

Testimony of
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INTRODUCTION

As President and CEO of the National Association of Broadcasters, I am pleased to appear before the Senate Judiciary Subcommittee on Antitrust, Competition and Business and Consumer Rights to discuss NAB's opposition to the pending EchoStar/DIRECTV merger.

EchoStar Chairman, Charlie Ergen, has made several promises to gain favor for his anticompetitive merger proposal. As the Committee will recall, three months ago Mr. Ergen told the FCC that the merged firm would be able to serve only 100 markets with local-to-local. Now, to try to create a distraction from the fact that his merger will end all competition between U.S. DBS firms, EchoStar has announced that it has suddenly found the capacity to provide local-to-local in all 210 U.S. television TV markets after the merger. This promise -- which is nothing more than that -- in no way alleviates broadcaster concerns, nor does it diminish the regulatory hurdles yet to be cleared by the applicants.

My written testimony first provides a general overview of the issues concerning broadcasters, then goes into greater detail regarding the impact of this merger on broadcasters and consumers.

A. The Transaction

EchoStar Communications Corporation ("EchoStar") and Hughes Electronics Corporation, a subsidiary of General Motors, Inc., have announced an agreement by which General Motors will spin off Hughes, including its Direct Broadcast Satellite ("DBS") business, DIRECTV, which will then merge with EchoStar. The parties to this transaction have filed a Consolidated Application For Authority to Transfer Control with the FCC seeking authority to transfer control of satellite, earth station, and other authorizations, including licenses to use orbital satellite positions for DBS services, into the new company.^{1/} The merger also is under review by the Department of Justice.

B. NAB's Members' Role As Broadcasters And Interest In Merger

The NAB is a non-profit trade association that promotes and protects the interests of radio and television broadcasters in Washington and around the world. The NAB is the broadcaster's voice before the Commission, Congress, and the courts. The NAB is committed to the goal of promoting localism and diversity in television programming throughout the United States.

The broadcasting industry provides free, over the air programming. As cable emerged, grew and thrived through the 70s, 80s and 90s as a Multichannel Video Programming Distributor ("MVPD"), it evolved as the "gatekeeper" of programming, particularly local programming, throughout the United States. With the 1999 passage of the Satellite Home Viewer Improvement

Act ("SHVIA"), satellite carriers were also granted this gatekeeper role, enabling DBS companies to deliver TV stations within their own markets without paying copyright royalties to the owners of the programming carried on those stations.

As suppliers of programming to local markets, the NAB's members stand to be substantially harmed by the proposed merger of EchoStar and DIRECTV. By combining the only two DBS providers, the merger will create a DBS monopoly, reduce the number of MVPDs, eliminate beneficial rivalry between two DBS firms to offer local-to-local service in new markets, and enable EchoStar and DIRECTV to exercise significant market power in both the purchase and distribution of video programming throughout the country. This reduction in competition will be to the detriment of both program suppliers and viewers.

C. Overview

EchoStar and DIRECTV, the sole remaining DBS companies with full-CONUS spectrum in the United States, propose to merge. Their merger would create a monopoly in large areas of the United States and for many millions of MVPD and broadband Internet customers. In most other areas, at best the merger would reduce the number of competitors to two, creating a duopoly and ending EchoStar's frequent role as a "maverick" in the DBS and MVPD industries. The net present value of the total consumer welfare loss over the next five years is estimated to be approximately \$3 billion or more.

The anticompetitive effects of this reduction of competition would be felt both by consumers and programming suppliers, including the local broadcast stations that are members of NAB. Broadcasters would be particularly harmed because they would lose the benefit of the DBS rivalry that has led to carriage of local broadcast stations in many markets on one or both DBS systems. The merger would also have a deleterious effect on broadcasters' ability to obtain fair compensation for retransmission consent.

The merger application is particularly audacious because both companies have been enormously successful on their own. Today DBS is a \$10 billion industry; it has grown from zero subscribers in 1994 to over 17 million at the end of 2001. More than two out of every three new MVPD subscribers choose DBS over cable. This phenomenal growth has accelerated markedly since the passage of SHVIA in late 1999, which allowed DBS providers to offer local broadcast signals. Since SHVIA's passage, EchoStar's and DIRECTV's subscriber numbers have grown 87.6 percent and 60.2 percent respectively.

At the same time as the DBS industry has enjoyed such striking success, it has concentrated into a two-firm duopoly, down from five licensees with full-CONUS spectrum in 1998. Today, EchoStar and DIRECTV control all 96 available frequencies at the three orbital locations capable of transmitting to the entire lower 48 states, 101 degrees W.L., 110 degrees W.L., and 119 degrees W.L. Because these are the only three full-CONUS orbital slots available to the United States in the high-power Ku-band, the barriers to entry into the DBS industry are not merely high, they are insurmountable. And because DBS has been the only successful competitive entrant against cable, this means that barriers to entry to an overall MVPD market are also extremely high.

The astounding growth of the DBS industry has been spurred by the direct head-to-head market and innovation rivalry between EchoStar and DIRECTV. Because DIRECTV was first to market in 1994, EchoStar, since its entry in 1996, frequently has played the role of a maverick with lower prices and innovative marketing concepts. Among the areas in which the two have competed fiercely are equipment and installation pricing, where EchoStar led the market downward; programming, where each service has developed niches, such as DIRECTV's subscription sports packages and EchoStar's wide array of international programming; technology, where the two firms have sought to outdo each other in offering personal video recorders, high definition receivers, and other innovative technologies; and local-to-local, which EchoStar first pioneered but where DIRECTV now offers service in more cities and in a more consumer-friendly manner. All of this rivalry-spurring innovation would be lost if EchoStar and DIRECTV were allowed to merge.

In terms of competitive effects, the proposed merger will have ill effects whether EchoStar's position is correct that there is a separate DBS market, or whether EchoStar and DIRECTV are closest substitutes for one another in an overall MVPD market. In either case, this is a merger to monopoly for millions of households throughout the United States who are not passed by cable systems, and at best a merger to duopoly everywhere else. EchoStar claims that there are only three million households in the former category, but the data it relies on are clearly inaccurate. Perhaps most strikingly, DIRECTV's own internal survey data show that there are more than three million households not passed by cable just among DIRECTV's own 10.7 million subscribers.^{2/} As to the national figures, the NRTC has suggested that the percentage of homes passed by cable may actually be only around 81 percent, based on a joint report by agencies of the Departments of Commerce and Agriculture. Whatever the exact number, it is clear that in many areas large numbers of consumers have no access to cable. For instance, Pegasus reports that in 22 states over 30 percent of housing units have no cable access.^{3/} For all of these consumers, this merger eliminates their only realistic competitive choice.

The situation is much the same for consumers who live in rural areas passed by financially marginal cable systems. A detailed study by a leading investment banking firm found that 8,270 cable systems, serving roughly 8.2 million predominantly rural subscribers, might become extinct within the next five to eight years because they cannot justify the investment to upgrade to digital.^{4/} Consumers in these territories will also face a monopoly DBS supplier if the merger is approved.

In nearly all other areas of the country this will be, at best, a 3-to-2 merger. As such, and particularly because it will eliminate EchoStar's closest competitor, it is likely that EchoStar will have the incentive and ability to unilaterally raise its prices, without regard to what the cable company may do. Also, with an MVPD duopoly established, it will be much more likely that EchoStar and the cable incumbents will be able to coordinate their pricing behavior.

Broadcasters, as local program suppliers, will suffer from this elimination of competition. The competitive rivalry between these two companies has spurred technological innovation that has expanded the capacity to provide local-to-local service on a cost-efficient basis. A monopoly EchoStar will have much less incentive to innovate and add local stations. The EchoStar and DIRECTV unenforceable "promise" to add all 210 DMAs over some undetermined period of

time if the merger is approved (while reserving the right to continue a vicious form of discrimination against many stations) in no way alters NAB's opposition to the merger. Given the track record of the competition between these companies, the advancements in satellite technology, and the considerable disparity between EchoStar's promises and its performance when left to its own devices, the NAB believes that more markets are likely to be carried as a result of competition than if they are at the mercy of an EchoStar monopoly. The Carmel Group subscription-TV analyst Jimmy Schaeffler agrees: "Consumers today probably have a greater chance of getting all 210 [markets], and getting them sooner, if the deal does not go through. This is one of the better examples of the real value of the existing competition between DirecTV and EchoStar in today's satellite industry."⁵ In addition, local broadcasters will be harmed by the reduction in the number of gatekeepers - cable and DBS - for local station programming. Because of the strong likelihood that a 2-to-1 or 3-to-2 merger creating highly concentrated markets will result in higher consumer prices and reduced output, such mergers are universally condemned. Such mergers fail to win approval even when (unlike here) they may offer large efficiency gains, as the U.S. Court of Appeals recently ruled in *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001). Here, the parties claim efficiencies would result through the elimination of duplicate carriage, principally of local broadcast stations. However, the claimed efficiencies fall far short of the "extraordinary efficiencies" required for a merger in a concentrated industry.

To be cognizable, an efficiency must be merger-specific, i.e., achievable only through the merger. In this case, to the contrary, as the Declaration of Richard Gould shows, based on DIRECTV's and EchoStar's own Engineering Statement each party individually easily could offer all local stations in all 210 DMAs.⁶ And in any event, the parties could eliminate duplication by entering into a joint venture agreement regarding as much programming as they find efficient - without the anticompetitive consequences of the merger.

Finally, recognizing that the merger would adversely impact consumers in non-cabled areas (but ignoring the anticompetitive impact elsewhere), EchoStar has proposed to offer a uniform national price, presumably to be enforced by the Commission and/or Department of Justice. Such a national pricing plan would be a giant step backward from the goals of the Telecommunications Act of 1996 to promote competition and eliminate regulation. Further, it simply would not work because there are many more dimensions to competition than a simple national monthly fee: prices for equipment and installation, customer service levels, investments in new local-to-local markets, and the like. And even as to price, Mr. Ergen himself admits that EchoStar would respond to specialized local pricing by cable operators.⁷

For these reasons, a national programming price fix will not work. But if it did work, it would harm, not benefit, competition. The uniform national price would be a duopoly price, not a competitive price, and would exacerbate the oligopolistic nature of the market.

In addition to the merger's adverse effects in video markets, it will have a similar anticompetitive effect in the satellite broadband market. Many millions of consumers who are not passed by an upgraded (or any) cable system, and who live too far from telephone company central offices to have Digital Subscriber Line ("DSL") service available, are totally dependent on DBS for high-speed Internet access. Both EchoStar and DIRECTV offer such service today. The merger would eliminate this competition, and without any serious claim of an efficiency benefit: since each customer needs his or her own dedicated broadband transmissions, there is no serious "avoidance of duplication" argument in the first place.

For all these reasons, NAB strongly opposes the proposed merger between EchoStar and DIRECTV.

II. ECHOSTAR'S TRACK RECORD WITH LOCAL STATIONS: A CONSISTENT PATTERN OF ABUSE AND LAWLESSNESS

In every aspect of their dealings with local TV stations, EchoStar has shown a shameful disrespect for obedience to law. Since EchoStar has been perfectly willing to openly defy actual statutory mandates in their dealings with local TV stations, there is little doubt that they will readily walk away from vague assurances it may make today to obtain government blessing for a merger to DBS monopoly.

A. EchoStar's and DirecTV's Abuse of the Distant-Signal Compulsory License: "Catch Me if You Can"

In 1988, with an extension in 1994, Congress created a special compulsory license in the Copyright Act to allow satellite carriers to retransmit distant ABC, CBS, Fox, and NBC stations -- but only to the tiny fraction of households that are "unserved" by local broadcast stations. 17 U.S.C. § 119. This statute is called the "Satellite Home Viewer Act," or "SHVA."

When DirecTV went into business in 1994, and when EchoStar did so in 1996, they immediately began abusing this narrow compulsory license by using it to illegally deliver distant ABC, CBS, Fox, and NBC stations to ineligible subscribers. In essence, the DBS companies pretended that a narrow license that could legally be used only with remote rural viewers was in fact a blanket license to deliver distant network stations to viewers in cities and suburbs.

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As a result of EchoStar's and DirecTV's lawbreaking, viewers in markets such as Meridian, Mississippi, Lafayette, Louisiana, Traverse City, Michigan, Santa Barbara, California, Springfield, Massachusetts, Peoria, Illinois, and Lima, Ohio were watching their favorite network shows not from their local stations but from stations in distant cities such as New York. Since local viewers are the lifeblood of local stations, EchoStar's and DirecTV's copyright infringements were a direct assault on free, over-the-air local television.

When broadcasters complained about this flagrant lawbreaking, the satellite industry effectively said: if you want me to obey the law, you're going to have to sue me. Broadcasters were finally forced to do just that, starting in 1996, when they sued the vendor (PrimeTime 24) that both DirecTV and EchoStar used as their supplier of distant signals. But even a lawsuit for copyright infringement was not enough to get the DBS firms to obey the law: both EchoStar and DirecTV decided that they would continue delivering distant stations illegally until the moment a court ordered them to stop.

The courts immediately recognized -- and condemned -- the satellite industry's lawbreaking. See, e.g., *CBS Broadcasting Inc. v. PrimeTime 24*, 9 F. Supp. 2d 1333 (S.D. Fla. 1998) (entering preliminary injunction against DirecTV's and EchoStar's distributor, PrimeTime 24); *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (permanent injunction); *CBS Broadcasting Inc. v. DIRECTV, Inc.*, No. 99-0565-CIV-NESBITT

(S.D. Fla. Sept. 17, 1999) (permanent injunction after entry of contested preliminary injunction); *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999) (affirming issuance of permanent injunction).

By the time the courts began putting a halt to this lawlessness, however, satellite carriers were delivering distant ABC, CBS, Fox, and NBC stations to millions and millions of subscribers, the vast majority of whom were ineligible city and suburban households. See *CBS Broadcasting*, 9 F. Supp. 2d 1333.

By getting so many subscribers accustomed to an illegal service, DirecTV and EchoStar put both the courts and Congress in a terrible box: putting a complete stop to the DBS firms' lawbreaking meant irritating millions of consumers. Any member of Congress who was around in 1999 will remember the storm of protest that DirecTV and EchoStar stirred up from the subscribers they had illegally signed up for distant network stations.

While Congress properly refused to grandfather all of the illegal subscribers signed up by DirecTV and EchoStar, the two firms ultimately profited from their own wrongdoing when Congress -- having heard an earful of consumer complaints -- enacted legislation in late 1999 providing for limited grandfathering.

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Not only did EchoStar and DirecTV ignore the plain requirements of the Copyright Act for years, but also when courts finally ordered their vendor (and them) to stop breaking the law, they took further evasive action to enable them to continue their lawbreaking.⁹ In particular, when their vendor (PrimeTime 24) was ordered to stop breaking the law, and to ensure that its partners (such as DirecTV and EchoStar) stopped doing so, both DBS firms fired their supplier in an effort to continue their lawbreaking.

When DirecTV tried this in February 1999, a United States District Judge held in open court that DirecTV's claims were "a little disingenuous" and promptly squelched its scheme. *CBS Broadcasting Inc. et al v. DirecTV*, No. 99-565-CIV-Nesbitt (S.D. Fla. Feb. 25, 1999); see *id.* (S.D. Fla. Sept. 17, 1999) (stipulated permanent injunction).

EchoStar has played the game of "catch me if you can" with greater success. Thanks to a series of stalling tactics in court, EchoStar is continuing today to serve large numbers of illegal subscribers. Realizing that broadcasters were about to sue it in Florida, for example, in October 1998 EchoStar filed a declaratory judgment action in its home district -- Colorado -- against ABC, CBS, Fox, NBC, and their Affiliate Associations. The District Court in Colorado (Judge Nottingham) granted broadcasters' request to transfer EchoStar's lawsuit to Florida, finding that EchoStar had engaged in "flagrant forum-shopping." Hearing Transcript, *EchoStar Communications Corp. v. CBS Broadcasting Inc.* (D. Colo. Mar. 24, 1999).

Although EchoStar's stalling techniques have thus far kept it from being subject to any long-term court order to stop its infringements, there is no doubt that EchoStar is continuing to break the law. When EchoStar was (briefly) ordered to start turning off its illegal subscribers in late 2000, for example, it candidly told the Court that it had so many illegal subscribers that it would take a long, long time to turn them all off, even if it turned off 5,000 subscribers per day.

B. The Satellite Carriers' Breach of Faith With Congress on the Local-to-Local Compulsory License

Starting in 1997, EchoStar began urging Congress to enact a new compulsory license that would allow satellite companies to carry local TV stations to local viewers without paying any copyright fees. DirecTV joined in the call for such a law in 1999.

In December 1999, Congress granted the DBS companies' wish in the Satellite Home Viewer Act of 1999 ("SHVIA"): it gave them carte blanche to deliver any TV station within its own market, without paying a penny in copyright fees to the owners of the programming carried on the station. Congress wanted to make sure, however, that the new compulsory license would not harm other stations in the market by putting a barrier -- the DBS firm -- between non-carried stations and many of their viewers.

Congress therefore told EchoStar and DirecTV in the SHVIA that if they wished to use this special new license, they would need -- starting in 2002 -- to carry all of the stations in each market. This simple and equitable principle is called "carry one, carry all."

The DBS firms happily accepted the gift that Congress had given them -- a local-to-local compulsory license. Thanks to that congressional largesse, the DBS firms have grown at a blistering pace since then: DirecTV has expanded from 7.86 million subscribers in November 1999 to 10.3 million today, while EchoStar has grown even more explosively, from 3.25 million in November 1999 to 6.43 million today.

The DBS industry made no secret of the fact that its phenomenal post-SHVIA growth has been largely the result of Congress' decision to make it easy for them to carry local TV stations. The Satellite Broadcasting & Communications Association, for example, said that the industry's "40% subscriber addition growth in 2000 is primarily the result of legislation passed in November 1999 allowing the DBS operators to offer local broadcast channels in markets of their choice."

How did EchoStar and DirecTV show their gratitude for this extraordinary gift? By brazenly seeking to defeat the will of Congress.

Only a few months after the SHVIA went into effect, EchoStar, DirecTV, and SBCA filed a lawsuit demanding that the Court invalidate the "carry one, carry all" principle, on the theory that Congress' generous (and lucrative) gift to the DBS industry somehow had to be even more generous to satisfy the First Amendment.

In effect, the DBS firms demanded that the court rewrite the SHVIA to give them a sweet deal that Congress had emphatically refused them: the ability to use the programming of local TV stations with no copyright fees whatsoever, combined with a free hand to cherry pick a few stations while effectively cutting all other local stations off from DBS households. (Just two

weeks ago, EchoStar and DirecTV filed an emergency motion asking the Court to stay the January 1, 2002 effective date of the SHVIA carry-one-carry-all provisions.)

Luckily, the courts have thus far brushed aside the satellite industry's intense effort to thwart Congress' will. But the lesson is clear: Congress (and the administration) would be foolish to approve a merger to DBS monopoly based on vague promises about future benefits. EchoStar and DirecTV's track record shows that they are perfectly willing to take a government-granted benefit -- here, permission to merge to DBS monopoly -- and then use every available tactic to unravel the terms on which the government granted the benefit.

C. The Satellite Carriers' Relentless Guerrilla Warfare Against "Carry One, Carry All."

EchoStar and DirecTV have not only attacked the principle of "carry one, carry all" on a wholesale basis in the courts, but have sought to sabotage it in their "retail" dealings with local stations requesting carriage. When local stations sent requests to EchoStar in the summer of 2001 asking for carriage, for example, EchoStar sent back crude form letters offering nonsense reasons for rejecting most stations, such as absurd claims that the stations didn't list the city in which they are licensed or that TV towers a few miles away did not provide a strong enough signal.

On its own initiative, the FCC sharply criticized EchoStar form-rejection-letter tactic for failing to "comply with the rule or the Report and Order." In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, CS Docket No. 00-96, ¶ 59, 16 FCC Rcd 1918 (Sept. 5, 2001).

EchoStar's recalcitrance has continued since then: many station owners have been forced to file complaints against EchoStar at the FCC to enforce the carriage rights that Congress granted them. See EchoStar, DirecTV Turn Down Dozens Of Requests For Carriage, Communications Daily (Oct. 19, 2001). Indeed, as press reports reflect, the FCC has been "inundated" by an "avalanche" of complaints that broadcasters were forced to file after being turned away by EchoStar, DirecTV, or both. *Id.*

D. EchoStar's Brazen Decision to Defy Congress and the FCC by Placing Disfavored Stations in "Satellite Siberia"

EchoStar and DirecTV have twice asked the FCC to rule that satellite companies can "satisfy" the carry-one-carry-all rules by relegating disfavored stations to an out-of-the-way satellite that viewers could receive only if they purchased an additional dish. In response, the Commission has twice emphatically rejected that proposal. See *In Re Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, ¶¶ 37-41, CS Dkt. No. 00-96 (released Sept. 5, 2001) (discussing initial rejection of DBS proposal and reaffirming prior rejection).

In an extraordinary slap in the face to Congress and to the FCC, EchoStar has decided to do exactly what the Commission had twice said would be unacceptable: purporting to "satisfy" its carry-one-carry-all obligations by putting disfavored stations on a completely different satellite that requires viewers to obtain new equipment. Specifically, in late December, EchoStar announced that many stations that it was required (starting on January 1, 2002) to offer on a

local-to-local basis would be available only to the tiny fraction of subscribers who obtained a second satellite dish capable of receiving signals from EchoStar's "wing slot" satellites located far over the Atlantic or the Pacific. NAB has been forced to file an emergency petition with the FCC to halt this outrageous practice, and innumerable broadcasters have filed protests with the Commission about it. (Among other things, EchoStar has rendered virtually all local Spanish-language, minority-owned, and religious stations inaccessible to viewers by segregating them on its wing-slot satellites.)

EchoStar has extensive experience with consumer reactions to obtaining local stations from a second satellite dish -- and it knows that consumers view a second dish as posing unacceptable costs, even if EchoStar supposedly offers to install the second dish "for free."^{12/} Indeed, EchoStar has previously told the Commission exactly that.

The pertinent background is as follows: from early 1998 until some time in 1999, and before the enactment of the SHVIA, EchoStar offered local-to-local transmissions of certain local stations (typically the major network stations) to subscribers in several markets.^{13/} At that time, all of the local stations that EchoStar offered were offered as a package, but -- because the package was offered from a "wing slot" satellite -- it required use of a second dish. In at least some cities, EchoStar offered second dishes for free -- just as it purports to be doing now -- except that it actually announced its free offer, rather than trying to keep it a secret.

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EchoStar ultimately abandoned the two-dish method of offering local stations. Before it did so, however, EchoStar candidly admitted to the Commission that, even under ideal conditions -- with a free dish, and with the entire local station package (as opposed to just a few stations) being offered on a second dish -- the two-dish option encountered "substantial consumer resistance," was "unfortunate[]," and "not an attractive alternative":

EchoStar has had to offer a two-dish solution to complement its full-CONUS offering with services from its satellites at 61.5° W.L. and 148° W.L. . . . EchoStar has encountered substantial consumer resistance to the perceived difficulties of installing and maintaining second dishes. . . . [citation omitted] ("As a 'second-best' solution to this problem of orbital scarcity, EchoStar has been offering limited local-into-local service through the use of half-CONUS satellite capacity. This requires the use of multiple dishes, and will thereby be more difficult to market as a convenient alternative to cable."); [citation omitted] ("EchoStar currently offers local programming through its satellites at 61.5° W.L. and 148° W.L. This arrangement unfortunately, requires customers to install a second dish in order to receive local programming. While some customers have embraced the two-dish system, others have found it to be cumbersome and difficult, despite EchoStar's offer to install the second dish free of charge. To date, the two dish solution has not proven to be a particularly attractive alternative to cable.") (citations omitted.)

[EchoStar] Petition to Deny, In Re Tempo Satellite, Inc., File No. SAT-ASB-19990127-00014 at 3 n.4 (filed March 5, 1999) (copy attached as Appendix A) (emphasis added).

Despite all this, at the FCC right now, EchoStar is aggressively defending its "right" to discriminate against local stations that it does not like by placing them in second-dish Siberia. And as discussed below, EchoStar is reserving the right to fulfill its "210-market" promise in this

same, grossly discriminatory manner -- which makes a mockery of the carry-one-carry-all principle that Congress embodied in the SHVIA. Given this duplicity, it would be irresponsible to treat EchoStar's eleventh-hour "210-market" promise as though it had any real-world meaning.

E. EchoStar's "Abuse of the Commission's Processes" About Retransmission Consent

EchoStar has brought the same abusive approach to the arena of retransmission consent -- the process by which DBS firms obtain permission from those local stations that the DBS firms do wish to carry. EchoStar's approach has been simple: if it is unable to make a retransmission consent deal with a station, it automatically -- as punishment -- files an FCC complaint alleging that the station had failed to bargain in good faith.

One broadcaster victimized by this practice was Young Broadcasting, Inc., which owns local TV stations in several markets. On August 2, 2001, the FCC's Cable Services Bureau rejected EchoStar's retransmission consent complaint against Young Broadcasting as unfounded. In *re EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, File No. CSR-5655-C, ¶32, at 15 (Aug. 6, 2001). Not only did the Commission reject EchoStar's complaint, but the FCC Bureau found that EchoStar had engaged in misconduct that the Bureau could not "excuse." The FCC Bureau chastised EchoStar for "abuse of process" and cautioned EchoStar "to take greater care with regard to future filings" (id. at 16), finding further that "EchoStar failed in its duty of candor to the Commission" by publicly disclosing portions of the documents for which it sought strict confidentiality in Commission proceedings. (Emphasis added.)

The FCC's Bureau held that "EchoStar's conduct in filing material with the Commission requesting confidentiality, while concurrently engaging in a public debate over the issues raised in this proceeding and publicly disclosing selected portions of the alleged confidential material, constitutes an abuse of the Commission's processes." Id. (emphasis added).

Again, the lesson is clear: it would be foolish to expect a monopoly DBS firm to obey the law and comply with legal processes when the company that would own the monopoly firm (EchoStar) has never done so in the past.

III. BROADCASTER CONCERNS WITH THE PROPOSED MERGER

Local-To-Local Service

EchoStar's "promise" to provide local-to-local service in all 210 markets does not resolve NAB's concerns

Perhaps the most perceptive comment about EchoStar's 11th-hour promise to offer local-to-local in all 210 markets has been made by Bob Shearman, the editor of a leading trade publication about the satellite industry: EchoStar's announcement is "a very shrewd political Hail Mary with no downside because it's unenforceable."

In one sense, EchoStar's new "Hail Mary" promise is no surprise -- as the NAB has always maintained, either company individually has the capacity to serve all 210 markets, and the combined company would obviously have the ability to do so. But what is notable is the

lightning speed with which EchoStar has reversed field: as of December 2001, EchoStar told the FCC that the combined firm could serve only 100 markets, but now -- facing the prospect that its merger to DBS monopoly will be rejected by the authorities -- it has suddenly "found" sufficient capacity.

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So what, if anything, has changed with Mr. Ergen's latest move? We now have a paper "commitment" from Charlie Ergen that after EchoStar has gotten what it wants -- the opportunity to swallow its competitor and become a DBS monopolist -- and after it is much too late to undo the merger, New EchoStar will supposedly offer local-to-local in all 210 markets.

Does it make sense to place any faith in this "promise"? The carefully hedged manner in which EchoStar has made this "commitment" -- and broadcasters' consistent bitter experience with EchoStar's bad faith maneuvering in the past -- shows that it does not.

First, the "210 markets" promise is nothing more -- only a promise. It is not a legally enforceable obligation -- and even if it were, EchoStar has shown that it will exploit every conceivable mechanism to avoid complying with legal obligations that it considers inconvenient at the moment. Since EchoStar is perfectly willing to defy federal statutes and regulations, there is no reason to expect it to live up to a mere unilateral promise, particularly when EchoStar will have achieved the benefit (merger approval) that it sought to achieve by making that promise.

Second, EchoStar has carefully avoided making any commitment about when it will offer local-to-local service in all markets. All of its new FCC filings contain ambiguous phrases like "as soon as two years after approval" -- words intended to give it all the wiggle room it needs to delay providing local-to-local in smaller markets for as long as the monopoly DBS firm likes, which may be a long, long time.

Third, and perhaps most significant of all, EchoStar is reserving the right to segregate some local stations on "wing-slot" satellites that can only be viewed if the subscriber obtains a second satellite dish. As discussed below, this tactic completely guts the carry-one-carry-all rule that Congress embodied in the SHVIA -- and EchoStar is aggressively defending its right to use this statute-destroying technique as part of its "210-market" promise.

A careful reading of the DBS firms' latest FCC filing reveals classic EchoStar game playing. Early in the filing -- in the part that EchoStar expects to be widely read -- EchoStar tries to create the impression that it will make all local stations in all markets available to customers with "one consumer-friendly mini-dish."^{16/} Far back in EchoStar's filing, however, the truth comes out: EchoStar tells the Commission that it "should reject attempts . . . to impose a special condition on the combined company that it carry all its 'must-carry' stations so that they are received on the same dish."

^{17/} That is, EchoStar insists on being able to carry out its "210-market" promise in a manner that -- as discussed in detail above -- makes the promise meaningless.

To sum up: EchoStar has now made an unenforceable promise to carry the local television stations in all markets at some indefinite time in the future, and with the threat to render many

local stations effectively unviewable by stranding them on satellites that require consumers to install a second satellite dish. Given the emptiness of this "promise" -- and the many other fatal problems with the merger that this promise does not purport to address -- NAB remains opposed to the merger.

Capacity for local-to-local without the merger is not an issue.

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 all 210 TV markets. A merger is not necessary to produce such a result because currently each provider strives to "leapfrog" the other in offering new service to different markets. With a merger, this incentive disappears. 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. It is precisely this competitive "fear" that has led to the current level of local-to-local service.

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(a) 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).^{19/} With the same amount of channel capacity, therefore, the DBS firms will be able to serve significantly more small markets than large markets.

(b) 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.^{20/} And by taking advantage of readily available technological advances, each company will be able in the future to greatly expand its ability to deliver even more television programming.

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(c) Satellite Capacity Is Constantly Increasing Through Technological Innovation

Although the analysis above shows that the two firms individually have ample capacity to deliver local-to-local in all 210 markets, 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."

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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. 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 has shown, they were correct.^{23/} 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 achieved a reuse rate of 7.33 with its first spot-beam satellite^{24/} - which is almost 50 percent higher than the 5.0 reuse rate that EchoStar originally planned to achieve with its two spot-beam satellites.^{25/} 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 110° W.L. and 119 ° W.L. orbital locations."

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(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.^{27/} Although the two firms say that they expect to achieve a 12:1 compression ratio with existing hardware,^{28/} their Engineering Statement, inexplicably, assumes a much too low compression ratio of only 10:1 when calculating how much capacity each firm has separately.^{29/} 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.^{30/} Second, both DIRECTV and EchoStar now state that they "expect" their own compression ratios to be at least 12:1.^{31/} 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.^{32/} - has stated that using the type of digital compression equipment it has sold to DIRECTV, the compression ratio is actually between 12:1 and 14:1.^{33/} 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 through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."^{34/}

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"^{35/} -- 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.

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.

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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.

3. 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. 37/ 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 ventures or other limited arrangements to develop, produce, or market new products.^{38/} 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.

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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.)^{40/} 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 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?^{41/}

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.^{42/} 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.

B. Retransmission Consent

In addition to the concerns regarding local-to-local service, broadcasters would also be at a disadvantage with a merged EchoStar/DIRECTV when it comes to negotiating carriage.

Broadcasters will be harmed because in monopoly markets they will face a monopolist 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.

C. 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.^{43/} 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.^{44/}

Even if a uniform national price were instituted and could be enforced (which it could not be), consumers in monopolized MVPD markets will pay somewhere between a monopoly price and a duopoly price. EchoStar will logically sacrifice some subscription revenue in 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."^{45/} This position is supported by a recent DBS industry study that found that DBS households were more likely to switch to a different DBS provider than to any other MVPD provider.^{46/} 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 - an Economist retained by

NAB - 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.^{47/}

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 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.^{48/} Such actions are harmful to consumers who will be denied access to this local programming.

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 - Professor Robert D. Willig - 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.^{49/}

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.^{50/} Professor Willig was apparently not advised that (1) EchoStar itself was responding to a DIRECTV promotion announced the previous day,^{51/} 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.^{52/}

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 not aggressively competing [with DBS] on price."^{53/} 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.^{54/} 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.^{55/} 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.

CONCLUSION

EchoStar's proposal to acquire its only DBS competitor would create a monopoly MVPD giant for many millions of Americans, would (at best) reduce consumer choices from three to two for all other Americans, and would snuff out the head-to-head competition between EchoStar and DirecTV that has led to the rapid rollout of local-to-local in many markets and would lead to further expansion of local-to-local in the future. In place of competition, EchoStar, one of the least trustworthy companies with which broadcasters have ever dealt, offers only its own unilateral promises -- which, when read carefully, promises virtually nothing. For all of these reasons, NAB remains opposed to the proposed merger of DirecTV and EchoStar.