STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee), Hearing Designation Order, CS Docket No. 01-348 (adopted October 9, 2002)

I support the Commission's decision to designate this merger for hearing. Generally, I believe market forces are the most effective means of delivering choice, innovation, and affordability to consumers. The Commission nevertheless must be cautious when market transactions would decrease, rather than increase, competition. Based on the current record in this proceeding, I believe the potential harm to competition outweighs the potential benefits, particularly for consumers in rural America. I therefore cannot conclude that the merger as proposed is in the public interest.

As I explain below, however, I have two concerns with the Hearing Designation Order. First, I believe the record and our precedent support a conclusion that at least some cable operators and DBS providers compete in the same market. Second, I believe EchoStar's violation of its statutory and regulatory must-carry obligations is sufficiently important and relevant to this merger that the issue should have been designated for hearing.

The Relevant Market for Video Services

As part of its examination of whether a merger is in the public interest, the Commission traditionally has conducted a competitive analysis of the impact that the merger would have on the marketplace. The first step in this endeavour is to define the relevant product market (or markets) to be studied. The Applicants argue that DBS services compete with cable services (where available), and thus the relevant product market is the multichannel video programming distribution ("MVPD") market.[1] This position is consistent with Commission precedent and policy.

The Commission repeatedly has recognized the existence of a MVPD market in which DBS and cable operators compete. As early as 1994, the Commission identified the "relevant product market" for our annual video competition reports as the MVPD market. The Commission concluded that "the relevant product market contemplated in the 1992 Act – multichannel video programming service – is the appropriate starting point for assessing the status of competition in the market for delivery of video

[1] I appreciate that many rural consumers do not have access to cable. Cable availability in a given location, however, is not at issue in the "product" market definition. A conclusion that the relevant product market is MVPD would not harm such rural consumers. In areas not served by cable, the "market" would still be MVPD, but the only "players" would be the two DBS providers.

programming."[2] Indeed, in our most recent competition report, the Commission concluded:

> Overall, the Commission finds that competitive alternatives continue to develop…. The growth of non-cable MVPD subscribers continues to be primarily due to the growth of DBS…. Between June 2000 and June 2001, the number of DBS subscribers grew from almost 13 million households to about 16 million households, which is nearly two and a half times the cable subscriber growth rate.[3]

Similarly, the Commission discussed the significant competition that has developed between DBS and cable operators in our Further Notice on the cable horizontal ownership limit:

> [A]lthough cable continues to be the dominant player in the MVPD market, its market share has diminished somewhat with the emergence and continued growth of competing MVPD providers. Perhaps the most important difference between the industry in 1992 and today is that in 1992 there was no clear nationwide substitute for cable. Today, on the other hand, DBS has a national footprint…. DirecTV now is the third largest MVPD operator, after AT&T and Time Warner, and EchoStar is the eighth largest.[4]

Notably, this Further Notice was issued pursuant to the D.C. Circuit's remand, in which the Court rejected our rule in part because the Commission had failed to adequately consider cable/DBS competition in setting the ownership limit. Indeed, the Court observed "it seems *clear* that in revisiting the horizontal rules the Commission will have to take account of the impact of DBS on [cable's] market power."[5]

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[2] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992,* First Report, 9 FCC Rcd 7442, ¶ 49 (1994).

[3] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, ¶ 5, 8 (2002).

[4] *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice Of Proposed Rulemaking, 16 FCC Rcd 17,312, ¶ 22-23 (2001) (internal citations omitted).

[5] *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (emphasis added). The Court further elaborated, "If an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch. The FCC shows no reason why this logic does not apply to the cable industry. Indeed, its most recent competition report suggests that it does. According to the Commission, several very small and rural cable systems have used a variety of schemes to add digital channels, expand their program offerings, and take preemptive action against aggressive DBS marketing." *Id.* (quoting *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Seventh Annual Report, 16 FCC Rcd 6005, ¶ 67 (2000).

Finally, in each of the last three cable mergers, the Commission assessed the competitive impact not on a "cable services" market, but on the MVPD market.[6]

In this Hearing Designation Order, however, the majority is unwilling to conclude that cable and DBS services compete. To the contrary, this Order states, "[i]n fact, the relevant product market may be limited to just DBS services."[7] This conclusion seems to contradict prior Commission precedent. Defining the relevant product market as DBS services would mean that in urban areas served by cable, our analysis would exclude cable operators as a viable alternative. Such an approach is not reflective of the actual competitive landscape in urban areas and diminishes the real challenges faced by rural consumers to obtain comparable services. Indeed, I am disappointed that the Commission seems to be taking a step away from the conclusion that at least some cable operators and DBS providers compete, despite having repeatedly reached that decision in the past.

The Order justifies its departure from the Commission's past discussions of a MVPD market by noting that although the relevant product market for a cable operator contains cable and DBS services, the relevant product market for a DBS provider might include DBS services and only *some* cable services.[8] Specifically, the Order hypothesizes that DBS providers compete with low capacity cable operators, but low capacity cable operators do not compete with DBS providers. I find this proposition confusing at best. First, even if true, it would lead to a conclusion that the relevant product market is only high capacity cable and DBS services. Thus, the hypothesis would not support the contention that, "in fact, the relevant product market may be limited to just DBS services."[9]

Moreover, I have concerns with the assertion that some products may be substitutes or "interchangeable," but only unilaterally. I question the conclusion that DBS services compete with low capacity cable services, but that low capacity cable services do not compete with DBS services. If the Commission were to say these services do not compete at all, I may or may not agree, but I would understand the argument. One might argue, for instance, that a Ford and a BMW do not compete in the same "car" market because there actually are *two* product markets: the "economy car"

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[6] *See Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control of Tele-Communications, Inc. to AT&T Corp.*, CC Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd 3160, ¶ 20-22 (1999); *Applications For Consent To The Transfer Of Control Of Licenses and Section 214 Authorizations From MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee,* Memorandum Option and Order, 15 FCC Rcd 9816, ¶ 36 (2000); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, ¶244 (2001).

[7] Order at ¶ 115.

[8] *See* Order at ¶ 109 and note 331.

[9] *Id.* at ¶ 115.

market and the "luxury car" market. But can you really claim that BMWs compete with Fords, but that Fords don't compete with BMWs? It seems highly unlikely that consumers would view some products as true substitutes – *i.e.*, "reasonably interchangeable"[10] – but only in one direction.

The majority argues that this seemingly odd conclusion is a result of the "hypothetical monopolist" procedure used to define the market:

> The relevant product that results from this procedure depends significantly on the products with which one started…. [I]t is entirely possible that we might derive different relevant product markets, given the different starting points.[11]

I understand that the hypothetical monopolist test might produce such an atypical result. But that does not mean it is a reasoned analysis to rely on that tool to conclude that cable competes with DBS but that DBS does not compete with cable. Some higher threshold of proof should be met to justify such a conclusion. We must not let our fascination with economic modelling tools, or our appreciation of the "hypothetical monopolist" test, cloud our judgement of what we are really attempting to evaluate: the extent to which consumers view products or services as interchangeable or substitutes.[12]

Ultimately, the Order states that the Commission is "unable to conclusively resolve the product definition at this time."[13] I find this hesitancy troubling and confusing, particularly in light of our previous conclusions about cable and DBS competition. Moreover, over the course of the last eleven months, the Commission has developed a voluminous record consisting of thousands of pages of documentary evidence. Many of these documents—including economists' affidavits—address directly the issue of whether and to what extent DBS and cable service compete at least to some degree. I found this evidence sufficient to conclude that these two services do compete, at least to some degree. The Order, however, designates this issue to be resolved by an Administrative Law Judge and concludes that, in fact, the relevant product market may be limited to just DBS services. I am not sure what new evidence would come to light during the hearing process that would make the Commission rethink its precedent and direction. Regardless, I believe the Commission should have used its expert judgement to make a conclusion based on the record we have before us.

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[10] *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) ("commodities reasonably interchangeable by consumers for the same purposes" are in the same market) ("*E.I. du Pont*").

[11] *Id.* at ¶ 109.

[12] *See E.I. du Pont*, 351 U.S. at 395.

[13] *Id.* at ¶ 114.

Finally, I fear that the Order's reluctance to identify the relevant product market and to conclude unequivocally that DBS providers and at least high-capacity cable operators compete indicates a step back from our recognition in several recent proceedings of the growing importance of intermodal or "platform" competition.[14]

Although the Order does not identify the relevant product market, it proceeds with the competitive analysis by hypothetically assuming that the relevant market is the MVPD market, as the Applicants propose. Accordingly, I concur in the competitive analysis of this Order.

EchoStar's Must-Carry Obligation

It is a basic tenet of our regulatory system that FCC licensees must comply with the Communications Act and our rules. In a license transfer context, we should consider whether the transferee is in compliance with the statute and our rules. Compliance with statutory provisions and FCC rules that are directly related to merger benefits should be particularly important.

Moreover, the Commission's public interest inquiry includes a determination that the applicant has the requisite character to hold a license.[15] As the attached Order explains, "violations of provisions of the Act, or of the Commission's rules or polices have a bearing on an applicant's character qualifications."[16]

As I explained in a detailed press statement last April, I believe EchoStar is violating the must-carry provisions of the Satellite Home Viewer Improvement Act

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[14] *See, e.g.*, *2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, MB Docket No. 02-277, FCC 02-249, ¶ 53 (rel. Sept. 23, 2002) (discussing "robust" competition among broadcasting, cable television and DBS); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 6 (2002) ("[R]esidential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite."); *In The Matter Of Appropriate Framework For Broadband Access To The Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, ¶ 37 (2002) ("[T]he technological evolution … enabled cable, wireless and satellite providers to begin to compete with the telephone network. In the broadband arena, the competition between cable and telephone companies is particularly pronounced….").

[15] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor*, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21305 ¶ 26 (1998)).

[16] Order at ¶ 28 (citing *Policy Regarding Character Qualifications In Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees,* Report, Order and Policy Statement, 102 FCC 2d 1208-9 (1986)).

("SHVIA") and our rules by placing some broadcasters' signals on a second dish.[17] I continue to be concerned about the burden this practice places on consumers and the impact this discrimination may have on some broadcasters—particularly public broadcasters.

I believe EchoStar's ongoing violation of its must-carry obligations is critical to our evaluation of the pending merger. As a preliminary matter, compliance with statutory and regulatory must-carry obligations is central to the provision of DBS service to consumers. It is therefore not surprising that several parties have cited this violation as a reason to deny or condition the merger.[18] Moreover, as the Order acknowledges, this violation "lies at the heart of the realization of the proffered public interest benefits claimed to flow from the merger – provision of additional local-into-local service pursuant to the must-carry rules."[19] EchoStar's violation of those rules is therefore both merger-specific and indicative of the applicant's future behavior.

Accordingly, I believe EchoStar's compliance with its must-carry obligations should be included in the issues designated for hearing before an ALJ. I therefore dissent in part, on the majority's decision not to include this issue among those designated for hearing.

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In conclusion, I agree with my colleagues that the record does not support a determination that the merger of EchoStar and DirecTV is in public interest. I note that the Order provides the companies 30 days to amend their application to include major revisions designed to address the anti-competitive impact of their proposed merger. For example, some parties have suggested that the applicants could divest some of their spectrum in a manner that would enable a *new* DBS provider with more efficient technology to compete nationally against a merged EchoStar/DirecTV. These two new DBS providers, it is argued, could provide all consumers with their local broadcast stations and thus serve as stronger competitors to cable than EchoStar and DirecTV do today. This idea is interesting, but the applicants have made no such proposal. If the applicants were to request such a structural remedy, it could merit further review as to its technical and economic feasibility. Failing to fully explore such options could be a missed opportunity to bring more competitive choices to consumers.

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[17] *See* Statement of Commissioner Kevin J. Martin and Commissioner Michael J. Copps Re: National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order, CSR-5865-Z (Media Bureau, April 4, 2002), April 10, 2002.

[18] *See, e.g.* Comments of the Association of Public Television Stations and the Public Broadcasting Service, Feb. 4, 2002, at 5-10. *See also* Order at note 130 (briefly describing the filings of seven parties who raised this issue).

[19] Order at ¶ 35.