

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CASE NUMBER 1:02CV02138

JUDGE: Ellen Segal Huvelle

DECK TYPE: Antitrust

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Defendants.)
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COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, and the states of Missouri, Arkansas, California, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Mississippi, Montana, Nevada, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wisconsin, the District of Columbia, and the Commonwealth of Puerto Rico (“Plaintiff States”), acting under the direction of their respective Attorneys General, or other authorized officials, bring this civil action to enjoin the merger of the two most significant direct broadcast satellite (“DBS”) companies in the United States, Echostar Communications Corp. (“Echostar”) and Hughes Electronics Corp. (“Hughes”), and allege as follows:

1. Over 80% of households in the United States subscribe to a multichannel video programming distribution (“MVPD”) service such as DBS or cable. Such services provide consumers with dozens, and in many cases hundreds, of video channels including well-known ones like CNN, ESPN, TNT, and HBO.
2. Hughes’ DirecTV DBS service and Echostar’s Dish Network DBS service are the only two nationwide MVPD services; each offers hundreds of channels to customers equipped with small satellite receiver dishes. For most U.S. households, Hughes and Echostar are two of only three providers of MVPD services, with a local cable system providing the third option.
3. For millions of U.S. households, there is no cable option; for these consumers, Hughes’ DirecTV DBS service and Echostar’s Dish Network DBS service are the only available MVPD services.
4. Hughes and Echostar compete vigorously against each other throughout the United States

as well as against cable companies in areas that have cable. As a result of the competition between Hughes and Echostar, customers have benefitted from lower prices and higher quality service.

5. The proposed acquisition of Hughes by Echostar would cause significant harm to competition in numerous local markets for MVPD services throughout the country. For millions of households this merger would create a monopoly. For tens of millions of households in the United States, this merger would create a duopoly. The combination of the nation's only two DBS firms would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. For the roughly 95% of U.S. television households that currently have three or fewer options for MVPD service, this merger would lead to higher prices and lower service quality than would be the case absent its consummation. The United States and the Plaintiff States therefore seek an order permanently enjoining the merger.

I. JURISDICTION AND VENUE

6. This action is filed by the United States under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain the Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.
7. The Plaintiff States bring this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain the violation by the Defendants of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Plaintiff States, by and through their respective Attorneys General, or other authorized officials, bring this action in their sovereign capacities and as *parens patriae* on behalf of the citizens, general welfare and economy of each of their states.

8. Echostar, Hughes, General Motors Corp. (“GM”), and DirecTV Enterprises, Inc. (“DirecTV”) are engaged in interstate commerce and in activities substantially affecting interstate commerce. Echostar and Hughes market and sell MVPD equipment and services throughout the United States. Echostar and Hughes sell their equipment and MVPD services directly to consumers, and also engage in commerce with third party distributors, retailers, and installers across state lines. Echostar's and Hughes' sales and commercial relationships in the United States, and in each of the Plaintiff States, represent a regular, continuous and substantial flow of interstate commerce, and have had a substantial effect upon interstate commerce as well as commerce in each of the Plaintiff States. The Court has jurisdiction over this action pursuant to Sections 15 and 16 of the Clayton Act, 15 U.S.C. §§ 25, 26, and 28 U.S.C. §§ 1331, 1337.
9. Echostar, Hughes, GM, and DirecTV transact business and are found in the District of Columbia. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c).

II. THE DEFENDANTS AND THE TRANSACTION

10. Echostar is a corporation organized and existing under the laws of the state of Nevada. Its Chairman and CEO, Charles W. Ergen, is also its largest shareholder, through a family trust owning a 49.8% equity interest and a 90.8% voting interest. Echostar launched its Dish Network DBS service (“DISH”) on March 16, 1996. In the six years since it began offering DBS service, Echostar has grown to roughly 7.5 million subscribers (as of June 30, 2002). In 2001, it generated in excess of \$4 billion in revenue.

11. Hughes is a corporation organized and existing under the laws of the state of Delaware.

It is a wholly-owned subsidiary of GM, a corporation also organized and existing under the laws of the state of Delaware. Hughes owns all of the issued and outstanding stock of DirecTV, another corporation organized and existing under the laws of the state of Delaware, which operates the DirecTV DBS service (“DTV”). The DTV service was launched on June 17, 1994. In the eight years since then, DTV has grown to 10.9 million subscribers (as of September 30, 2002). Hughes also operates the nation’s largest high-speed, satellite-based Internet access service under the DirecPC and Direcway brands. Within the next year or so, Hughes plans to launch a next-generation satellite Internet service called Spaceway. In addition, Hughes operates DSL broadband Internet service under the DirecTV DSL brand. In 2001, Hughes generated \$8.2 billion in revenue, of which \$5.6 billion was generated by its U.S. DTV operations.

12. Pursuant to an Agreement and Plan of Merger dated October 28, 2001, as well as several related agreements, GM agreed to sell Hughes, the parent of DirecTV, to Echostar in a deal that was then valued at roughly \$26 billion in cash and stock. The resulting merged entity would assume the Echostar corporate name and would use the “DirecTV” brand for its DBS service offering. Charles Ergen would be Chairman and CEO of the newly merged company and, through a family trust, would hold approximately 16.7% of the total shares of outstanding common stock (and an approximate 39% voting interest).

13. On December 3, 2001, the Defendants filed an application for the transfer of control of various licenses issued by the Federal Communications Commission (“FCC”) that would be necessary for the merged firm to conduct its business. Unless and until their FCC

application is granted, the Defendants cannot consummate the merger. On October 10, 2002, the FCC, citing substantial competitive concerns with the transaction, announced that it was noticing the license transfer application for a hearing. This hearing is not expected to be completed for a minimum of several months.

III. THE RELEVANT MARKET

A. Historical Background and Description of the Product

14. Satellite television service provided directly to the home has been available since the late 1970s. The first such services were provided in a range of the electromagnetic spectrum known as “C-band.” The low-power C-band signal requires large receiving dishes measuring four to eight feet in diameter. The size and cost of the dishes has been a barrier to widespread marketplace acceptance of C-band service. Use of C-band service has been declining substantially in recent years as existing customers replace their larger dishes with smaller, less expensive DBS equipment.
15. The next satellite TV technology to emerge after C-band was medium-power service. A medium-power service requires a smaller dish than does C-band service, but a significantly larger receiving dish than those currently used by DTV and DISH. A joint venture of several of the nation’s largest cable companies known as Primestar launched the only commercially significant mass market medium-power service in 1991. Hughes purchased Primestar in 1999, converted its customers to its DTV DBS service, and shut down the medium-power service. No other commercially significant medium-power service has ever been launched in the United States, nor is any such launch anticipated today.

16. The current generation of DBS services--those operated by Hughes (DTV) and Echostar (DISH)--are typically referred to as “high-power” services. Receiving dishes for these DBS services are significantly smaller than the medium-power dishes, typically 18-24 inches in diameter. As with the older satellite services, to subscribe to a DBS service a consumer must also acquire a set-top box that decodes the signal from the antenna and displays it on the customer’s television set.
17. The spectrum allocated for high-power DBS service is limited by international treaties, and the FCC is responsible for assigning all U.S. satellite orbital positions and frequencies. Only three orbital slots have signal footprints that allow a high-power DBS satellite to transmit programming to the entire continental United States (excluding Alaska). These three slots are referred to as full-CONUS slots. Thirty-two transponder frequencies are available at each orbital slot; thus, in total there are 96 full-CONUS frequencies available. Each frequency can carry multiple channels (e.g., HBO, ESPN). Due to technological improvements, the number of channels that can be carried per frequency has increased substantially over the years. Although high-power DBS service can also be offered from non-full-CONUS slots, these slots are substantially less desirable for a mass-market DBS service because they do not cover the entire continental United States.
18. In June 1994, Hughes and United States Satellite Broadcasting, Inc. (“USSB”) began offering the nation’s first high-power DBS service utilizing the 32 frequencies they controlled. DTV signed up nearly one million subscribers in its first year. As part of a 1994 contractual arrangement, DTV is exclusively promoted and sold by the National

Rural Telecommunications Cooperative (“NRTC”) in certain rural regions of the country.

Pegasus Communications Corp. is the NRTC’s largest affiliate reselling DTV.

19. In March 1996, Echostar began offering its DBS service, DISH, utilizing the 24 frequencies it controlled.
20. Both Hughes and Echostar were successful with their respective DBS services, experiencing steady and consistent growth. By January 1998, DTV had more than three million subscribers, and DISH had more than one million subscribers.
21. As of the beginning of 1998, five companies controlled the 96 full-CONUS DBS frequencies: Hughes/DirecTV, Echostar, USSB, ASkyB (a joint venture of MCI/Worldcom and News Corp.), and Tempo Satellite, Inc. (“Tempo”). Over the next 18 months, Hughes bought USSB and Tempo, and Echostar acquired the ASkyB licenses. These transactions substantially increased the number of full-CONUS frequencies available to Hughes, and more than doubled the number of full-CONUS frequencies available to Echostar. By mid-1999, all 96 full-CONUS slots available for DBS service in the United States were in the hands of just two firms--Hughes (46) and Echostar (50)--a situation that continues to this day.
22. By late 1999, DISH had grown to more than three million subscribers, and DTV had grown to more than 5.5 million. Until late 1999, both DBS firms were effectively precluded by legal obstacles from offering local broadcast channels to their subscribers via their DBS satellites. Thus, if DBS customers wanted to receive local stations, they either had to receive them via broadcast antennas or from their cable company. In November 1999, the Satellite Home Viewer Improvement Act was signed into law, eliminating the legal obstacles to the provision of local broadcast stations via satellite.

Within days, Hughes and Echostar began offering local broadcast stations in the largest television markets in the United States, providing further impetus to their competitive success.

23. The past few years have seen continued substantial growth for both DBS firms. They have continued to add subscribers at an average rate of more than one million a year. Indeed, in the year or so since the proposed merger was announced, DISH alone has added more than one million additional net subscribers. Today, DTV has more than 10.9 million subscribers, and DISH has more than 7.5 million. Hughes and Echostar each has grown to become among the largest five MVPD firms in the United States.

B. Relevant Product Market

24. The relevant product market affected by this transaction is multichannel video programming distribution (“MVPD”)--a term frequently used in the industry and by the FCC. Although the programming can in theory be delivered via a number of distinct methods, the only firms to experience a significant degree of commercial success are those distributing programming via digital or analog cable, or direct broadcast satellite.
25. Among the characteristics of an MVPD service are: (1) a large number of channels, typically between several dozen and several hundred; (2) programming not available “over-the-air” including a mixture of “basic” services (e.g., ESPN, CNN, USA, TNT), as well as premium services (e.g. HBO, Showtime, Cinemax); and (3) a monthly subscription fee for programming.
26. MVPD providers typically offer a wide variety of “tiered” programming packages and “a la carte” services. These tiers generally include: (1) one or more “basic” and/or “expanded basic” packages which include a variety of “core” programming channels

available for a monthly fee; and (2) “premium” or “pay” services that include networks available on a per-service basis such as HBO and Showtime. Many MVPD providers offer additional services such as electronic program guides and pay-per-view events for which viewers can see a recent movie or live sporting event by paying a one-time fee. Cable firms typically include local over-the-air television signals as part of their “basic” offering. For the two DBS firms, local broadcast channels are available via satellite to a majority of households in the country for an additional monthly fee.

27. Cable television and DBS are both MVPD products. Although the programming services are delivered via different technologies, and there are important differences between cable and DBS, consumers view the services as similar and to some extent substitutable. Cable and DBS compete by offering similar packages of basic and premium channels for a monthly subscription fee. Cable is differentiated: many systems are “digital” systems (or are in the process of converting to digital) with hundreds of channels that make them good substitutes for DBS, whereas others are older “analog” systems that are more distant substitutes.
28. Standard over-the-air broadcast television does not include the variety of programming services that are available to MVPD subscribers: it does not provide nearly the number of channels; it does not provide access to popular services such as ESPN, CNN, TNT; and it does not permit access to premium services such as HBO or Showtime. Thus, most consumers do not consider broadcast television an acceptable substitute for cable and DBS services. Accordingly, even though they can receive over-the-air stations for free, customers are willing to pay a significant sum--several hundred dollars a year--for MVPD service. Indeed, over the past several years, despite the fact that prices for

MVPD service, particularly cable, have increased significantly, the percentage of households subscribing to such service has actually also increased. The FCC reported that as of June 2001, over 85 million U.S. households (more than 80% of total households) subscribed to an MVPD service. In the event of a small but significant price increase by cable and DBS providers of MVPD, the increase would not be made unprofitable by customers switching to over-the-air television.

29. C-band satellite services are not an acceptable substitute for cable or DBS for the vast majority of American consumers due to the size of the necessary equipment (four to eight feet in diameter) and cost of owning C-band systems. C-band subscribership has declined from a peak of 2.3 million in 1995 to around 750,000, and it is still shrinking. During roughly the same time frame, DBS subscribership has gone from under one million to over 18 million. C-band is not a significant competitive constraint on cable or DBS today: a small but significant price increase for cable and DBS services would not cause a sufficient number of customers to switch to C-band so as to make the increase unprofitable.

C. Relevant Geographic Market

30. Consumers purchasing MVPD services select from among those companies that can offer such services directly to the consumer's home. Because DTV and DISH both are satellite-based services operating from full-CONUS satellite locations, they can reach any customer in the continental United States with an unobstructed view of the satellite. However, cable system operators generally must obtain a cable franchise from local, municipal, or state authorities in order to construct and operate a cable system in a specific area and, in fact, build wires out to the homes in that area. Consumers cannot

purchase MVPD services from a cable firm operating outside their area because that firm does not have the authority to run wires to the consumer's home. Thus, although the set of MVPD providers able to offer service to individual consumers' residences generally is the same within each local community, it differs from one local community to another. For ease of analysis, therefore, it is useful to aggregate consumers who face the same competitive choices in MVPD providers, for example by aggregating customers in a county or other jurisdiction served by the same cable system, or by no cable system.

31. Thus, the United States comprises numerous local geographic markets for MVPD service, each consisting of a community whose members face the same competitive choices. In each, customers can choose from either DTV or DISH. In most markets, a local cable operator provides a third option. In a very few markets representing no more than 5% of U.S. households, customers can choose to buy from a fourth provider. Customers cannot choose to purchase service from a cable operator who does not serve their area.

IV. MARKET CONCENTRATION

32. There are millions of households in the United States for which DTV and DISH are the only competitive MVPD options. In the markets without cable, the proposed merger would reduce the number of competitors from two to one and create an MVPD monopoly.
33. In most of the rest of the United States, DTV, DISH, and the incumbent cable company are the only MVPD options. In many of these markets, the cable system is a modern "digital" system with hundreds of channels and is therefore a good substitute for DTV and DISH; however, many are older "analog" systems that are more distant substitutes

for the services offered by the DBS firms because they offer far fewer channels and services, as well as inferior picture and audio quality. The vast majority of the population of the United States lives in geographic areas that are served by an incumbent cable system, but no second cable provider. In these markets, the proposed merger would reduce the number of competitors from three to two and create an MVPD duopoly.

34. The markets for MVPD services in the United States are highly concentrated and would become dramatically more so as a result of the proposed merger according to the HHI, the standard measure of market concentration (defined and explained in Appendix A). In the merger-to-monopoly markets described in paragraph 32, the HHI would increase to 10000, the maximum possible. Although shares and HHIs vary in the merger-to-duopoly areas described in paragraph 33, typically the merger would result in an increase in the HHI of more than 100 points to a level greater than 6000. Moreover, given that DTV and DISH are continuing to increase their market shares steadily at the expense of cable, current shares understate their competitive significance. Even more important, because the two DBS firms are such close substitutes for each other, they are major constraints on each other's behavior to an extent not adequately captured by their market shares alone in the MVPD markets.

35. In a few local markets, a second firm has been granted authority to construct its own cable system to compete with the incumbent cable provider. These "overbuilders" literally build a second wireline cable system over the incumbent's franchise territory or, more commonly, a portion thereof. Overbuilding has been limited to a small number of markets where an unusual combination of population density, demographics, topography, and other factors make such a strategy feasible. Similarly, although there are a handful of

MVPD systems that use alternate technologies, e.g., multichannel multipoint distribution service (“MMDS”), sometimes known as wireless cable; or very high speed digital subscriber line (“VDSL”) service which uses telephone lines; these are only available in a handful of markets to a total of several hundred thousand subscribers. Thus, households where there is a competitive alternative to DBS or incumbent cable amount to no more than approximately 5% of U.S. households.

36. For millions of American households, the proposed merger is a merger-to-monopoly, reducing the number of MVPD competitors from two to one. For tens of millions of households--most of the United States--this is a merger-to-duopoly, reducing the number of MVPD competitors from three to two.

V. ANTICOMPETITIVE EFFECTS

A. Monopoly Markets

37. In the geographic markets where DTV and DISH are the only two MVPD options, this merger would create a monopoly and eliminate any effective competition. Because the two DBS services are the only competitive option for MVPD service in uncabled areas, a disproportionately large percentage of DBS customers--perhaps in excess of 30% according to the companies’ own internal estimates--are in areas that do not have cable. Given that such a large portion of its existing customer base would be in areas with no competition post-merger, the merged firm would have a substantial incentive to charge different prices, or provide different quality of service, to these customers. Moreover, the merged firm would have the ability to discriminate against these customers, e.g., by running promotions for which these customers are not eligible, or by special offers available only to customers who switch from cable, or who are threatening to switch to

cable. Thus, as a result of this merger millions of American consumers would be confronted by a monopolist provider of MVPD service which would have the incentive and ability to charge higher prices and provide lower service quality than would exist without the merger. As Echostar itself noted in a court filing in 2000: “Millions of potential DBS customers . . . live in areas that do not have access to cable. For these millions of customers and potential customers, if there is no competition between DTV and DISH Network, there is no competition at all.”

B. Duopoly Markets

38. In the geographic markets where DTV and DISH are two of three MVPD services, i.e., areas in which there is also an incumbent cable company, this merger would create a duopoly and substantially lessen competition to the detriment of consumers.
39. Because Hughes and Echostar are the only two facilities-based DBS services, they offer products that are closer to each other in character and pricing than either is to cable. As Echostar itself acknowledged in papers filed in a 2000 lawsuit against DirecTV, “Echostar is DIRECTV’s closest competitor.”
40. As a result of the closeness of their respective DBS services, Hughes and Echostar monitor each other's behavior and competitively react to each other. Although Hughes and Echostar also compete against cable, the similarity between their DTV and DISH services results in important competition between them that produces benefits to consumers and that would be lost as a result of this merger.
41. Indeed, because most DBS customers switch from cable, much of the competition between Hughes and Echostar is to attract the customers switching from cable. If this merger were to proceed, this competition--the competition between Hughes and

Echostar--would be lost, and consumers would face higher prices and lower quality than they would otherwise.

42. Hughes and Echostar compete on a broad array of price and quality characteristics, including programming pricing, programming packages, acquisition of channels, retailer compensation, equipment pricing, installation pricing, local broadcast channels, and targeted promotions. Echostar itself acknowledged in papers filed in U.S. District Court in 2000, "DIRECTV and Echostar react primarily to each other when setting equipment and service prices." Competition between Hughes and Echostar has taken the form of measuring themselves against one another, looking to each other when making price and quality decisions, seeking to have a competitive advantage over each other (or at least to maintain approximate parity), and imitating competitive improvements that the other has initiated. Consumers have benefitted from competition between the two that would be lost after the merger.
43. Competition to Offer Attractive Programming Prices: Echostar and Hughes compete to offer customers the most attractively priced programming, and this competition has restrained them from increasing prices, even as many cable prices have increased. Price competition between Hughes and Echostar keeps prices low not only for basic programming packages, but also for additional programming, such as pay-per-view movies and foreign language channels.
44. Competition to Offer Attractive Programming Packages: Both Echostar and Hughes sell several programming packages (a bundle of channels for a single price). A key competitive factor for consumers is the content of the packages -- how many channels, and which ones. Competition between Echostar and Hughes has been a significant factor

in each firm's decisions to make its packages more attractive to consumers by adding channels, and consumers have benefitted from this competition.

45. Competition to Offer Programming Variety: Echostar and Hughes compete to obtain channels to put into their programming offerings so as to make them available to consumers. This competition benefits consumers.

46. Competition to Make Technological Improvements in Channel Capacity: Competition between Hughes and Echostar pushes both firms to make technological improvements so that they can offer more channels to consumers. Both have dramatically improved channel capacity over the past five years, and each is continuing to work on additional technological improvements.

47. Competition to Make Low Equipment Prices Available to Consumers: Customers can obtain equipment for DBS service either directly from Hughes and Echostar or through third-party retailers who sell the service and equipment. Hughes and Echostar compete to offer retailers attractive financial subsidies for equipment sales, and retailers consequently can and do make low prices available to consumers. Hughes and Echostar closely track each other's equipment pricing and respond to each other's promotions. Since Hughes first launched its service, equipment prices to consumers have dropped dramatically from several hundred dollars to near zero, because Hughes and Echostar, largely driven by competition between them, have increasingly subsidized its cost.

48. Competition on Installation Pricing: When Hughes launched its DBS service in 1994, users were faced with either installing a satellite dish themselves or paying for an expensive professional installation. Over time, competition between Echostar and Hughes has forced both firms routinely to offer free professional installation to

customers.

49. Competition to Provide Local Channels: Competition between Echostar and Hughes has led to the dramatically increased availability of local channels via satellite over the past three years. Initially, Hughes did not offer local channels via satellite and had no plans to do so. But when Echostar announced that it would offer local broadcast channels in certain markets via satellite, Hughes changed its approach. Hughes embarked on an aggressive strategy to offer local broadcast channels via satellite, constructing two state-of-the-art spot-beam satellites designed to provide local signals in up to 103 local markets, accounting for roughly 85% of U.S. households. (The second is scheduled for launch late next year.) Competition between Hughes and Echostar also affects the firms' decisions on whether and when to offer local channels in additional markets.

50. Competition Targeting Each Other's Customers: Both Echostar and Hughes have targeted the other's customers with specific promotions that offer more attractive pricing or more attractive terms for DBS service.

51. Thus, competition between Hughes and Echostar occurs across a broad array of product characteristics and prices. If the two firms merge, the firms will not face the competitive constraint that has led to these competitive benefits to customers. As Echostar CEO Charles Ergen noted in an e-mail concerning Alaska, where DTV does not have a strong signal: "[r]ealize we have signal in Alaska and DTV doesn't have much, we don't have competition there. We don't need to be as aggressive." If this merger were to go forward, a substantial amount of competition--the competition between Hughes and Echostar--would be lost and the merged firm would not "need to be as aggressive."

52. In addition, because this merger would reduce the number of MVPD competitors from

three to two in many relevant geographic markets, it would facilitate tacit coordination and substantially increase the likelihood of increased interdependent pricing between the merged entity and incumbent cable providers.

53. If Hughes and Echostar were to merge, each major cable company would compete with the merged DBS firm, but no cable company would compete significantly with any other major cable company. Such a structure increases the risk of coordinated behavior.
54. Both Hughes and Echostar are capable of targeting, and have in the past targeted specific markets with intensified marketing initiatives and promotional pricing. A cable company that departed from a coordinated pricing scheme could be “targeted” by the merged DBS firm to discipline them, discourage cheating, and help enforce a collusive scheme.
55. The merger of Hughes and Echostar, by increasing substantially the risk of coordinated behavior in MVPD markets, would likely lead to higher prices and lower service quality--both for the merged firm and for the incumbent cable companies interacting with the merged firm--than would exist absent the merger.

C. Lack of Countervailing Factors

56. Entry or expansion on a widespread scale will not be timely, likely, or sufficient to undo the competitive harm that would likely result from the proposed merger.
57. Although the past decade has seen much interest and discussion regarding new alternatives to DBS and cable for MVPD, these have almost universally failed to materialize. Cable overbuilders have, by far, been the most successful of the alternatives to incumbent cable and DBS. But even they serve less than 5% of U.S. households, and due to the inherent difficulties of an overbuild strategy many overbuilders have either abandoned plans to enter new markets or curtailed expansion significantly. Alternative

MVPD technologies such as MMDS, VDSL, etc., have serious drawbacks and therefore have thus far failed to have much marketplace impact. It is highly unlikely that the percentage of households served by overbuilders or any other alternative to incumbent cable or DBS will increase substantially in the foreseeable future, even if MVPD prices were to increase 5-10%.

58. Entry by a new DBS entrant would be extremely difficult, time-consuming, and expensive. Because Hughes and Echostar control all the frequencies for the three DBS slots that cover the entire continental United States, as well as most of the ones which cover a part of the United States, it is unlikely that any other firm could offer a competitive, mass-market, nationwide service. Even assuming a DBS entrant could overcome the lack of frequencies, it would face hundreds of millions, if not billions, of dollars in costs to design, construct, and launch satellites, design and manufacture set-top boxes and dishes, negotiate programming contracts, and create a distribution and installation network. If an entrant were to overcome these obstacles, it would likely be years, if ever, before it became a strong, effective competitor to the merged firm and incumbent cable systems. As Echostar itself stated in a court filing in 2000, "It is very unlikely that competitors, other than DISH Network and DTV, will enter the DBS service market in the United States because of the significant cost of entry into the marketplace."
59. Although Hughes and Echostar assert that the merger would produce substantial efficiencies, they cannot demonstrate merger-specific efficiencies that would be sufficient to reverse the merger's anticompetitive effect.

VI. VIOLATION ALLEGED

60. The United States and the Plaintiff States hereby incorporate paragraphs 1 through 59.

61. Pursuant to an Agreement and Plan of Merger dated October 28, 2001, Echostar and Hughes intend to merge their businesses.
62. The effect of the proposed acquisition of Hughes by Echostar would be to lessen competition substantially in interstate trade and commerce in numerous geographic markets for MVPD service accounting for roughly 95% of the U.S. population in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.
63. This merger threatens loss or damage to the general welfare and economies of each of the Plaintiff States, and to the citizens of each of the Plaintiff States. Plaintiff States and their citizens will be subject to a continuing and substantial threat of irreparable injury to the general welfare and economy, and to competition, in their respective jurisdictions unless the Defendants are enjoined from carrying out this merger, or from entering into or carrying out any agreement, understanding, or plan by which Echostar would merge with or acquire Hughes, its capital stock or any of its assets.
64. The transaction would likely have the following effects, among others:
- (a) competition in the development, provision, and sale of MVPD service in each of the relevant geographic markets would be eliminated or substantially lessened;
 - (b) actual and future competition between Echostar and Hughes, and between these companies and local cable firms, in development, provision, and sale of MVPD service would be eliminated or substantially lessened;
 - (c) prices for MVPD service would likely increase to levels above those that would prevail absent the merger; and
 - (d) innovation and quality of MVPD service would likely decrease to levels below those that would prevail absent the merger.

PRAYER FOR RELIEF

The United States and the Plaintiff States request:

1. That the proposed acquisition be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. §18;
2. That the Defendants be permanently enjoined and restrained from carrying out the Agreement and Plan of Merger dated October 28, 2001, or from entering into or carrying out any agreement, understanding, or plan by which Echostar would merge with or acquire Hughes, its capital stock or any of its assets;
3. That the United States and the Plaintiff States be awarded costs of this action; and

4. That Plaintiffs have such other relief as the Court may deem just and proper.

Respectfully submitted,

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APPENDIX A

Herfindahl-Hirschman Index

“HHI” means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30%, 30%, 20%, and 20%, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). (Note: Throughout the Complaint, market share percentages have been rounded to the nearest whole number, but HHIs have been estimated using unrounded percentages in order to accurately reflect the concentration of the various markets.) The HHI takes into account the relative size distribution of the firms in a market and approaches zero when a market consists of a large number of small firms. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. *See Horizontal Merger Guidelines* ¶ 1.51 (revised Apr. 8, 1997). Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the guidelines issued by the U.S. Department of Justice and Federal Trade Commission. *See id.*