Testimony of

The Honorable Jeremiah W. Nixon

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The only two competitors for consumers of multichannel video programming in certain markets not effectively served by cable seek to merge into a single entity, leaving those consumers at the complete mercy of a perfect monopolist. Even in the other parts of the country where consumers may avail themselves of a cable alternative, the result of the proposed merger would be a duopoly. Barriers to entry are extremely high. For a new DBS competitor to enter this market to discipline prices and encourage better service would require an extraordinary investment of many hundreds of millions to build, launch and insure a satellite and more to provide the ground systems, advertising and other expenses necessary to begin a DBS business from scratch. In addition, any new entrant would be required to obtain all appropriate licenses from the Commission. No court has ever approved a merger to duopoly under similar circumstances.1

In 1998, the U.S. Department of Justice sued to enjoin the transfer of the Full CONUS Orbital Slot located at 100° W.L. from ASkyB to PrimeStar, claiming that the transaction would reduce the number of competitors in rural MVPD markets from four to three, i.e., from EchoStar, Hughes-DIRECTV, PrimeStar and ASkyB to just EchoStar, Hughes-DIRECTV and PrimeStar. The Justice Department also claimed that the merger was illegal in urban MVPD markets, where Cable Television and satellite services were available, typically reducing the number of MVPD competitors from five to four. If a four to three and a five to four merger was wrong then, it stands to reason that in the same market just a few years later, a two to one and three to two merger is wrong.

The Proposed Merger Creates a Perfect Monopoly in Areas of the Country Not Effectively Served by Cable - Mostly Rural Areas.

Hughes, through its DIRECTV unit, owns 61.7% of the market for direct broadcast satellite (DBS) service, while EchoStar has 38.3% of that market.2 Together, they would create a monopoly in DBS. That monopoly extends to MVPD for a significant number of consumers. According to EchoStar "millions" do not have access to cable and broadcast.3 For all of these mostly rural households, the options will be reduced from two competitors to one. The merger will leave rural Americans with only one choice for multichannel video programming distribution (MVPD). Rural businesses that depend upon the services provided by satellite will also be subjected to a monopolist should the merger go through and the license transfers be approved. The perfect monopoly that will be created in many areas of the country and the unavoidable and foreseeable consequences of that monopoly cause me to oppose the merger.

Charles W. Ergen, Chairman and Chief Executive Officer of EchoStar, himself admitted that there is a problem with this deal especially in rural communities. He said, as reported in a recent article, "If the market is satellite only, then I wouldn't approve this deal. It's going to be a nonstarter."4 In various rural MVPD markets where cable does not pass or effectively serve homes, the relevant MVPD market is satellite only and therefore it creates significant antitrust issues, even in the eyes of EchoStar's CEO.

Another problem associated with this acquisition is the reduction in competition in emerging technologies such as broadband Internet. There is a terrific disparity between urban and rural areas for this technology.5 Allowing this acquisition would leave rural households even further behind urban areas for this increasingly important and popular service. The absence of competition for satellite delivered high-speed Internet service will stymie the development and availability of content for this emerging service. Increasingly, this technology is used to provide coverage of important local, state and federal governmental meetings and information. It also provides access to entertainment avenues such as sporting events, music, movies and movie trailers. Videoconferencing is an increasingly important way for business to be transacted; high-speed Internet access is important for this business tool to be available.

Other technologies cannot be counted on to gain acceptance or penetration in order to discipline prices and services through competition. In recent years, there has been talk of new technologies that would allow some of these services to be provided through telephone lines and other avenues. These options have yet to materialize with any significant degree of penetration.

The Proposed Merger Creates a Duopoly in the Rest of the Country

Even in areas where cable is an option for MVPD, the acquisition would result in only two options where there had once been three. Such a reduction in competition is unacceptable. Three-to-two mergers are nearly always anticompetitive and the efficiencies and advantages claimed thus far by the merging parties do little to assuage the concerns recognized by federal court precedent and reflected in the NAAG Horizontal Merger Guidelines and the FTC and DOJ Horizontal Merger Guidelines.

Moving beyond what may be the effect in rural communities, this merger presents difficult issues with regard to the rest of the country. Assuming that DBS competes with cable, the proposed merger would create a duopoly for MVPD in areas of the country served by cable. In most communities where cable is an option, there is a single cable operator and two DBS providers. Post-merger there would be only two options for consumers - a duopoly. Mergers to duopoly are rarely, if ever, approved. A problem with a duopoly is the presumption that increases in concentration will increase the likelihood of tacit collusion.6 In a duopoly there is a real danger of supracompetitive pricing at monopolistic levels.7 Where there is a duopoly and high barriers to entry, there is the opportunity and every incentive to collude to increase prices.8 Therefore, not only is the proposed merger a problem in the markets where cable is available but the promise by EchoStar to price nationally based upon its price in the areas where it enjoys a duopoly only assures that the potential for supracompetitive pricing will extend to the rural areas where it holds a monopoly. Merger policy has at its core the goal to "obstruct the creation or reinforcement by merger of such oligopolistic market structure in which tacit coordination can occur."9

EchoStar's Efficiency Arguments are Irrelevant and Factually Inaccurate

EchoStar argues that only through this proposed merger can it increase the capacity to the level necessary to provide the services consumers desire, high speed internet access, local-into-local in all markets, and additional programming. The technology exists for such increased capacity today.10 Even so, vigorous competition is the most assured way to achieve creative and swift innovation. With only a single actor in the market, any technological advances are left to the self interest of the monopolist. There is no incentive for the monopolist and only slightly more for the oligopolist to invest in the research and development necessary to develop and deploy innovative technological advances. In any event, competition, not consolidation, is the best way to achieve the innovation necessary to expand capacity. With more than one or two competitors working diligently toward technological advances, they are more likely to occur and to occur more rapidly than if only a few are engaged in such activity. Consumers then get what they desire, the programming and access to technology through several different providers competing for consumers. Without such competition, the consumer will have no option when faced with a monopolist or only two duopolists who don't have the same incentives as they would have in a competitive market to provide the lowest price, best service and ever increasing technology.

The parties argue that only through the proposed merger will they be able to provide the high-speed internet access consumers desire. They claim the technology does not exist to provide the spectrum needed for broadband services. Yet both companies currently provide such service through EchoStar's StarBand and DIRECTV's DIRECWay product. Both services are provided on the Ku-Band. In addition, both companies include deployment of Ka-Band services in their separate business plans. A very significant number of consumers in different sections of the country have only satellite providers as their source for broadband services. For these consumers, DSL and cable are not an available alternative. If the merger is consummated, one company will control the price, quality and technology for this important service.

EchoStar has advanced several reasons why it believes this proposed merger will garner certain efficiencies claimed to be beneficial to consumers that trump any competitive concerns. But there is no proof that these efficiencies are merger specific. Under the antitrust laws, when merging parties argue that a merger may result in certain efficiencies, the efficiencies must be merger specific.11 In other words, it is not enough to show that there are efficiencies, the efficiencies must be available only because of the merger. For instance, when EchoStar announced the merger and filed the necessary FCC applications, it argued that only with a perfect monopoly in DBS will it be able to expand such service into as many as 100 markets. A similar claim was made in the unsuccessful challenge to the Carry One, Carry All requirement in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").12 In that case, the United States relied upon technical analysis that showed that EchoStar and DIRECTV each individually could serve all local broadcast channels to subscribers in all DMAs using a small portion of their respective current transponder capacity.13 It is interesting that with the motivation to get this deal approved, the executives and their engineers were able to find a way to provide local into local into 210 markets.

It should be noted that all of these claims regarding the ability of the two satellite companies to efficiently use their capacity to comply with the Carry One, Carry All requirement were fully presented before Congress within the context of hearings on the proposed legislation. Congress recognized that satellite technology is improving and heard from satellite company executives regarding plans to develop spot beam satellites so that spectrum frequencies can be reused in order to increase capacity to provide local-into-local in more and more markets.14 With this evidence in hand, Congress elected to adopt its regulation knowing the present day limitations and the continuing advancements being made in technology. In fact, one reason Congress delayed implementation of § 338 was to allow for some additional time for satellite carriers to develop the new technology about which they had testified.15 With full knowledge of the state of competition at the time and after giving full hearing to all market participants, Congress determined that despite any capacity constraints it would be in the public interest to preserve local stations by enacting SHVIA. Congress knew at the time that not all markets would be fully served at the outset and that local-into-local would expand gradually from larger markets to smaller over time. Congress enacted SHVIA to stimulate competition along with all its consumer benefits.16 It cannot be the subject of rational debate then that Congress intended for its Carry One, Carry All to be used as an excuse to reduce the very competition it had hoped to advance.

EchoStar's Proposed Fixes Will Not Work and Call for Undesireable Regulation

EchoStar's promises, assurances and alleged commitments are poor substitutes for direct and vibrant competition. According to EchoStar's economist, "EchoStar is committed to providing more diverse programming, and more advanced services." and "New EchoStar has committed to maintaining its policy of uniform national pricing for its programming."17 EchoStar by presenting these arguments invites the government to regulate it indefinitely. In order that consumers can be assured that New EchoStar's commitments will be honored for all time, it will be necessary to establish which government agency will regulate, the appropriate measure of the competitive price and how terms such as quality, programming, service and equipment are monitored. It is no real assurance that, in the words of EchoStar's own economist, "rural customers would likely be no worse off following the merger" or that they "may benefit from more intense competition between New EchoStar and cable companies."18 It is disheartening that EchoStar's argument is not that rural consumers interests will indeed be advanced but that they may benefit and will be no worse off than before.

EchoStar realizes that there is an especially significant antitrust problem with this proposed merger in rural areas not passed by cable or where cable is otherwise not a viable option. Attempting to address this concern, EchoStar offers to continue a policy of national pricing. Under their proposal, they would consent to offering DBS services at the same price to all consumers whether or not cable is a viable option. EchoStar argues that this should resolve all concerns about subjecting a significant portion of the population to a monopolist. Not only is this proposal an admission that the merger would create a monopoly in certain parts of the country, it fails to address all of the anticompetitive concerns and raises additional problems.

First, the underlying difficulty is not avoided by the national pricing proposal. Approving the merger and the license transfers would hand a significant portion of the country's consumers over to a monopolist. Second, the proposal assumes that a duopoly price is a competitive price and that there will be no collusion between the duopolists. Third, EchoStar's promise does not account for the fact that prices in areas where DBS competes with cable may be artificially increased on the backs of the captive rural consumers. Fourth, it further entrenches the way of business that focuses technology and programming efforts on urban areas over rural. Since the company's profit margin principally will be determined by the urban price and services provided there, including programming, there will be little incentive to provide the type of programming and services desired by consumers residing in the country-side. For example, if rural consumers who only have access to DBS for MVPD, desire program X and program X is not popular in the city, there is no incentive for the sole DBS carrier to carry program X at all. However, if there are more than one DBS provider trying to attract that rural population, one or both will feel compelled to provide program X. Fifth, EchoStar's proposal calls for government regulation - for all time. For these reasons, national pricing does not resolve the concern that the interests of citizens and businesses in rural communities not adequately served by cable will be undercut by this merger to monopoly.

Not only is a promise of uniform pricing insufficient to assuage legitimate concerns, it will not adequately be constrained by any means. EchoStar's argument that cable rates will constrain New EchoStar's national pricing[19] is directly contradicted by assertions it made in EchoStar Communications Corporation v. DIRECTV Enterprises, Inc., Civ. No. 96-4963. In that case, EchoStar averred that EchoStar is DIRECTV's closest competitor, that consumers do not view cable as an effective substitute for high-power DBS services, that EchoStar and DIRECTV react primarily to each other when setting equipment and service prices, and that millions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and EchoStar, there is no competition at all.[20] EchoStar's court-filed statements show that the two DBS companies establish prices based upon the competition between them and not so much with cable and that consumers in rural areas of the country not passed by cable or otherwise not sufficiently served by cable will be subjected to an unrestrained monopoly if one of the two are eliminated from the market. Accepting as true EchoStar's own arguments, there can be no faith that the assurances offered today will in any way protect those consumers. That faith is further shaken by Mr. Ergen's own statements about the nature of the national pricing promise. He indicated in response to questions on the subject that his promise would make allowances for New EchoStar to respond to local promotions or rebates by cable.[21]

It is anathema to the standards of our federal system and the principles of antitrust laws to benefit some fortunate enough to have a cable alternative on the backs of those who have been denied access to cable and are therefore captive to a potential perfect monopolist for DBS services. Where there are anticompetitive effects in one area of the country, the parties cannot justify the merger by claiming procompetitive effects in another.[22]

Conclusion

I oppose this merger because it would create a monopoly for MVPD for a significant number of Americans. There are now two firms competing for that business and after a merger there would be just one. In Missouri, all consumers in one-third of our households would have only one option for MVPD and high-speed internet access. My responsibility is to enforce the antitrust laws in order to protect all citizens in my state from mergers that would reduce competition.

The Clayton Act does not allow a merger when the effect "may be substantially to lessen competition, or tend to create a monopoly." We know from years of experience that a lessening of competition equals a lessening of innovation. Prices will be higher and there will be lower quality and service. If the merger is allowed, technology advances necessary to drive the same phenomenal increases in capacity we have seen in recent years will not be developed. EchoStar wants to get the capacity the quick and easy way, from eliminating a competitor, rather than to innovate for it. For short term gains in capacity, we would be sacrificing increases in technology that will take us beyond new frontiers if we ensure vibrant competition. In addition, we would be allowing these short term gains that benefit shareholders on the backs of consumers who would be subjected to a monopolist.

Mr. Ergen's promises to price nationally and to rebroadcast local-into-local channels across the nation are concessions, but they do not address the core concerns. They do not resolve the basic problem with a merger to monopoly or to duopoly which is that a significant reduction in competition will inevitably lead to higher prices, lower quality, reduced programming options and, perhaps most importantly in this industry, slow or no technological innovation. Furthermore, both of the proposals call for undesirable government regulation of a new type that would not be necessary if competition is preserved.