPEG-4

Finally, there is every reason to expect that the current signal compression technology, known as MPEG-2, will be replaced by more advanced technologies, such as MPEG-4 (and no doubt future generations thereafter). With higher compression ratios in the future, the number of TV channels that can be supported on a single frequency will increase beyond the assumptions set forth above.[280]

* * * * * * * * *

Just as anyone who bought a personal computer in 1998 has seen it become a virtual antique today, satellite engineers have a long and unbroken record of making last year's performance standards seem old hat. If the Commission leaves these two highly energetic and creative DBS rivals to continue their spirited competition with one another, there can be no doubt that satellite "capacity" will continue its long tradition of explosive growth for many years to come.

2. All Of The Benefits Of The Merger Can Be Obtained Today By A Production Joint Venture

EchoStar claims that it must merge with DIRECTV to gain the efficiencies of combining duplicative spectrum capacity in order to offer new services and local channels in more markets.[281] However, this is not the case. All of the claimed efficiencies (*i.e.*, elimination of duplicative spectrum) can be obtained through a joint venture. Antitrust laws do not prohibit competitors from forming joint

---

[280] *See* Gould Decl. at 14.

[281] Of curious note is Mr. Ergen's claim that this is a merger of two "weak" competitors. As was noted by an industry observer, "[u]ntil he had DIRECTV in his sight, did Charles Ergen ever say his company, and DBS as a whole, could not compete with cable?" Bob Scherman, *A Satellite TV Monopoly: Death Of Competition and Choice*, 13 SATELLITE BUSINESS NEWS, Nov. 7, 2001, 12.

ventures or other limited arrangements to develop, produce, or market new products.[282] Production joint ventures are looked upon favorably by the courts because they can allow for the pro-competitive effect of integrating functions while at the same time allowing competition between the parties to the joint venture to thrive.[283]

EchoStar can easily enter into a joint venture with DIRECTV to share channel uplinks and downlinks. In fact, EchoStar's merger filings demonstrate beyond doubt that such a joint production venture is plainly feasible: the two parties are already planning on taking all the technical steps necessary to such a venture, such as providing their customers with set-top boxes capable of receiving programming from either firm's satellites. (Strikingly, EchoStar recently announced that it expects to have such a box ready by this spring.)[284] If EchoStar and DIRECTV were correct about the gains to be achieved by avoiding duplicative backhauls, uplinks, and downlinks of television programming, those gains would plainly be sufficient to finance the steps necessary to achieve the same gains through a joint

---

[282] *See* 2000 ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, <http://www.ftc.gov/bc/guidelin/htm>. *See also PPG*, 798 F.2d at 1508 (D.C. Cir. 1986) ("cooperation with other market participants could yield similar results without causing the same market concentration.").

[283] *See generally,* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, ch. IV(B)(2) (4th ed. 1997). *See also In re General Motors Corp.*, 103 F.T.C. 374 (1984) (production joint venture between two largest automobile manufacturers in the world upheld because it was a limited enterprise rather than a merger of two parents).

[284] *EchoStar Gears Up For Takeover*, Communications Daily (Jan. 10, 2002) ("As EchoStar gears up for proposed acquisition of Hughes Electronics and DIRECTV, *it expects to have set-top box (STB) by spring capable of receiving rival's service.* Pro 301 will ship as EchoStar receiver but will contain 4 MB of memory for DIRECTV's advanced program guide and it will be modified to handle its satellite switching, [EchoStar] Senior VP Mark Jackson said at CES here. Final detail, should $26 billion deal be approved, would be for DIRECTV to transfer source code to box via software download to receiver's flash memory, Jackson said . . . .") (emphasis added).

venture – while preserving the enormous benefits to the public of rivalry between two DBS firms rather than allowing creation of a DBS monolith.

In a recent interview, EchoStar Chairman Ergen explained why the two firms had not yet formed a joint venture:

> [we] couldn't … get these efficiencies without merging… because we had some obstacles to overcome. Whose technology are we going to use? That meant one of the companies had to replace all of their boxes, and the other company got away without having that cost…. Second, how would you combine the spectrum? You can't flip a switch with two incompatible systems today and suddenly overnight light up and change out all of those boxes…. [Also, who] would get what frequencies and how many frequencies [would you] trade off?[285]

In other words, Mr. Ergen did not—and could not—dispute that a joint venture is technically feasible; the only obstacle is to agree on allocation of costs.[286] If the benefits of avoidance of duplication were as great as the applicants contend, however, they would have every incentive to go back to the bargaining table—after the merger is disapproved—to resolve the cost allocations.

VIII. ECHOSTAR'S PROPOSED FIX OF A NATIONAL PRICING PLAN WOULD NOT WORK AND WOULD BE ANTICOMPETITIVE

To ameliorate the danger of monopoly power abuse that the merger will create, EchoStar has proposed to price its product on a national basis and accept federal regulatory supervision of its promise. From the perspective of both the public interest and antitrust doctrine, EchoStar's cure is worse than the poison. Acknowledging that it has the incentive to exercise its monopoly power in areas where MVPD competition will cease to exist, EchoStar requests that the Commission turn back the

---

[285] *Ergen* at 11.

[286] Indeed, as discussed above, EchoStar has already developed (since the merger announcement) a new set-top box capable of decoding both firms' signals.

clock to the days of monopoly markets and rate regulation. But as former Federal Trade Commission Chairman Robert Pitofsky explained, this "leaves the government in the position of monitoring rates and complicated terms in every community to guard against discrimination – a role that the government tries not to play in a free market economy – certainly not when the transaction is a horizontal merger to monopoly or near monopoly."[287] In fact, Mr. Ergen himself has emphasized that "the Communications Act commands policy makers and industry to move away from 'the monopoly oriented, over-regulatory origins of communications policy and toward a world in which the market, rather than bureaucracy, determines how communications resources should be utilized.'"[288]

Harkening back to regulated monopolies is a complete reversal from the direction the Commission and Congress have steered the communications industry. The goal of the Telecommunications Act of 1996 was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[289] Yet EchoStar wants the Commission to run a reverse and create monopoly markets with "safeguards to protect [homes in monopolized areas]"

---

[287] Robert Pitofsky, Prepared Statement Before the House Comm. on the Judiciary (Dec. 4, 2001), at 8.

[288] *Competition to Cable: Hearing Before The Senate Commerce Committee* (July 27, 1998) (statement of Charles W. Ergen) (quoting Michael Powell, *Communications Policy Leadership*, 50 FED. COMM. L.J. 529, 534 (1998)).

[289] Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (introductory statement); *see* Joint Managers' Statement, S. Conf. Rep. No. 104-230, at 113 (1996) (stating that the 1996 Act would establish a "pro-competitive, deregulatory national policy framework").

through "a form of rate regulation": a national pricing plan where "if the government says [EchoStar's] got to charge a uniform rate across the country, [Mr. Ergen] would sign a consent [decree]."[290]

A. Pricing For Equipment, Installation And Monthly Service Is Complex And Difficult To Monitor

There is a broad range of charges and fees related to DBS service, starting with the equipment and installation. Equipment fees dropped dramatically with EchoStar's entry into the DBS market and the firms often reduced their equipment fees and waived their installation fees during promotions to secure DBS subscribers. In addition, as discussed above, there is a tremendous variety of packages of programming with different monthly rates based on the number of channels and the addition of local service. Traditionally, DIRECTV has provided premium sports and pay-per-view packages and EchoStar has been the pricing maverick. The firms' widely disparate offerings vary by packages and geographic area, and are often promoted in conjunction with reduced prices on equipment. A uniform national pricing plan might equalize programming prices in theory, but in practice regulators would have to monitor a nightmarishly complex set of equipment rebates and introductory offers aimed at securing new customers.

B. Desirable Price Competition Through Specialized Local Pricing Deals Would End

A uniform national pricing plan would end local promotions that DBS firms have periodically targeted at specific areas. For example, in June 1996, EchoStar offered its DBS equipment and services at a discounted rate of $199 for equipment and $300 for an annual service subscription limited to consumers in seven DMAs, including Washington, D.C./Baltimore, Phoenix and Portland, Oregon, in

---

290 *Ergen* at 8.

which cable operators were raising their rates by as much as 21 percent.[291] In May 2000, in an-ongoing dispute between Disney and Time Warner Cable about the carriage of ABC, Disney took out full-page ads in newspapers in New York City, Los Angeles and Houston offering a $198 rebate for Time Warner customers to switch to DIRECTV.[292] EchoStar had also offered Time Warner customers a free dish and installation for subscribing to a year's worth of programming. Then, in October 2001, EchoStar targeted customers of Charter Communications, the fourth largest cable company with roughly seven million customers, with a $100 discount off its $199 equipment for presenting a Charter cable bill when subscribing to the DISH Network's "I Like 9" programming package.[293] Similarly, EchoStar and DIRECTV have recently targeted subscribers of Cablevision, the seventh largest cable company serving three million subscribers in the New York City area, with advertisement campaigns and promotional offers.[294] It is in the public interest to encourage these localized price wars, not to curtail them.

C. EchoStar Has Professed The Need To Price Locally

Recognizing the need to compete on price and service in local markets, EchoStar has expressed the intention to continue such consumer promotions. In his December 2001 interview, Mr. Ergen

---

[291] *EchoStar announces special promotion in select cable rate increase markets,* Business Wire (June 6, 1996).

[292] *ABC lures Time Warners viewers to satellite,* USA Today, May 3, 2000, <http://www.usatoday.com/life/cyber/tech/review/crh109.htm> ("If Time Warner can dish it out, so can we - at no cost to you").

[293] Skyreport, Oct. 8, 2001 <http://www.skyreport.com/skyreport/oct2001/100801.htm>

[294] *See* Reply Comments of Cablevision Systems Corp., In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, CS Docket 01-129, at 3 (filed Sept. 5, 2001).

explained that even with "rate regulation" from the federal government holding him to a promise of uniform national pricing, his new monopolist DBS company would need to react to local competitive situations: "if somebody comes in and offers a $300 rebate to get your customers in a particular location, then you have to have the ability to respond to that."[295] This competitive behavior is good for consumers but would be prohibited with a national pricing plan, unless EchoStar changes its national price every time it participates in a local price war – which it plainly will not do.

D. A Price Guarantee Will Not Protect Consumers In Rural Areas

EchoStar will have monopoly power to raise price or reduce output in areas without a competitive substitute. At best, its national price would be based on an urban area duopoly where it prices against a closer substitute in digital cable. This is hardly likely to be a competitive price for anyone, including rural consumers. In fact, a profit-maximizing EchoStar would have an incentive to price above the urban duopoly price at which customers might switch to digital cable because EchoStar will sacrifice urban customers to the point where subscriber losses are offset by a price increase to the 30 percent of customers for whom EchoStar will be a monopoly MVPD provider. Dr. Sidak explains in his Declaration in detail why the post-merger price for both urban and rural areas will be higher than pre-merger prices.[296] He also points out the likelihood of non-price discrimination against rural consumers.[297]

---

[295] *Ergen* at 11.

[296] Sidak Decl. ¶¶ 54-57.

[297] *Id.* at ¶¶ 60-61.

E. Uniform National Pricing Makes Oligopolistic Effects More Likely

A national price plan raises a significant likelihood of anticompetitive effects in local duopoly MVPD markets across the country. Instead of letting market forces determine price, EchoStar proposes to signal to its duopolist cable competitors everywhere what its price will be in every local market. To the extent that EchoStar does honor this commitment, coordinated behavior will be greatly facilitated.[298] As the Merger Guidelines explain, "[m]arket conditions may be conducive to or hinder reaching terms of coordination. For example, reaching terms of coordination may be facilitated by . . . existing practices among firms, practices not necessarily themselves antitrust violations, such as *standardization of pricing*…."[299] This is the exact scenario that EchoStar proposes. As Mr. Ergen describes it, the standard pricing will be "very similar to what AOL does with its Internet service with a national price."[300] For economic purposes, however, national uniform pricing will make signaling price changes to EchoStar's MVPD duopoly competitors more efficient, with only one announcement necessary for all local markets.

---

[298] *See* 6 AREEDA ¶ 1411 ("One firm's actions are interdependent with those of another when their utility depends on the other firm's response. If firm *A* has any influence on market price, it knows that its price change will affect rivals and that its gain from changing price depends upon rival reactions."); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 43 (1976) (firms are "interdependent in their pricing" when "they base their pricing decisions in part on anticipated reactions to them.")

[299] Merger Guidelines § 2.11 (emphasis added); *see* Michael L. Weiner, *Facilitating Practices: Distinguishing The Legitimate From the Unlawful*, 7 ANTITRUST 22, 22 (1993) ("It may be that firms are able to achieve coordination, however, when they employ certain so-called 'facilitating practices,' such as industry-wide advance price announcements").

[300] *Ergen* at 8.

F. National Pricing Would Not Prevent Loss Of Consumer Benefits From Non-Price Competition

Even if EchoStar has uniform national prices, standardized national pricing will not remedy the anticompetitive effects that consumers would experience with the elimination of EchoStar and DIRECTV's non-price competition. DBS customers will no longer benefit from the firms' competition, as discussed above, in offering award-winning customer service, expanded programming packages, and advanced technological services. Under the proposed remedy, for example, there is no adequate method to ensure that the level of service (*e.g.*, number, type, and variety of channels) provided to rural areas would be equal to that offered to urban markets. EchoStar will have no incentive to continue to invest in the same improvements in technology and quality, like digital sound, high definition television and digital video drives, for local markets where there is no competing DBS provider or only complementary cable service. Nor would a monopoly DBS firm have the same incentives to make investments to offer local-to-local programming in additional markets. At the end of the day, a significant number of consumers in many local markets are likely to end up paying more and getting less.

G. National Pricing Would Not Prevent Harm To Programmers And Broadcasters

A national pricing scheme for consumers offers cold comfort to programmers and broadcasters who will experience a reduction in competition to carry their content, including programming networks and local broadcasts. Instead, broadcasters in 110 local DMAs will be unable to distribute their local service via satellite, while broadcasters in the other 100 will have no competing DBS distributor to turn to in bargaining retransmission consent agreements. There will be less output of local-to-local broadcasting for consumers and less revenue for broadcasters. For programmers looking for carriage

to households not served by other MVPDs – currently a good 30 percent of DIRECTV's customers – they will have only one option. As a monopsonist provider for a large portion of the country, if EchoStar does not wish to carry any given channel, that programmer will have nowhere to turn.

IX. THE MERGER WOULD HARM COMPETITION IN THE HIGH-SPEED INTERNET MARKET

A. Rural Areas Do Not Have Cable Broadband Access And Are Beyond The Range Of DSL Telephone Lines

Currently, there are only three sources of broadband service for rural America: satellite, cable and telephone companies. However, it is not economically practical for cable modems and Digital Subscriber Lines ("DSL") to serve the majority of the rural population. Thus, satellite is the only viable broadband option for most rural communities. Allowing the EchoStar/DIRECTV merger to proceed would mean that a monopolist would be setting the prices in many rural areas, because there would be absolutely no competition for broadband services.

1. Reasons Why Many Rural Areas Are Not Served By Cable Or DSL

It is cost prohibitive for cable operators to offer broadband service in rural areas and DSL is limited by the proximity of homes and businesses to a network hub. On average, rural cable operators serve less than 1,000 subscribers per headend.[301] Upgrading a cable system to provide digital video and broadband services means incurring significant fixed costs per headend. Urban cable operators can efficiently spread these fixed costs over their many subscribers (especially when they have upwards of 100,000 customers). It is not cost effective, however, for a rural cable operator to try to spread those

[301] Monica Hogan, Interview with Mark Pagon (Chairman Pegasus Communications Corp.), *Pagon: Pity Cable's Rural Ranks*, MULTICHANNEL NEWS, June 4, 2001 at 36 ("Pagon").

same large costs over 1,000 customers.[302] As a result, satellite broadband service is particularly appealing to the millions of rural customers whose broadband services are limited.[303] For many rural customers, satellite is the only option, and there is no technology on the horizon that can provide broadband as efficiently and affordably as satellite.[304]

2. Many Areas Are Unserved By Cable Or DSL

One industry study indicates that in 2002, 28 percent of the U.S. will be without terrestrial broadband access.[305] In the very near future, according to other industry observers, there will be approximately 20 to 30 million U.S. households that will be unserved by cable modem or DSL.[306] As a result, by the end of 2005 some expect there to be about 5 million U.S. broadband satellite subscribers generating total revenues of approximately $4.5 billion.[307]

---

[302] *Id.* (noting that for rural cable operators "costs are in many cases in excess of $10,000 per customer. A customer is not worth that.").

[303] Armand Musey, *Dollars And Sense: Broadband: The Next Big Thing?*, VIA SATELLITE June 10, 2001 at 1 ("Musey") ("DBS growth in rural areas has been consistently strong due to a lack of viable alternative. Broadband satellite services should achieve similar levels of household penetration.").

[304] Pagon at 36 (noting that "in five years' time [rural consumers] still won't have cable or DSL broadband access.").

[305] The Yankee Group, "Access Broadband" presented at Pegasus Communications 2001 Investor and Management Conference (May 30, 2001); Ken Terry, *DBS Aims to Bring Internet to the Sticks*, CABLEVISION (Mar. 26, 2001) at 12 (18% of the market still won't have terrestrial broadband access in 2005).

[306] *See* Musey at 1; Bob Phillips, Testimony on Telecommunications and the Internet before The Committee on Energy and Commerce, "The Status of Competition in the Multi-Channel Video Programming Distribution Marketplace" (Dec. 4, 2001) ("The number of households unserved by any type of cable … could be as high or higher than 20% of the homes across the country … or more than 25,000,000 households.").

[307] *See* Musey at 1.

3. Rural Areas Depend On Broadband For Survival

Rural communities depend on the health of their small businesses for their own future survival. Due to the lack of broadband alternatives, satellite provides rural communities the ability to "choose where they *want* to live, instead of dictating where they *have* to live. It will give small and large businesses the same freedom in determining where to locate."[308] The Texas Public Utility Commission reported: "E-commerce may be especially important for rural communities because it makes areas of Texas more attractive to businesses and residents. For the first time, proximity to customers is less significant. Yet proximity to fast Internet connections remains important, as new high-tech startups, as well as older, more established firms, are becoming increasingly dependent upon high-speed Internet connections."[309]

Given the current lack of competition for rural broadband service, it is necessary for competition to flourish between EchoStar and DIRECTV to provide rural America with the most cost-effective and up-to-date broadband service.

---

[308] Bob Phillips, Testimony on the Farm Bill Concept Paper before The U.S. House of Representatives Committee on Agriculture (July 19, 2001).

[309] *Id.* (citing Texas Public Utility Commission's Report to the 77th Legislature on *Advanced Services in Rural and High Cost Areas*).

B. The Only Broadband High-Speed Internet Access To Rural Areas Is Broadband Satellite Service Owned Or Controlled By DIRECTV/Hughes And EchoStar.

DIRECTV/Hughes and EchoStar through its equity interest in StarBand™[310] control the only two satellite broadband products available today. DIRECTV/Hughes offers one-way and two-way products under its DIRECWAY® brand,[311] and EchoStar offers StarBand, a two-way service.[312] DIRECWAY and StarBand are currently available nationwide, according to their promotional material – giving rural Americans satellite broadband access and a choice between two providers.

A DIRECWAY ad placed in the SkyRetailer Consumer Electronics Show Guide, Las Vegas 2002, states, "Introducing DIRECWAY - Broadband You Can Sell Right Now, Everywhere." The ad features a map of the continental U.S. showing that all areas have DIRECWAY access. EchoStar also advertised its StarBand broadband product at the January 2002 Consumer Electronics Show. A StarBand/DISH Network brochure states, "If you can see the southern sky – and 9 out of 10 households can – you can receive this incredible technology."

---

[310] EchoStar Press Release, *EchoStar Assumes Controlling Equity Stake in StarBand* (July 11, 2001); EchoStar Press Release, *EchoStar Completes $50 Million Investment in StarBand* (Sept. 27, 2001).

[311] "No matter how you want your Internet access, there's an option that's right for you. One-way (a.k.a. dial return) systems let you receive large files with blazing fast satellite speed uploading information back to the Internet through your phone line. Two-way (a.k.a. satellite return) systems offer you the power of satellite for both uploads and downloads, eliminating the need for a phone line to surf the Internet." *See* DIRECWAY website at <http://www.hns.com/direcway/for_home/learn_more/oneway_twoway.htm.>

[312] *See* EchoStar website at <http://www.dishnetwork.com/content/internet/whats_starband/index.shtml.>

DIRECWAY's website reinforces its national availability stating, "DIRECWAY is the new way to get high-speed Internet wherever you live."[313] EchoStar's website also features StarBand's availability – "It's available nationwide – StarBand is the first satellite service to be available in all 50 states."[314]

C. The Merger Will End All Competition Between The Two DBS Companies For Broadband Customers

1. The Merger Will Reduce Rural America's Broadband Choices Today

The EchoStar/DIRECTV merger is unnecessary to provide competitive broadband high-speed Internet access to rural America, and the merger will actually snuff out existing competition. Today DIRECTV and EchoStar compete for satellite broadband customers – giving rural customers a choice between providers based on product, service, price and bundling options. A rural customer can also purchase the products through varying distribution channels.[315] The merger will eliminate those choices. If allowed to go forward, one provider would control both of today's satellite broadband offerings.

---

[313] *See* DIRECWAY website at <http://www.hns.com/direcway/for_home/home.htm>

[314] *See* EchoStar website at <http://www.dishnetwork.com/content/internet/whats_starband/index.shtml>.

[315] For example, DIRECWAY's two-way product is offered through DIRECTV, EarthLink, Pegasus and NRTC, and its one-way product is offered through Hughes and AOL. StarBand sells direct to the consumer or is offered through EchoStar and other partners, including NRTC. *See* DIRECWAY website at <http://www.hns.com/direcway/for_home/how_to_get_it/getting_direcway.htm;> StarBand website at <www.starband.com>; and NRTC website at <http://www.nrtc.org/navigate.cfm?page=Broadband.>

2. The Merger Will Also Reduce Rural America's Future Broadband Choices

DIRECTV/Hughes and EchoStar have both invested in next-generation satellite broadband two-way offerings in the Ka-band (as opposed to their current Ku-band products), The new Ka-band products should offer faster and more economical connections.[316] DIRECTV/Hughes is set to launch its SPACEWAY service in 2003,[317] and EchoStar has invested $50 million for a 20% stake in Wild Blue Communications, Inc. (formerly iSky),[318] which also plans to begin offering two-way services in 2003.[319]

In addition, DIRECTV/Hughes and EchoStar dominate Ka-band holdings – many of which are CONUS slots allowing customers to receive satellite broadband and video from the same dish. DIRECTV/Hughes holds Ka-band CONUS licenses at 99º, 101º and 103º,[320] and EchoStar has licenses at 121º[321] and 113º.[322] EchoStar also has an indirect interest in 109.2º via its investment in WildBlue. Therefore, a merged company would control almost half of the Ka-band CONUS capacity

---

316 *See* <*http://www.medialifemagazine.com/news2001/apr01/apr02/4_thurs/news6Thursday.html.*>

317 Hughes/Salomon Presentation at 16.

318 EchoStar Press Release, *EchoStar Invests in iSky to Offer First Bundled Two-Way Broadband Internet, TV Service Via Satellite* (Mar. 27, 2000) (<www.EchoStart.com>).

319 *See* WildBlue website at <http://www.medialifemagazine.com/news2001/apr01/apr02/4_thurs/news6Thursday.html.>

320 FCC Press Release, *FCC International Bureau Authorizes Second-Round Ka-Band Satellite Systems* (Aug. 2, 2001).

321 *Id.*

that is particularly conducive to satellite broadband, limiting the number of future satellite broadband entrants and eliminating any future national competitors that could offer a bundled DBS and satellite broadband product on one-dish. As outlined previously, the head-to-head competition between DIRECTV and EchoStar has resulted in lower DBS equipment prices and greater technological innovations. As a new product, satellite broadband needs competition to do the same.

D. Satellite Broadband Is Growing

On January 9, 2000, Hughes announced that DIRECWAY had surpassed the 100,000 subscriber mark.[323] In making the announcement, Pradman Kaul, chairman and CEO of Hughes Network Systems, said, "We are very optimistic about the future and the continued success of DIRECWAY. With all of the business and marketing alliances we have secured, we see enormous potential for growth of DIRECWAY services spanning all markets – enterprise, small business and consumer alike." He also stated, "There is a considerable broadband market out there for which DIRECWAY is clearly a winning solution."[324] With DIRECWAY subscribers growing at a 17% per quarter,[325] Hughes 2002 financial guidance projects an additional 100,000 to 200,000 subscribers.[326] (Since StarBand is a private company, no total subscriber numbers are available.)

---

[322] 113º was originally licensed to VisionStar, Incorporated, but the FCC granted VisionStar the right to transfer control of 113º to EchoStar on October 25, 2001. *See* SkyReport, *"FCC Approves VisionStar/EchoStar Transfer"* at www.skyreport.com.

[323] Hughes Press Release, *DIRECWAY Subscribers Break 100,000 Mark* (Jan. 9, 2002).

[324] *Id.*

[325] Letter from John P. Janka to Magalie Roman Salas (Office of the Secretary, FCC) with Attachment re: Notice of *Ex Parte* Presentation: SAT-MOD-20011221-00135, S2133, SAT-MOD-20011221—00136, S2132 (Jan. 14, 2002).

E. No Duplication Issue With Broadband

Proponents of the merger claim that its main efficiency is the elimination of duplicative usage of radio spectrum. This argument, although of no force in the MVPD context, is completely inapplicable in connection with broadband services. Rather than beaming out one set of programming to all broadband consumers, EchoStar and DIRECTV essentially offer individualized programming to each of their customers. The information each consumer requests via the Internet is unique, and the information downloaded as a result is equally unique. The broadband capacity needed to offer this "programming" to each consumer will not change whether the merger takes place or not. Thus, there can be no broadband spectrum freed up as a result of the merger, and therefore, no efficiencies gained due to avoidance of duplication.

X. AWARDING ALL THE LICENSES FOR FULL-CONUS DBS SPECTRUM TO A SINGLE ENTITY IS CONTRARY TO ESTABLISHED COMMUNICATIONS POLICY AGAINST MONOPOLIZATION OF THE SPECTRUM

A determination about the public interest, convenience, and necessity requires a broad consideration of federal communications policy.[327] And it is an unmistakable theme of federal communications policy that – for sound and obvious reasons – the Commission has never agreed to allow a single firm to control 100 percent of an entire spectrum, as the proposed DBS giant here would control all CONUS high-power Ku-band spectrum. The Commission should deny this Application

---

[326] Hughes Electronics Corp. SEC Form 8-K (Jan. 15, 2002).

[327] *See* Telegraphs, Telephones, and Radiotelegraphs, 47 U.S.C. § 310(d) (2001) ; *see also In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee,* 14 FCC Red. 3160, at ¶ 14 (1999) ("[O]ur public interest analysis . . . . encompasses the broad aims of the Communications Act.").

because, for reasons that go beyond the competition-related matters discussed above, the concentration of 100 percent of CONUS DBS spectrum in a single company would not serve the public interest, convenience, and necessity.

While there is room for argument about precisely how many licensees within a given spectrum are necessary to achieve communications policy objectives, there is no rational argument that it is sound policy to consolidate an entire spectrum band in a single commercial entity – and the Commission before has never allowed such a startling result. Consider the consequences to the American economy and the communications industry if the Commission had:

- ? allowed a single company to acquire all FM stations throughout the country on the grounds that a huge FM radio firm was the only way to compete effectively with the "entrenched" AM industry;
- ? permitted a single company to acquire all wireless licenses throughout the country to create a wireless giant to better compete with the "dominant" landline telephone industry; or
- ? enabled a single company to control every UHF station in the United States, on the grounds that 100 percent UHF consolidation in a single company would allow the firm to compete more effectively with the "powerful" VHF television industry.

Any of these decisions would have been a terrible mistake that would have gravely damaged the communications industry (and the national economy). The same would be true if the Commission were somehow to permit the extraordinary – and utterly wrongheaded – proposal now before it.

The Commission has a special obligation, as a matter of communications policy, to ensure that the proposed transaction maximizes effective exploitation of the spectrum.[328] This obligation finds its authority in section 303(g) of the Communications Act, which empowers the Commission to "encourage

the larger and more effective use of radio in the public interest."[329] The Supreme Court first fleshed out the meaning of this section in *NBC v. United States*,[330] in the context of considering the "chain broadcasting" regulations promulgated by the Commission. These regulations set the ground rules for the network broadcasting relationship between network radio stations and their affiliates.

The Supreme Court upheld the regulations. Although the Court commented that one party appeared to be asking it to "regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other,"[331] the Court rejected that view, concluding that Congress did "not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic."[332] And in delineating the boundaries of "the larger and more effective use of radio in the public interest," the Supreme Court held that "[t]he facilities of radio are limited and therefore precious; they cannot be left to wasteful use

---

[328] *See, e.g.*, *NBC v. United States*, 319 U.S. 190, 218 (1943) ("'With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them.'") (citation omitted).

[329] 47 U.S.C. § 303(g). In *NBC*, the Supreme Court recognized that Section 303(g) is a source of substantive FCC authority. *See* 319 U.S. at 217-18 ("[Section 303(g)] preclude[s] the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' . . . [T]here is no evidence that Congress did not mean its broad language to carry the authority it expresses.") (citation omitted).

[330] 319 U.S. 190.

[331] *Id.* at 215.

[332] *Id.* at 215-16.

without detriment to the public interest."[333] Therefore, concentrating licenses for spectrum in a single entity contradicts "the larger and more effective use" of spectrum.[334]

This principle has guided the Commission ever since. Indeed, we are aware of no instance in which the Commission has ever approved a spectrum monopoly – and contrary examples are legion. In the context of Digital Audio Radio Satellite Service ("DARS"), for example, the Commission confronted the challenge of providing for a competitive DARS service in the face of severely constrained spectrum availability.[335] In assessing the competitive environment in which DARS would exist, the Commission recognized that "[o]ther audio delivery media are not, of course, perfect substitutes for satellite DARS"[336] because of differences in "programming menu[es] . . . , the sound quality, the cost of equipment, and the presence or absence of a subscription fee."[337] Taking these factors into account, the Commission concluded that "licensing two satellite DARS providers will serve the public interest."[338]

> Critically, however, the Commission
>
> agree[d] with commenters . . . *that there should be more than one satellite DARS license awarded*. Licensing at least two service providers will help ensure that

---

[333] *Id.* (quoting 47 U.S.C. § 303).

[334] *Id.* at 217, 218.

[335] *In re Establishment of the Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHZ Frequency Band*, 12 FCC Rcd 5754 ¶ 77 (1997) ("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.").

[336] *Id.* ¶ 78.

[337] *Id.*

[338] *Id.*

> subscription rates are competitive as well as provide for a diversity of programming voices. The two DARS licensees will compete against each other … for other aural delivery media mentioned above. Accordingly, eligible auction participants may acquire only one of the two licenses being auctioned.[339]

Like DARS, DBS is a unique product for which other media are not a perfect substitute. Just as DARS differentiated itself from terrestrial radio services and other audio delivery media in terms of programming, sound quality, price, payment structure, and availability, DBS distinguishes itself in, among other things, the number and types of television channels and programming and digital audio and video quality. And just as the Commission determined that more than one DARS licensee was necessary to safeguard competitive pricing, service, and product innovation, the Commission has recognized that multiple DBS licensees are necessary to ensure optimal exploitation of the Ku-band spectrum.[340] Nothing in DIRECTV's and EchoStar's Application provides any basis for altering this assessment.

Similarly, the Commission has used a variety of devices to avoid frequency assignment schemes that unnecessarily restrict the number of competitors in spectrum-based markets. For example, the Commission adopted a spectrum cap to promote competition in the market for Commercial Mobile Radio Services ("CMRS"). "The primary public interest purpose underlying the original adoption of the spectrum aggregation limits was to promote pro-competitive ends in the CMRS markets. In initially setting the spectrum cap in 1994, the Commission's goal was to 'discourage anticompetitive behavior

---

[339] *Id.* (emphasis added).

[340] *See In re Tempo Satellite, Inc., Assignor and DIRECTV Enterprises, Inc., Assignee*, 14 F.C.C.R. Rcd 7946 ¶ 15 (1999) (acknowledging EchoStar's "aggressive campaign" to acquire subscribers as a check on DirecTV's ability to amass market power).

while at the same time maintaining incentives for innovation and efficiency.'"[341] And these spectrum aggregation caps achieved their intended purpose: consumers "have realized the benefits of competition in the form of increased output, lower prices, and increased diversity of service offerings."[342] The Commission has pledged to continue to monitor any consolidation of this spectrum on a case-by-case basis.[343]

Likewise, with respect to spectrum allocation for fixed-satellite service in the Ka-band, the Commission has imposed limitations on the number of orbital locations that may be assigned to any license applicant.[344] "Historically, this limitation pertained to the provision of domestic FSS in the United States, the objectives being to avoid prematurely assigning an excessive number of orbital locations to an existing licensee for expansion of its domestic system and to promote entry opportunity

---

[341] *In re 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report & Order WT Docket No. 01-14, FCC 01-328, ¶ 26 (rel. Dec. 18, 2001) ("2000 Biennial Regulatory Review"). Indeed, in the 1995 DBS spectrum auction, the Commission limited any applicant to an attributable interest in no more than one full-CONUS orbital location for precisely the same reason. *See Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 F.C.C.R. 9712 ¶ 29 (1995) ("This one-time auction rule will essentially ensure that each of the three full-CONUS DBS orbital locations will initially be controlled by entities that do not share interests with DBS operators at the other two orbital locations. We believe that this will permit the development of fully competitive DBS services.").

[342] *2000 Biennial Regulatory Review* ¶ 26.

[343] *Id.* ¶ 2. In particular, at the time of the Commission's Report & Order, the market included six nationwide mobile telephony operators, as contrasted with the DBS market's two nationwide players. *See id.* ¶ 38. Moreover, "it is relatively easy [in the CMRS market] for existing competitors to add capacity in response to any price increase, and therefore firms cannot profitably reduce output and sustain a high price for a significant period of time." *Id.* ¶ 45. The same obviously cannot be said for the DBS market.

[344] *See* 47 C.F.R. §§ 25.140(e), (f).

in the bands."[345] Significantly, the Commission has waived these regulations where license applicants "agreed to an arrangement that accommodated all pending applications for space stations, and left room for additional assignments."[346] The proposed transaction, of course, leaves no room for additional assignments, and, indeed, creates an insurmountable barrier to entry into the DBS market.[347]

In short, the Commission has never approved the creation of a spectrum monopoly of the variety contemplated here. Moreover, when the Commission permits spectrum consolidation — as distinguished from spectrum monopolization — in other markets, the markets always contain "checks" on the consolidation —in the form of sufficient numbers of competitors, sufficient spectrum capacity, and sufficiently low barriers to entry — to ensure continued service of the public interest. The DBS market contains no such mitigating factors. DIRECTV and EchoStar have therefore presented no basis for the wholly unprecedented assignment of all of the licenses in any entire spectrum band to a single entity.

CONCLUSION

EchoStar and DIRECTV have proposed a merger that would give EchoStar control of all full-CONUS United States DBS locations. This merger will result in a consumer welfare loss of

---

[345] *In re Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Third Report & Order, CC Docket No. 92-297, FCC 97-378, ¶ 24 (rel. Oct. 15, 1997).

[346] *In re Kastarcom, World Satellite, LLC,* Order & Authorization DA 01-2614, ¶ 10 (rel. Nov. 13, 2001) (emphasis added).

[347] *See In re Tempo Satellite, Inc.*, 14 F.C.C.R. at 7954-55 ¶ 17 ("[S]hort of DIRECTV or EchoStar selling or leasing significant channel capacity to a third party, grant of the proposed transaction prevents a third domestic DBS operator from using DBS channels at one of the existing full-CONUS orbital locations to provide service to different MVPD markets.").

approximately $3 billion or more over the next five years, cannot be justified under prevailing antitrust doctrine, and is completely contrary to the public interest.

The merger would create a monopoly "gatekeeper" in large numbers of local markets across the United States that do not have cable service or that have limited analog cable systems not competitive with cable. If the market is MVPD, the merger will still result in a monopoly in smaller markets and a gatekeeper duopoly between EchoStar and the cable incumbent in nearly all remaining local markets.

Awarding all full-CONUS spectrum to a single company would be contrary to established Commission policy, eliminate competition and harm the public interest. For all of the above reasons EchoStar and DIRECTV's transfer of control application should be denied by the Commission.

Respectfully Submitted,

Thomas P. Olson
Nicole Telecki
Maya Alexandri
C. Colin Rushing
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Edward P. Henneberry
Dylan M. Carson
Pradeep Victor
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 783-0800

Henry L. Baumann
Benjamin F. P. Ivins
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5300

Date: February 4, 2002

Filename:	EchoStar Petition 2.3.021.doc
Directory:	C:\DOCUME~1\TolsonS\LOCALS~1\Temp
Template:	C:\Program Files\Microsoft Office\Templates\Normal.dot
Title:	EchoStar Petition
Subject:	
Author:	Bonnie Ziegler
Keywords:	
Comments:	
Creation Date:	02/04/02 10:40 PM
Change Number:	4
Last Saved On:	02/05/02 10:51 PM
Last Saved By:	Shirley Tolson
Total Editing Time:	2 Minutes
Last Printed On:	02/05/02 10:52 PM

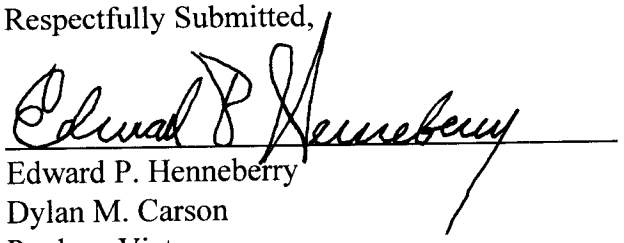
As of Last Complete Printing

Number of Pages: 123

Number of Words: 24,418 (approx.)

Number of Characters: 139,183 (approx.)

Respectfully Submitted,



Edward P. Henneberry
Dylan M. Carson
Pradeep Victor
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 783-0800

Henry L. Baumann
Benjamin F. P. Ivins
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5300

Thomas P. Olson
Nicole Telecki
Maya Alexandri
C. Colin Rushing
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Date: February 4, 2002