THE STATUS OF COMPETITION IN THE MULTI-CHANNEL VIDEO PROGRAMMING DISTRIBUTION MARKETPLACE

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

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THE STATUS OF COMPETITION IN THE MULTI-CHANNEL VIDEO PROGRAMMING DISTRIBUTION MARKETPLACE

TUESDAY, DECEMBER 4, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2123, Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, Barton, Gillmor, Deal, Shimkus, Terry, Tauzin (ex officio), Markey, Green, McCarthy, Harman, Boucher, Brown, and Dingell (ex officio).

Staff present: Jessica Wallace, majority counsel; Jon Tripp, deputy communications director; Hollyn Kidd, legislative clerk; Andy Levin, minority counsel; and Courtney Johnson, research assistant.

Mr. UPTON. Good afternoon. Years ago when driving through the more rural areas of my district, I would see a few big satellite TV dishes dotting the landscape, and nowadays they are significantly smaller, more prevalent, and in more urban and suburban areas as well.

In fact, in the old days if a person ever got lost, all they had to do is wait until nightfall to navigate by the North Star. Now satellite dishes are so prevalent that they can also navigate during the day by the dishes which chart a southwesterly course.

But much more than a navigational tool, satellite TV, more specifically direct broadcast satellite, DBS, has become a solid and formidable competitor with cable in the multi-channel video programming distribution marketplace, primarily in urban and suburban areas, and DBS and its predecessor technologies have for the first time brought multi-channel video programming to certain rural areas where the laws of physics preclude over-the-air broadcast signals, and economics make cable service impractical.

By and large, all of this has been great new for the consumer, unleashing waves of innovation and expansion of services in both DBS and cable.

In addition, almost 1 in 5 households continue to receive their television signals through free, over-the-air local broadcasts. So while not a multi-channel video programming platform, free, over-the-air local broadcast remains a critically important piece of our Nation's TV fabric.

Moreover, DBS carriage of a local broadcast signal in a subscriber's local market remains an important public policy objective embodied in the Satellite Home Viewer Improvement Act of 1999, SHVIA. Today's hearing is on the status of competition in the MVPD marketplace for it is the vitality of that competition which will have a direct bearing on the quality, price, array of viewing options, and other services which Americans will have in their living rooms with respect to cable and/or DBS, not to mention other emerging and aspiring competitors.

What do we know about the MVPD marketplace today? Well, recent surveys suggest that cable has about 80 percent market share, while DBS has about 18 percent. We also know that both cable and DBS have experienced significant consolidation in past years, and we all know that more consolidation may be upon us or may be right around the corner as EchoStar and DIRECTV, America's two largest DBS providers, seek to merge, while AT&T Broadband, America's largest cable company, might merge with another cable giant like Comcast, Cox or even AOL Time Warner.

But as we seek to define the status of competition in the MVPD marketplace today and to try to understand the impact of proposed or imminent mergers on that marketplace, we first need to define that marketplace. Do we look narrowly in isolation at the DBS market as separate and distinct from the cable market, or do we look at one, big, multi-channel video programming distribution marketplace where DBS and cable and perhaps aspiring and emerging technologies are going head to head.

Intuitively as a consumer I think that choice, where there is a choice, is between cable and DBS. If I am unhappy with my cable provider, as my folks were, I am going to switch to DBS. If I am unhappy with DBS, I am going to switch back to cable, and perhaps I will unplug altogether and rely solely on free, over-the-air broadcasts as many Americans do today.

In an event, what this suggests is that those in the areas where there is a choice, the relevant market is the whole MVPD marketplace.

However, in examining the status of competition in the MVPD marketplace, what is more difficult to grapple with is that there are parts of the marketplace where there is no choice between cable and DBS, principally those areas in which approximately 9 million rural Americans live, where cable has not reached or practically speaking cannot be reached.

These folks rely solely on DBS, and many are served through the resale of DIRECTV by virtue of agreements with the National Rural Telecommunications Cooperative and its affiliated members, such as the Bloomingdale Telephone Company in my district. It is a unique but important part of the marketplace which, no doubt, adds some complexity to our examination of the overall picture.

Part of today's hearing focuses on the proposed merger of EchoStar and DIRECTV and its potential impact on competition in the MVPD marketplace. Today EchoStar and DIRECTV are with us. While I have not yet seen their filings with the FCC and DOJ, which will begin to provide the necessary details for a thorough examination of their proposed merger, I generally understand what they are trying to accomplish through this proposed merger.

And preliminarily, I would say this: What they bring to the table cannot be easily dismissed in terms of competing against cable, who have shown themselves to be fierce and worthy competitors and continue to possess the overwhelming lion's share of the MVPD marketplace.

Moreover, the companies state that once merged, they would expand into local, from 36 and 41 markets probably to about 100, and perhaps a merged entity eventually could serve all markets. As I mentioned earlier, carriage of local TV signals is an important policy objective embodied in SHVIA, which must be pursued on behalf of the consumer.

Certainly we will need to closely examine the aspects of the proposal. Also, the companies state that the merger would permit more efficient use of the company's combined spectrum, enabling them to more robustly bring a host of non-video services, like broadband, high speed Internet access, to market more vigorously and competitively.

Moreover, the company suggests that more efficient use of the spectrum would enable increased HDTV programming carriage, which would certainly help the digital transition.

Thus, all in all these companies bring much to the table, but in addition, as I indicated earlier, we will have to look very closely at the implications of the merger for folks in the rural areas where there is no cable service and, thus, DBS is the only true competitor.

That is the issue that I look forward to learning about more from our distinguished panelists this afternoon, and more generally, the exclusivity portion of the program access rules, which are said to sunset next year. Moreover, the cable ownership limits proceedings are also important issues potentially impacting on the competition in the MVPD marketplace.

I know that our witnesses are prepared to discuss these topics as well. I look forward to their testimony and recognize my friend, the ranking member of the subcommittee, Mr. Markey.

[The prepared statement of Hon. Fred Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON, CHAIRMAN, SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

Good morning. Years ago—when driving through the more rural areas of my district—I would see a few big satellite tv dishes dotting the landscape. Nowadays, they are significantly smaller, more prevalent, and in more urban and suburban areas, too. In fact, in the old days, if a person ever got lost, he used to have to wait until nightfall to navigate by the North Star. Now, satellite dishes are so prevalent, he can also navigate during the day by the dishes—which chart a southwesterly course.

But much more than a navigational tool, satellite tv—more specifically Direct Broadcast Satellite (DBS)—has become a solid and formidable competitor with cable in the multi-channel video programming distribution (MVPD) marketplace, primarily in urban and suburban areas, and DBS, and its predecessor technologies, have for the first time brought multi-channel video programming to certain rural areas where the laws of physics preclude over-the-air broadcast signals and economics make cable service impractical. By and large, all of this has been great news for the consumer—unleashing waves of innovation and expansion of services in both DBS and cable. In addition, almost one in five households continue to receive their television signals through free, over-the-air local broadcast, so—while not a multichannel video programming platform—free, over-the-air local broadcast remains a critically important piece of our nation's television fabric. Moreover, DBS carriage of a local broadcast signals in a subscriber's local market remains an important public policy objective, embodied in the Satellite Home Viewer Improvement Act of 1999 (SHVIA).

Today's hearing is on the status of competition in the MVPD marketplace, for it is the vitality of that competition which will have a direct bearing on the quality, price, and array of viewing options, and other services, which Americans will have in their living rooms with respect to cable and/or DBS, not to mention other emerging and aspiring competitors.

What do we know about the MVPD marketplace today? Recent surveys suggest that cable has about 80% marketshare, while DBS has about 18% marketshare. We also know that both cable and DBS have experienced significant consolidation in past years—and we all know that more consolidation may be upon us or may be right around the comer as EchoStar and DirecTV, America's two largest DBS providers, seek to merge—while AT&T Boradband, America's largest cable company, might merge with another cable giant like Comcast, Cox, or AOL Time Warner.

As we seek to divine the status of competition in the MVPD marketplace today and try to understand the impact of proposed or imminent mergers on that marketplace, we first need to define that marketplace. Do we look narrowly, and in isolation, at the DBS market as separate and distinct from the cable market? Or do we look at one big multi-channel video programming distribution marketplace where DBS and cable, and perhaps aspiring and emerging technologies, are going head-to-head? Intuitively as a consumer, I think the choice—where there is a choice—is between cable and DBS. If I am unhappy with my cable provider, I will switch to DBS. If I am unhappy with my DBS, I will switch back to cable. Perhaps, I will unplug altogether and rely solely on free over-the-air broadcast? Or, as my mother always urged, perhaps I will turn off the tv and just read a book! In any event, what this suggests to me is that, in those areas where there is a choice, the relevant market is the whole MVPD marketplace.

However, in examining the status of competition in the MVPD marketplace, what is more difficult to grapple with is that there are parts of the marketplace where there is no choice between cable and DBS, principally those areas in which approximately 9 million rural Americans live—where cable has not reached or, practically speaking, cannot be reached. These folks rely solely on DBS, and many are served through resale of DirecTV—by virtue of agreements with the National Rural Telecommunications Cooperative (NRTC) and its affiliated members, such as the Bloomingdale Telephone Company in my district. This is a unique, but important, part of the marketplace which no doubt adds some complexity to our examination of the overall picture.

Part of today's hearing focuses on the proposed merger of EchoStar and DirecTV and its potential impact on competition in the MVPD marketplace. Today, EchoStar and DirecTV are with us. While I have yet to see their filings with the FCC and the DOJ (filed last night)—which will begin to provide the necessary details for a thorough examination of their proposed merger—I generally understand what they are trying to accomplish through their proposed merger. Preliminarily, I would say this: what they bring to the table in this regard cannot be easily dismissed in terms of competing against cable—who have shown themselves to be fierce and worthy competitors and continue to possess the overwhelming lion-share of MVPD marketplace. Moreover, the companies state that, once merged, they would expand local-into-local—from 36 and 41 markets, respectively, to over 100. Perhaps, a merged entity eventually could serve all markets? As, I mentioned earlier, carriage of local television signals is an important policy objective—embodied in SHVIA—which must be pursued on behalf of the consumer. Certainly, we will need to closely examine this aspect of the proposal. Also, the companies state that the merger would permit more efficient use of the companies' combined spectrum, enabling them to much more robustly bring a host of non-video services, like broadband, to market more vigorously and competitively. Moreover, the companies suggest that more efficient use of spectrum would enable increased HDTV programming carriage, which would certainly help the digital transition. Thus, all in all, these companies are bringing a lot to the table today.

But in addition, as I indicated earlier, we will have to look very closely at the implications of this merger for folks in those rural areas where there is no cable service and thus DBS is the only truly viable competitor. This is an issue which I look forward to learning more about today from our distinguished panelists.

More generally, the program access rules, which are set to sunset next, and the cable ownership limits are also important issues potentially impacting on competition in the MVPD marketplace. I know our witnesses are prepared to discuss these topics as well.

I want to thank all of our witnesses for being here today. I now recognize my good friend, the Ranking Member of the Subcommittee, for an opening statement.

Mr. MARKEY. Thank you, Mr. Chairman, very much, and I want to commend you for calling these very important hearings today on the current status of video competition and to explore the impact of the proposed DIRECTV-EchoStar merger on the multi-channel video marketplace.

It is clear that competition to the cable industry has not materialized for most consumers in any significant way after passage of the Telecommunications Act. We have ceased to expect and no longer wait for the Bell Companies to mount a large scale assault of cable markets across the country.

We do have RCN in a number of markets, and in the Boston area the mere presence of RCN has had a positive effect upon cable rates.

Yet the cold reality for the overwhelming majority of consumers is that an alternative wire line competitor is not going to show up in their neighborhood any time soon to provide competition to the incumbent cable company.

I say all of this in an environment where AT&T will be raising cable rates for millions of consumers in Massachusetts in excess of 8 percent this year. Many other cable consumers around the country will also see rate increases well over the rate of inflation.

That is why we have increasingly looked to satellite competition as a way to foster choice and competition. Although it has not been a price competitor to cable, our Nation's two direct broadcast satellite providers certainly offer many consumers a needed choice.

I was the author in this committee of the local-to-local amendment to the Satellite Home Viewer Improvement Act of 1999. I worked with the gentleman from Louisiana, Mr. Tauzin, as we have partnered over the past 12 and 15 years in this area as in many others to insure that there would be additional programming choices for consumers.

Permitting satellite providers to bring local broadcast stations back into central, certain, local markets a part of a seamless satellite service has helped to make DBS a more realistic and a comparable alternative for many consumers in the top 40 media markets, markets that include approximately 70 million households.

I commend the satellite industry for the competitive inroads they have made in the marketplace and for their efforts to deploy broadband access to the Internet by way of satellite as well.

The proposed DIRECTV-EchoStar merger, however, absent other regulatory intervention or action would eliminate the current DBS versus DBS competition, which provides all consumers with a choice of either DIRECTV or EchoStar.

A merger of the two would also lock up for the benefit of a single company the preponderance of orbital assets presently allocated to direct-to-home satellite services, including he spectrum utilized to provide ubiquitous coverage to the 48 contiguous States.

Moreover, there are media reports and rumors of yet further consolidation in the cable marketplace, as AT&T attempts to spin off its cable assets most likely to other incumbent cable companies. Cable pioneer Ted Turner recently predicted that the cable industry will essentially be reduced to just two large providers as well.

Does anybody else see the irony in calling this a hearing on the status of video competition? It should be entitled a status check on video consolidation. In my view, the challenge for policymakers is to assess rapidly what we can do to jump start competition across the board and to encourage the FCC to explore ways to actively promote additional competition in our telecommunications marketplace.

In addition, we need to extend the access to cable programming rules that are up for renewal at the FCC, as well as explore other issues about building access, must carry obligations, and ever increasing cable programming fees if we endeavor to increase the prospects for robust cable competition in the future.

Finally, I believe the recent debacle involving shutoffs of Excite-at-Home subscribers underscores the need for the FCC to insure that cable modem consumers have choices over that cable wire. I continue to believe that current law compels such action because broadband access to the Internet is a telecommunications service.

It is time for the FCC to act not only to foster open competition consistent with the intent of the Telecommunications Act, but to do so with haste so that the consumers are no longer left vulnerable to an inside the Beltway battle over semantics that only a telecommunications lawyer could delight in.

And, by the way, I will note that every lawyer in the room just nodding their head as I said that.

Which is every person in the room.

Again, I thank the chairman for putting this hearing together today so that we can assess the implications of this merger and look forward to future hearings where we can explore other issues related to promoting cable and programming competition.

I look forward, Mr. Chairman, to hearing from our witnesses.

Mr. UPTON. Thank you.

I would recognize chairman of the full committee, Mr. Tauzin.

Chairman TAUZIN. Thank you, Mr. Upton.

I, too, want to thank you for the hearing, sir.

As we proceed on these matters, I believe we must look forward to insure that consumers are able to reap all the tangible benefits that flow from healthy, vigorous competition. They are easy to identify. Lower prices, increased programming options, new, improved services, better attitudes. That is the way it works: One store in town; you are stuck with bad prices, bad service, bad product, bad attitudes. A second store in town shows up, and all of these things improve dramatically. If you get 3 or 4 stores in town, it really gets good.

And so the question is: how do we make sure consumers enjoy these benefits?

And perhaps the biggest issue, of course, today is the proposed merger of EchoStar and DIRECTV. This union, if approved by regulators, would create a satellite company larger than the largest cable MSO today, AT&T.

So the hearing, among other things, has to examine whether this proposed merger's impact on competition in the MVPD marketplace, the multi-channel video programming marketplace, is, in fact, good for consumers. I want to look at its impact on the broadband market place obviously as that develops and as that new marketplace becomes one where hopefully competition will rule.

In my mind, the question of whether the merger should go forward comes down to three tests: (1) will the combined EchoStar-DIRECTV increase the likelihood of the DBS and cable industries will remain formidable competitors, as they are becoming today?

(2) will a combined EchoStar-DIRECTV yield real benefits to consumers? Will it insure that DBS and cable continue to prod each other to serve an increasing number of markets, to offer increasingly competitive prices and improved services through technological innovation?

And finally, (3) will a combined EchoStar-DIRECTV result in a multi-programming marketplace that will accommodate new and aspiring multi-video programming competitors.

And as most of you know, Mr. Markey and I have worked long and hard to insure that there is a vibrant DBS industry to provide head-to-head competition with the incumbent cable industry. They make each other better and consumers win.

Moreover, as the cable industry continues to undergo its own consolidation, we see a number of cable companies looking to buy AT&T's cable unit. The committee has to decide whether or not the satellite industry needs this merger if it is going to survive and thrive as one of the several competitors in the video services of the future.

EchoStar and DIRECTV need to demonstrate clearly the consumer benefits that will come from this merger. We are very interested in the 9 million rural consumers who do not enjoy access to cable. Today they can choose between EchoStar and DIRECTV, but should the merger be approved by DOJ and FCC, these consumers would be left with the Hobson's choice of obtaining video services from the merged company or from no one at all. We have to ask how will this merger increase or diminish consumer choice in these video services, particularly for these 9 million folks. Indeed, enabling the creation of a vibrant and viable satellite TV industry was to create more choices for consumers.

Will, for example, consumers get the guarantee of national pricing so that they can have the benefits of consumers who do face—who do live in a market where there is true competition.

We know the merger will also have an impact on the broadband marketplace. If satellite is going to be a competent competitor in the broadband world, providing video services along with interactive high speed data services and Internet services, it obviously needs to do a better job than it does today.

Cable has a superior broadband product. Let's face it, and the local phone companies need regulatory relief if they are to unleash their potential as broadband competitors. That is why, I am working so hard in trying to pass Tauzin-Dingell.

A merged DBS entity with more financial strength may, indeed, be more capable of developing and providing competitive broadband products. We need to think about that.

And while there has been much talk regarding this merger, there is other activity in the marketplace I certainly expect we are going to address other activity this afternoon, Mr. Chairman.

For example, in 1992, Congress was concerned that a majority of cable operators enjoyed a monopoly in program distribution at the local level and concluded that the use of exclusive contracts between vertically integrated program vendors and cable operators served to thwart development of competition among distributors.

So Congress absolutely prohibited exclusive contracts between vertically integrated program vendors and cable operators in areas unserved by cable, and we generally prohibited exclusive contracts within areas served by cable unless the FCC determined that such a contract was in the public interest.

We did it because we recognized in these instances some exclusive contracts do provide countervailing benefits for the programming market or the development of competition among distributors.

The general prohibition on exclusive contracts, Mr. Chairman, expires, sunsets on October 5 2002, and unless the FCC determines that the prohibition continues to be necessary, it goes out of the law.

So while I have come to no absolute conclusions yet as to whether or not the rule has served its purpose, we ought to talk about that today.

Another issue, Congress passed the Satellite Home Viewers Improvement Act of 1999, which granted DBS authority to provide local broadcast stations, television stations, in their local markets without obtaining a copyright permit to do it.

For the first time, the DBS industry would be able to compete on comparable footing with the local cable company operators because it could provide all of the video programming, local as well as cable programming.

However, SHVIA requires satellite carriers by January 1, 2002, to carry upon request all local TV broadcast stations in the local markets in which the satellite carriers carry at least one TV broadcast station. That rule is know as the “carry one, carry all” rule.

The DBS industry has now sued, claiming that this law violates their constitutional rights. We ought to ask today, Mr. Chairman, how this lawsuit dovetails with EchoStar’s commitment to serve more local markets, and I look forward to discussing this issue with both EchoStar and DIRECTV today.

And last but not least, the hearing will cover the FCC’s recently initiated proceeding to reexamine its horizontal and vertical limits on cable companies. The FCC rules were remanded because the court determined that the FCC’s prior cable ownership limits had not been adequately supported and that the FCC had not sufficiently considered changes in the multi-video programming marketplace.

Just yesterday the Supreme Court declined to review that ruling. So we are anxious to hear from these witnesses today and what do you think about it and where do we stand.

Mr. Chairman, we have got a lot of good issues to talk about, and not just EchoStar and DIRECTV, but the whole issue is are we really going to have good competition out there or are all of these movements in some way going to diminish what we tried to accomplish over all of these many years.

There is some thought that maybe if done correctly we can make a few changes in policy that can make sure it all happens right, and if we just sit back and watch it, we might see some of the progress we created diminish.

We have got some work to do, Mr. Chairman. Thank you.

[The prepared statement of Hon. W.J. “Billy” Tauzin follows:]

PREPARED STATEMENT OF HON. W.J. “BILLY” TAUZIN, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

I would like to commend Chairman Upton for holding this hearing today, which will allow us to examine important changes taking place in the multi-channel video programming (“MVPD”) marketplace. As we proceed on these matters, I believe we must look to ensure that consumers are able to reap the tangible benefits that flow from healthy, vigorous competition: lower prices, increased programming options, and new services.

Perhaps the biggest issue in this market today is the proposed merger of Echostar and DIRECTV. This union, if approved by regulators, would marry the nation’s two DBS providers, creating a satellite company larger than the largest cable MSO today, AT&T. This hearing, among other things, will examine this proposed merger’s impact on competition in the MVPD marketplace, its impact in the broadband marketplace, and most importantly, its impact on consumers.

In my mind, the question of whether this merger should go forward comes down to three tests: (1) will a combined Echostar/DIRECTV increase the likelihood that DBS and cable industries will remain the formidable competitors they are today?; Test 2: will a combined Echostar/DIRECTV yield real benefits to consumers? Will it ensure that DBS and cable continue to prod each other to serve an increasing number of markets. offer increasingly competitive prices, and improve service offerings through technological innovation? And finally Test Three: will a combined Echostar/DIRECTV result in an MVPD marketplace that will accommodate new, aspiring MVPD competitors?

As most of you know, I strongly believe that it is absolutely vital to have a vibrant DBS industry to provide head-to-head competition with the incumbent cable industry. They make each other better and consumers win. Moreover, as the cable industry continues to undergo its own consolidation—indeed a number of cable companies want to acquire ATT’s cable unit—this committee must consider whether or not the satellite industry needs this merger if it is going to survive and thrive as one of several competitors for video services in the future.

Echostar and DIRECTV need to demonstrate clearly the consumer benefits that would result from this merger. In particular, I am interested in the nine million rural consumers who do not have access to cable. Today, they can choose between Echostar or DIRECTV. Should this merger be blessed by DOJ and the FCC, these consumers will be left with what some believe to be a Hobson’s choice of obtaining video services from the merged company or from no one at all. Because enabling the creation of a viable and vibrant satellite TV industry was to create more choice for consumers, I must ask: how would this merger increase or diminish consumer choice in video services?

This merger also will have a tremendous impact on the broadband marketplace. If satellite is going to be a competent competitor in the broadband world, providing video services along with interactive high-speed data services and Internet services, it needs to do a better job than it does today. Cable has a superior broadband product, and the local phone companies need regulatory relief to unleash their great potential as broadband competitors (which is why I am working hard to bring HR 1542 to the floor). A merged DBS entity, with more financial strength, may indeed be more capable of developing and providing competitive broadband products.

While there has been much talk regarding this merger, there is other activity in this marketplace I hope will be addressed this afternoon.

For example, in 1992 Congress was concerned that the majority of cable operators enjoyed a monopoly in program distribution at the local level, and concluded that the use of exclusive contracts between vertically integrated programming vendors and cable operators served to thwart the development of competition among distributors. So Congress absolutely prohibited exclusive contracts between vertically integrated programming vendors and cable operators in areas unserved by cable.

However, we generally prohibited exclusive contracts within areas served by cable, unless the FCC determined that such a contract was in the public interest. We did this because we recognized that in these instances. some exclusive contracts provide countervailing benefits to the programming market or to the development of competition among distributors. This general prohibition on exclusive contracts in areas served by cable will sunset on October 5, 2002, unless the FCC determines that the prohibition continues to be necessary. At this point I have come to no absolute conclusions on whether or not this rule has served its purpose so I hope to learn more today.

On another issue, Congress also passed the Satellite Home Viewer Improvement Act of 1999, which granted DBS providers the authority to distribute local broadcast television stations in their local markets without obtaining copyright permission to do so. For the first time the DBS industry would be able to compete on comparable footing with local cable operators when it comes to the availability of broadcast programming. However, SHVIA requires satellite carriers, by January 1, 2002, to carry upon request all local TV broadcast stations in local markets in which the satellite carriers carry at least one TV broadcast station, also known as the "carry one, carry all" rule. The DBS industry has brought suit saying that this law violates their constitutional rights. How does this lawsuit dovetail with Echostar's commitment to serve more local markets? I look forward to discussing this issue with Echostar, DIRECTV and NAB today.

Last but not least, this hearing will cover the FCC's recently initiated proceeding to re-examine its horizontal and vertical limits for cable companies. The FCC's rules were remanded because the court determined that the FCC's prior cable ownership limits had not been adequately supported and that the FCC had not sufficiently considered changes in the MVPD marketplace. Just yesterday, the Supreme Court declined to review that ruling.

I am anxious to hear from our witnesses on these and other issues.

Thank you.

Mr. UPTON. Thank you.

Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman, for convening the hearing today on competition in the multi-channel video marketplace.

I am going to focus my comments today on the proposed acquisition of DIRECTV by EchoStar and note that the focus of the debate about whether the acquisition is in the public interest is whether it is in the interest of rural America.

I represent one of the largest stretches of rural America of any Member of Congress in the eastern U.S., and in the area that I represent, there are tens of thousands of constituents who do not have access to cable. The only means of obtaining multi-channel video programming in these homes is through a satellite service.

And today I clearly want to say that in my opinion this acquisition is definitely in the interest of my constituents and in the interest of rural Americans who will receive expanded services and better service offerings as a consequence of this merger being consummated.

It takes a lot of satellite capacity to compete effectively with cable TV, an industry that has horizontal breadth and vertical integration. I have no doubt that the proposed merger will benefit consumers by making the surviving satellite company a far stronger competitor to cable TV.

I am going to spend just a few minutes this afternoon addressing the rural matters that are at the core of this debate.

First, it is absolutely clear that as a result of the merger, services to rural residents will improve. My constituents in the western part of Virginia do not have access at the present time to local television stations delivered by satellite, and under present circumstances, they are not likely to have this new local-into-local service for several years at best.

The merger will lead to a far more efficient use of satellites, and as a consequence, enable EchoStar to more than double the number of local television markets that are served with local-into-local service. That number today is approximately 40, and upon a consummation of this merger that number could be increased to approximately 100.

The merger will also enable the more rapid launch of satellite delivered, high speed Internet access services by significantly lowering the per subscriber cost of the service and making the service truly economical on a large scale for the first time.

That service will also broadly benefit my rural constituents who have no cable access by making broadband available to them for the first time through any delivery mechanism.

But what about the argument that some have put forward that reducing two major service providers to one provider simply cannot be in the interest of consumers? I, frankly, think that EchoStar has answered these questions in a way that is more than satisfactory.

As a first matter, the company will commit to uniform national pricing so that the prices charged where there is no cable competition in rural areas is the same price that is charged in the markets with cable where I would note the satellite customers derive most of their subscribers at the present time.

Other elements of the service will also be the same. The same national programming will be offered everywhere, in urban areas and in rural areas alike with no difference. The same 800 number for customer service can be accessed by any subscriber to the service in rural areas or urban areas alike just as it is today with no difference.

An on premises installation of the set top box and the satellite dish is currently performed by local independent retailers who compete with each other in offering that service. That would not change with this merger, and there would still be the same competition in the installation of on premises customer equipment.

And so rural residents who are the focus of the antitrust debate will receive valuable new services from the merger, broadband opportunities they don't have, local-into-local services they don't have, and they will have no disadvantages arising to them as a consequence of the merger.

I think this merger is broadly in their interest, and because it will create a far stronger cable competitor nationally, it is in the greater American national interest as well.

So, Mr. Chairman, I want to thank you for holding this hearing and convening this very impressive panel of witnesses. There are broader issues in terms of multi-channel video competition that I would personally like to address at a future time, and I share with Mr. Markey, for example, the desire to have open access over all Internet transport platforms. I think it is broadly in the national interest to do that.

That is a subject, I might suggest, that deserves its own day of hearings, and I would commend that to the subcommittee at the proper time.

But I want to thank you for organizing this hearing. It is an important subject, and I look forward to this testimony.

Mr. UPTON. Thank you.

Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman.

Just to add to some redundance, I will state my opening statement here. First of all, let me state or tell you, Mr. Chairman, as we have talked in the past, before I came to Congress 3 years ago now, I spent 8 years on the Omaha City Council where I chaired what would be the companion committee to this at the local level, and we had an unprecedented run for about 8 years in Omaha. We had three cable companies competing against each other, and it was fantastic.

We had incredible service provided to its customers. We had what was unheard of in the industry, and that is falling prices and adding channels.

But something started to happen in the late 1990's. First of all, U.S. West decided its experiment into the cable field was a failed experiment and stopped competing, and then Cablevision and Cox decided to stop competing by swapping territories, and we were left with one cable company and no competition.

And what have we seen? Increasing prices.

So as we talk here today about competition in the field, I have to wonder how we're going to define and look at competition. Fortunately within the city limits, DIRECTV has made some inroads. They've been somewhat aggressive in their marketing.

So now Cox got a little fat for a while, but now they actually have someone they have to pay attention to in Omaha, although I will state Cox has done a fantastic job in the city of Omaha providing their cable services.

But once you step out of the city limits, you don't have a cable company anymore. All you have is satellite TV. so as there is at least some semblance of competition within the city limits, there is maybe soon no competition once you step outside of those city limits.

So how do we define competition? Is it simply territories? As long as there are some territories where there is competition and ignore the areas that there are not?

And I wonder out loud that if cable companies have eliminated competition by swapping territories, if in essence we sit here and flex our muscles and talk about competition today, whether some time the, quote, unquote, just nature of the business isn't going to do the same thing between satellite and your cable companies, that is, cables get the inner cities; satellites get everything else, and no competition anymore.

And I can see that. I can see it moving in that direction. We have already seen semblances and evidences of that occurring within the industry.

So we have this blue ribbon panel of witnesses today. I would like to hear about not only the state of competition today, but what will it be for a rural consumer in the future? How are those people in my district in Valley, Nebraska that do not have access to cable but only have satellite, how will they fare 2 years from now? How will they be insured that they will have some semblance of TV service?

And, yes, Mr. Chairman, one of our options is simply to go back to antenna, but you have children as well. And as we moved into our new home in Valley and have neither cable nor satellite yet, an hourly request for, "Will you turn it to Cartoon Network? Will you turn it to Nickelodeon?" and I have to explain then the mechanics of antenna versus cable, that is really not an option for some families.

I yield back my time.

Mr. UPTON. It sounds like you have a problem.

Mr. TERRY. Yes.

Mr. UPTON. I recognize Ms. Harman.

Ms. HARMAN. Thank you, Mr. Chairman.

And thank you for holding this important hearing and this timely hearing on competition in the direct broadcast satellite and cable television markets.

Like you, I remember the world before satellite dishes. I even vaguely remember the world before television.

Of course, like Mr. Boucher, I am very interested in the proposed merger between EchoStar and DIRECTV. As you know, this committee, and the Nation's telecommunications policies have wisely been guided by the principle that the consumer and the marketplace are best served by vigorous competition. I believe that principle must guide us in this case, as well.

Of course, as we have just heard from Mr. Boucher and Mr. Terry, who gets my sympathies for having young children who are so TV oriented, the arguments about competition are complicated. One argument has to do, as Mr. Terry was saying about competition between the DBS and the cable industries. Another argument has to do about access to service in the DBS industry. That is what Mr. Boucher was talking about.

But I would put out there a third argument or maybe an additional argument that has to do not with the effect of competition on service, but the effect of competition on innovation.

It is critically important that going forward we not only have competition in service, but we have innovation in the television transmission and the broadband industries. If we do not continue to have innovation, we will never solve the tough problems of service access to rural areas.

Let me mention one additional point that, of course, is of extreme interest to me, and that is that DIRECTV is my constituent, and so, of course, it has been very well represented.

But the truth is that DIRECTV employs about 1,200 people in El Segundo, California, and 150 more at its antenna farm in Marina del Rey, California, both of them in the 36th District.

El Segundo, as some of you may know, is just south of Los Angeles International Airport, which of course, like all other major airport hubs has been hard hit by job losses since September 11th.

Two weeks ago, for example, I visited a major company in El Segundo that prepares food for the airlines. It has laid off half its work force. The South Bay in California in which these cities are located has lost about 41,000 jobs in the last 3 months. So I am very concerned about reports that a merger between DIRECTV and EchoStar could result in substantial additional job cuts and the closing, the possible closing of DIRECTV's California facilities.

Let me point out that DIRECTV also plays a broader role in the aerospace sector and in the regional economy of Los Angeles. DIRECTV, as I think we all know, had its origins in Hughes Electronics, which was the original developer of the geosynchronous satellite. That satellite, the first of which was built in 1961, was built in Culver City, California, and our commercial satellite system that grew from that has been a mainstay of the California economy.

In the early 1990's, when California's aerospace industry was headed to depression, Hughes and other aerospace companies diversified into many new industry sectors, and that diversification saved them and saved our economy.

Part of that diversification was the development of DIRECTV. Today both the private and public sectors benefit from the coexistence and interaction of commercial, military, and intelligence satellite applications which have benefited from the formation of companies like DIRECTV.

And I would be very, very worried if a merger of DIRECTV with any other company put some of those synergies at risk.

So in conclusion, Mr. Chairman, these days I spend most of my time talking about the need to develop digital capacity to counter a digital terrorist threat. As we think about that, we have to think about the need for a robust commercial satellite industry and a strong high tech software and hardware sector.

This merger and these issues are about a lot more than channel surfing, even though Mr. Terry's kids may think that is the issue. They are really about our survival.

I yield back the balance of my time. Thank you.

Mr. UPTON. The gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

I will be brief. I appreciate the hearing. We are all interested in what is going on in the multi-channel video programming marketplace and to access the direction that we as a Nation through public policy want to move.

I want to focus on a couple of things. I also represent a large rural district that we have the fear of being disenfranchised based upon maybe the major markets being covered in local into local and the smaller markets being left out. And I do not know if the proposed merger will do anything to help that, and I have heard comments that it will not.

So I am a very strong supporter of the benefits of free, over-the-air broadcasts for community service and safety issues, and I have seen it work in my district with floods and hurricanes and the like, and I want to make sure that that is protected and available.

One provider could, in essence, even if they were going to provide it, could make that cost exorbitant for the local broadcaster, which is another concern.

So we are looking at this closely. We want to be open minded, but the promise of or a guarantee of high quality DBS service being available to all my constituents not just for the benefits of entertainment, but really the growth of rural America is really dependent upon a vibrant broadband access, whether that is from direct satellite or whether that is from cable or that cellular or even on the telephone wire.

So I will be focusing on that. I appreciate the hearing, Mr. Chairman, and I yield back my time.

Mr. UPTON. Thank you.

The Chair will recognize the ranking member of the full committee, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, thank you, and I want to commend you for the hearing today.

This is an important hearing. It may very well be the only one, which we have on this particular subject for some time into the future, and it relates to the state of competition in the multi-channel video marketplace, and I believe that it is not only timely, but as I have said, important, given the recent merger announcement by the two national satellite television companies, EchoStar and DIRECTV.

Separately these two companies are the third and the sixth largest multi-channeled video programming distributors in the United States. If approved, the combined company will become No. 1 in the country with nearly 17 million subscribers.

Questions relative to consumer service, competition, and of course, antitrust matters are raised by this event, but in this age of rapid consolidation, one must observe that the vaunted position which will be achieved by this newly merged company may not last long. AT&T, which instantly became No. 1 when it swallowed the cable giants TCI and Media One just a few years ago, is also on the auction block. AT&T suitors include AOL Time Warner and Comcast, currently the second and fourth largest industry players, respectively.

And whoever succeeds in pursuit of AT&T will quickly leapfrog a newly merged EchoStar to occupy the No. 1 position, at least until the next merger.

Now, having said these things, I have enormous respect for my friends in the satellite and cable industries. They provide a necessary and widely accepted service to the American people, and I look forward with great fascination to hearing all of them and everybody else explain how this consolidation will actually increase competition in the MVPD market.

Certainly we will hear how these mergers will result in additional consumer welfare. It may well be that in a year or so we will hear differently from the consumers.

Increased efficiencies, it is said, lead to lower prices and better service for the American public. These arguments are occasionally true, but they presume that effective competition in the market will remain after the merger is completed, and that a number of questions which need to be answered prior to that merger are, in fact, both asked, responded to, and understood.

I am not prepared to make any judgments today as to whether the EchoStar transaction will substantially lessen competition in the MVPD market. That determination will be made by the antitrust authorities after more intensive analysis.

But I am concerned about some of the practical effects of this combination on the consuming public. While I am heartened by the public statements of EchoStar expressing its intent to expand local-into-local service to more markets nationwide, I understood that both EchoStar and DIRECTV have recently requested a judicial stay of the must carry requirements that the Congress imposed as a condition of providing this service.

I note that EchoStar indicated support of those at a prior time, but now raises questions as to constitutionality.

In my view, a full "must carry" obligation beginning January 1, 2002, was an integral part of the compromise struck in the Satellite Home Viewer Improvement Act of 1999. That considered not only the concerns of the viewing public, but also of others in the different parties of the industry, including those parts which provide free viewing to the American public of over-the-air broadcasting, something which I regard as being very necessary for this country to continue to sustain. The law gave the satellite companies a compulsory copyright license free of charge entitling them to carry broadcast of local stations so that they could compete more effectively with cable, something I applaud. The condition was that satellite companies, like their cable competitors, must be subject to the same set of rules, i.e., "must carry."

The Congress believed in 1999 that EchoStar must bear the burden of complying with the law and receive the benefit which they had sought rather than to litigate one half of the bargain struck. I hope that the good intentions expressed by EchoStar more recently in the context of this merger will, in fact, stand the test of time and will not confront this committee with any sudden changes of view or position by EchoStar.

Specifically EchoStar has stated that it will absorb the cost of replacing any consumer equipment made obsolete by the merger. I hope we will learn more about the content and the extent of this commitment today, and to understand what it will really mean to the consuming public, to the industry, and to the Congress.

I also hope that we will learn more about the extent of the commitment today. Does it include new satellite dishes, new set top boxes, professional installation, which can be expensive, and/or positioning or repositioning of satellite receivers? Does it cover replacement of high end equipment, including high definition satellite tuners and the combination of set top boxes containing personal video recorders? I believe that 17 million of our constituents expect us to find the answers to these questions, and I join them in thinking that they have a right to know exactly and precisely what will become of their stranded investment as a result of this merger.

Finally, I hope to hear more about EchoStar's plan for the future of uniform national pricing. Will rural communities have access to the same pricing plans as urban consumers for all programming, including premium and a la carte services? I have heard that it is the intention of EchoStar to assure this. I want to hear that assurance here, but I also want to hear what that assurance means and whether or not there might be some change in that subsequent to enactment of legislation or actions by the regulatory agencies.

Now, other questions. Will marketing promotions and special offers continue to be available to consumers in communities that are no longer served by a cable competitor? An important question to many who live in rural areas and elsewhere in this country.

Mr. Chairman, these are critical questions. There probably are others. It is my view they must be answered satisfactorily in the very near future if we are to be sure that we are carrying out our responsibilities to consumers and that we are protecting them and assuring that competition continues to survive and to provide broad benefits to the American public in the multi-channel video marketplace.

I commend you for these hearings, Mr. Chairman, and I thank you for recognizing me and making this statement possible.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Thank you, Mr. Chairman. Today's hearing on the state of competition in the multichannel video marketplace is particularly timely, given the recent merger announcement by the two national satellite television companies, EchoStar and DIRECTV.

Separately, these two companies are the third and sixth largest multichannel video programming distributors, or "MVPDs," in the United States. If approved, the combined company will become number one in the country with nearly 17 million subscribers.

But in this age of rapid consolidation, that vaunted position may not last long. AT&T, which instantly became number one when it swallowed cable giants TCI and Media One just a few years ago, is also on the auction block.

AT&T's suitors include AOL Time Warner and Comcast, currently the second and fourth largest industry players, respectively. And whoever succeeds in its pursuit of AT&T will quickly leapfrog a merged EchoStar to occupy the number one position—at least for a time.

Now I have enormous respect for my friends in the satellite and cable industries, and I look forward with great fascination to hearing them explain how all this consolidation is actually *increasing* competition in the MVPD market.

Certainly we will hear how these mergers result in additional consumer welfare. Increased efficiencies, they say, lead to lower prices and better service for the American public. And these arguments are often true. But they presuppose that effective competition in the market will remain after the merger is completed.

I am not prepared to make a judgment today as to whether the EchoStar transaction will substantially lessen competition in the MVPD market. That determination will be made by the antitrust authorities after more intensive analysis. But I am concerned about some of the practical effects of this combination on the consuming public.

While I am heartened by the public statements of EchoStar expressing its intent to expand "local into local" service to more markets nationwide, I understand that both EchoStar and DIRECTV recently requested a judicial stay of the "must carry" requirements that Congress imposed as a condition of providing this service.

In my view, a full "must carry" obligation beginning January 1, 2002, was an integral part of the compromise struck in the Satellite Home Viewer Improvement Act of 1999. That law gave satellite companies a compulsory copyright license, *free of charge,* entitling them to carry local broadcast stations so they could compete more effectively with cable. The condition was that satellite companies—like their cable competitors—would be subject to must carry rules.

The Congress believed in 1999 that EchoStar would bear both the burden and the benefit of that law, rather than litigate one half of the bargain struck. I hope the good intentions expressed by EchoStar more recently in the context of this merger will, in fact, stand the test of time.

Specifically, EchoStar has stated that it will absorb the cost of replacing any consumer equipment made obsolete by this merger. I hope we will learn more about the extent of this commitment today. Does it include the cost of new satellite dishes, new set top boxes, professional installation and/or repositioning of satellite receivers? Does it cover replacement of higher-end equipment, including high definition satellite tuners, and combination set-top boxes containing personal video recorders? I believe that 17 million of our constituents have a right to know precisely what will become of their stranded investment as a result of this merger.

Finally, I hope to hear more about EchoStar's plan for the future of uniform national pricing. Will rural communities have access to the same pricing plans as urban consumers for all programming, including premium and ala carte services? Will marketing promotions and special offers continue to be available to consumers in communities that are not served by a cable competitor?

Mr. Chairman, I believe these are some of the critical questions that must be answered satisfactorily if we are to make sure consumers are protected and competition continues to survive in the multichannel video marketplace.

Mr. UPTON. Thank you.

Mr. Gillmor.

Mr. GILLMOR. Pass, Mr. Chairman.

Mr. UPTON. Mr. Brown.

Mr. BROWN. The issues today are obviously very complex. They have significant implications for the future of the multi-channel video programming marketplace. Both large and small companies play a very important role in this enterprise, and it is important to continue to promote competition and protect consumers.

I wanted to take this opportunity to welcome Michael Fiorile, the President and CEO for the Dispatch Broadcast Group in Columbus, Ohio. Dispatch Broadcast Group includes WBNS-TV and AM-FM in Columbus; the Ohio News Network, WTHR-TV in Indianapolis; and Dispatch Interactive Television. WBNS-DT is the only digital signal in the Columbus market.

Mike's credentials are impressive. He served as Vice President and General Manager of TV stations in Sacramento and Ashville and Flint, in Scranton. He currently serves as Vice Chairman of the National Association of Broadcasters' Television Board and is Vice Chairman of the NAB Digital Television Task Force.

Thank you for joining us today, and thank you to all of the panel.

I yield back, Mr. Chairman.

Mr. UPTON. Ms. McCarthy.

Ms. MCCARTHY. Mr. Chairman, there has already been a whole lot of wisdom shared by members more senior than I about what today is all about and about what the future must determine, and so I am going to submit my remarks for the record.

I am thankful that you are holding this hearing. I suspect it will be one of many. I know that I, too, share the concern raised by the chairman and ranking member about how the consumer will benefit, how the spectrum will be divided, but we make sure that we provide local channels, at least 100 of them across this Nation. You know, we are only at 42 right now.

All of these probably will come out in the testimony from the experts we have here before us, and so I am going to yield back so that we can proceed to hear from them.

[The prepared statement of Hon. Karen McCarthy follows:]

PREPARED STATEMENT OF HON. KAREN MCCARTHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Thank you Chairman Upton and Ranking Member Markey for holding this hearing on the status of competition in the multichannel video programming marketplace. I look forward to the testimony of all of the witnesses regarding the merger between DirecTV and EchoStar as well as program access rates, cable ownership limits, cable pricing, and local content providers.

Cable and satellite television send a variety of programming to more than 80 percent of households nationwide. Consumers now have hundreds of channels to choose from due to advances in digital technology. While the number and variety of services offered by these programming distributors is increasing, including broadband Internet and digital music channels, the number of competitors in the industry is decreasing, potentially providing consumers less choice.

In Missouri, only ⅔ of the households are accessible by cable. Nearly 850,000 families had no option for multichannel programming before Direct Broadcast Satellite (DBS) came to the marketplace. Because of the efforts of many of these companies with representatives before us today, consumers in rural areas can now watch 150 channels of digital programming and download files from the Internet at broadband speeds which were previously unattainable.

I am concerned the merger of the two companies which provide these services, DirecTV and EchoStar may remove competitive incentives from improving services while maintaining low prices. We need to ensure that if this merger is approved, benefits will be passed on to consumers, not just the companies involved. While mergers frequently lead to increased efficiencies and economies of scale, I would like to ensure the consolidated companies will pass on savings to consumers. I hope to learn how the single merged company plans to continue to expand competitive services and offer competitive prices to the 9 million DBS subscribers who do not have the option to subscribe to cable. We cannot allow a monopoly satellite company to take advantage of rural consumers.

DirecTV and EchoStar are currently the third and sixth largest multichannel video programming distributors, respectively. If the merger proceeds, the new entity would become the largest in the country. As a proponent of competition, I would like to know how consolidation in the industry will increase competition in this market.

I also look forward to hearing how the merger will ensure that all local channels will be provided to 100 localities, when currently the two separate companies only serve 42 unique markets. I am interested in the witnesses' views of the implementation of this proposal as well as their opinions of the current lawsuit to overturn the Satellite Home Viewer Improvement Act of 1999 in which Public Law 106-113 required all local channels must be provided by the DBS system if one is, the "carry one, carry all" policy.

Furthermore, I am concerned how the spectrum will be divided to contain the new high definition signals while continuing to provide local content. Local content requires a great deal of capacity consideration each local signal is sent to the entire country but only viewable in certain areas. This is a large waste of spectrum, and I look forward to hearing how more this can be more efficiently used.

I eagerly anticipate the testimony of the distinguished panelists so we can gather more insight into the state of competition in this high tech industry which is so vital to the economic livelihood of America.

Thank you Mr. Chairman. I yield back the balance of my time.

Mr. UPTON. Thank you.

I would note that all members by unanimous consent will have their opening statement as part of the record.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. ELIOT ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman: I truly appreciate your calling this hearing. The multi-channel video programming distribution (MVPD) marketplace is certainly an exciting and growing industry. New technologies and capabilities for existing ones are being introduced all the time.

My primary concern for today's hearing is the merger of Echostar and DirecTV. In the days following September 11th, as awful as I felt, I was strengthened by the outpouring of assistance from across the nation. From the millions of dollars in donations to the construction companies who are now cleaning up Ground Zero—without a written contract I would add, and an issue our full committee should be looking into—I was amazed at the response by individuals and companies.

Thus, I must admit my amazement at the reaction to a simple request from WNET Channel 13, my local PBS station in New York. DirecTV was asked for temporary space on its system because Channel 13 was no longer broadcasting. Instead of DirecTV leaping at the chance to assist a gravely wounded partner in the world of television, DirecTV chose to act in a inconsiderate manner and deny this request. Considering the numerous channels on their system, 225 or so, I was quite frankly stunned at the reaction. Now DirecTV is asking the federal government to approve the creation of a national monopoly in the satellite home viewer market. I am forced to wonder if DirecTV, with a competitor in the industry, was so unresponsive, what would the reaction of a megacompany be to future requests.

As we are the subcommittee that directly oversees the FCC, and the FCC oversees the merger, I am very interested in learning more about this proposal. As it stands, these companies must prove to the FCC—and us—why such a merger is in the public interest. These companies, after being a party to the SHVIA, have now sought to overturn the must carry rules in court and even now are seeking an injunction to prevent the laws requirement's from taking force on January 1, 2002.

Beyond my own parochial concerns, I believe this has direct implications for a number of issues that Mr. Tauzin and others have regarding program access rules. I also think we should be aware that an alternative technology presented by Northpoint is trying to break into the MVDP market, which is opposed by EchoStar and DirecTV.

I have many, many concerns, Mr. Chairman. I look forward to learning the answers to them.

Mr. UPTON. At this point we are going to go to the panel. We have an impressive list of witnesses led by Mr. Charlie Ergen, CEO of EchoStar; Mr. Eddy Hartenstein, Chairman and CEO of DIRECTV; Mr. Robert Sachs, President and CEO of the National Cable and Telecommunications Association; Mr. Neal Schnog, President of UVISION on behalf of the American Cable Association; Mr. Bob Phillips, President and CEO of National Rural Telecommunications Cooperative; Mr. Jared Abbruzzese—how do I get closer?—Abbruzzese, Acting CEO of WSNet; Mr. Marshall Pagon, President and CEO of Pegasus Communications; and Mr. Michael Fiorile, president and CEO of the Dispatch Broadcast Group and represented by the National Association of Broadcasters.

Gentlemen, we appreciate your testimony coming in advance. It is all made part of the record, and we will start, Ms. Sachs, with you. If you could limit your remarks to 5 minutes, at which point when we are doing with the panel we will entertain questions from those members that are here.

Thank you, Mr. Sachs.

We are getting an upgrade. I want you to know when this calendar year is over, we are going to be at least as wired as the Education Committee. I have made that pledge.

We are going to start your time over as well. So go ahead. I am not going to be like the Michigan State timekeeper.

STATEMENTS OF ROBERT SACHS, PRESIDENT AND CEO, NATIONAL CABLE AND TELECOMMUNICATIONS ASSOCIATION; NEAL SCHNOG, PRESIDENT, UVISION, ON BEHALF OF AMERICAN CABLE ASSOCIATION; BOB PHILLIPS, PRESIDENT AND CEO, NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE; JARED E. ABBRUZZESE, ACTING CEO, WSNet; MARSHALL W. PAGON, PRESIDENT AND CEO, PEGASUS COMMUNICATION; MICHAEL J. FIORILE, PRESIDENT AND CEO, DISPATCH BROADCAST GROUP; EDDY W. HARTENSTEIN, CHAIRMAN AND CEO, DIRECTV; AND CHARLES W. ERGEN, CEO, EchoSTAR

Mr. SACHS. Thank you.

Mr. UPTON. Welcome to the big house.

Mr. SACHS. That is the equivalent of does your TV turn to Channel 3.

Mr. Chairman, members of the subcommittee, my name is Robert Sachs, and I am President and CEO of the National Cable and Telecommunications Association.

Thank you for providing us with the opportunity to testify before your subcommittee on the subject of video competition.

Mr. Chairman, competition in the video marketplace is vigorous and well established. Today consumers can choose from a variety of multi-channel video providers, including direct broadcast satellites, alternative broad band providers like RCN, phone companies and utilities. Indeed, most consumers have a choice of at least three multi-channel video providers.

Last year in its seventh annual report on competition in the video marketplace, the FCC found that “competitive alternatives and consumer choice continue to develop.” Subscribership to satellite and terrestrial competitors to cable has jumped nearly tenfold from an aggregate of 2.3 million non-cable, multi-channel video customers at the time of the 1992 Cable Act to almost 21 million in September 2001.

That is correct, and the number may surprise you. But nearly 21 million consumers, almost one out of every four subscription television customers, today obtain multi-channel video programming from a source other than a cable operator.

Mr. Chairman, as these results demonstrate, we believe that the goal of fostering video competition set by Congress in the 1992 act has been met. While cable operators are clearly facing competition from a variety of sources, DBS, in particular, has proven itself as a competitive substitute for cable.

With the passage of the Satellite Home Viewer Improvement Act, DBS companies can now retransmit local broadcast signals into their market of origin. The total number of DBS subscribers jumped from 14 million to 17 million between September 2000 and this past September, a 19 percent annual growth rate. DIRECTV now has 10.4 million subscribers, more than all but two cable companies, AT&T Broadband and AOL Time Warner.

The No. 2 DBS provider, EchoStar, has 6.4 million subscribers, more than all but four cable companies. By any measure EchoStar and DIRECTV are formidable competitors to cable.

Moreover, with the additional channels and operating efficiencies that would result from combining these two companies, there is no reason to believe that a 17 million subscriber satellite company will be any less formidable.

NCTA does not take a position with regard to the proposed EchoStar-DIRECTV merger. We do not seek to gain competitive advantage by imposing regulatory conditions on competitors, and we believe that any antitrust issues raised by the merger are best left to resolution by expert agencies.

Our position, however, is that multi-channel video competition is already fierce, leading our industry to respond by embarking on a massive effort to upgrade facilities and launch new services. Since 1996, our industry has invested approximately $55 billion of risk capital to deploy broadband plant in order to offer new advanced digital services, including digital video, high speed Internet, and cable telephony.

Mr. Chairman, consumers are benefiting from this rapid and unabated growth of competition in the video market, and the convergence of video, voice, and data services in the digital broadband marketplace will only accelerate this trend.

Cable will continue to be a leader in providing consumers with choice not only in video services, but also in high speed Internet and cable telephony.

At the same time, consumers will be able to choose from among multiple vendors when making their purchases. In this highly competitive environment, companies that succeed will be those who offer consumers the best quality, value, and service.

It is not possible to forecast which companies will be most successful, but one thing that can be said with certainty is that American consumers will be the ultimate winners.

Thank you very much.

[The prepared statement of Robert Sachs follows:]

PREPARED STATEMENT OF ROBERT SACHS, PRESIDENT AND CEO, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

INTRODUCTION

Mr. Chairman, members of the Subcommittee, my name is Robert Sachs and I am President and CEO of the National Cable & Telecommunications Association. Thank you for providing us with the opportunity to testify before your subcommittee regarding competition in the multichannel video market.

Mr. Chairman, competition in the multichannel video marketplace is vigorous and well established. Today, consumers can choose from a variety of multichannel video providers, including direct broadcast satellites (DBS), alternative broadband providers like RCN, phone companies, like Qwest and utilities, like Sigecom. Indeed, most consumers have a choice of at least three multichannel video providers. As a result of this competition, nearly 21 million consumers—almost 23 percent of subscription television customers—today obtain multichannel video programming from a source other than a cable operator.

To determine whether competition exists, one only need look at what's been happening in the marketplace since the passage of the 1996 Telecommunications Act. With respect to the marketplace for the delivery of video services, the answer to that question is clear. Video competition is fierce, leading to service enhancements and product innovation that inure to the benefit of consumers.

The cable industry responded to this competition and the regulatory stability created by the passage of the 1996 Act by embarking on a massive effort to upgrade facilities and launch new services. Since the passage of the 1996 Act, the cable industry has invested roughly $55 billion to deploy broadband plant in order to offer a wide array of new advanced digital services, including digital video, high speed Internet access, cable telephony and interactive applications. The DBS industry, seeking to maintain its lead position in subscriber growth has responded to cable's investment by launching its own satellite delivered broadband services and obtaining exclusive sports programming.

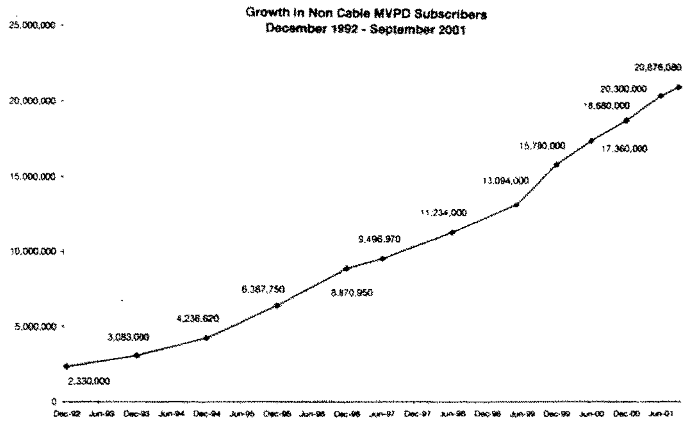
Competition in the Video Market Is Well Established And Growing Steadily

Market Share of Multichannel Video Program Distributors (MVPDs)—September 2001

MVPD	Subscribers (in Millions)	Percent of MVPD Market
DBS	16.73	18.05
C-Band	0.94	1.01
MMDS	0.62	0.67
SMATV	1.50	1.62
Local Telephone Companies	0.43	0.46
Broadband Competitors	0.66	0.71
Total Non-Cable	20.87	22.53
Cable	71.79	77.47
Total Multichannel Subscribers	92.66	100.00

Source: NCTA Research Department estimate based on data from A. C. Nielsen, Paul Kagan Associates, Cable World, SkyREPORT, and public reports of individual companies.

Today, cable competes with a wide range of satellite and terrestrial providers. Last year in its *Seventh Annual Report on Competition in the Video Marketplace,* the FCC found that "competitive alternatives and consumer choice continue to develop." Customers have increasingly flocked to these alternatives, with non-cable subscribership growing nearly *ten-fold* from an aggregate of 2,330,000 non-cable MVPD customers at the time of the 1992 Cable Act to more than 20,876,000 in September 2001.



While cable operators are clearly facing competition from a variety of sources, DBS in particular has proven itself as a competitive substitute for cable. With the passage of the Satellite Home Viewer Improvement Act (SHVIA) in November 1999, DBS companies can now retransmit local broadcast signals into their market of origin ("local-into-local"). As of November 2001, DirecTV and EchoStar made available local TV signals in 42 markets with over 65 million television households. When combined with their ability to offer hundreds of channels of digital video and CD quality sound, DBS companies compete vigorously with cable. The total number of DBS subscribers jumped from 14 million to 16.73 million between September 2000 and September 2001—a 19 percent annual growth rate. DirecTV now has more subscribers (10.4 million) than all but two cable operators—AT&T and AOL Time Warner—making it the third largest multichannel video provider in the U.S. The number two DBS provider, EchoStar, is the fifth largest MVPD and has more customers than all but three cable companies. Furthermore, DirecTV predicts that it will add 1-1.2 million new subscribers in 2002.[1] EchoStar forecasts net subscriber additions to total between 1.5 and 1.75 million in 2001, with similar gains predicted in 2002.[2]

TOP 12 MULITCHANNEL VIDEO PROVIDERS

Company	Number of Subscribers
AT&T Broadband	13,750,000
Time Warner Cable	12,654,000
DirecTV	10,341,000
Comcast	8,437,000
Charter	6,970,000
Echostar	6,430,000
Cox Communications	6,206,737
Adelphia	5,693,035
Cablevision Systems	2,988,590
Mediacom	1,585,000
Insight	1,275,500
CableOne	760,000

Source: NCTA Research based on Company 3Q reports

Clearly, EchoStar and DirecTV are formidable competitors to cable and enjoy a number of competitive advantages. For example, DBS has been all digital from the start, giving it greater channel capacity than many cable systems, and has been able to achieve greater efficiencies in advertising and promotion with uniform national pricing. In addition, DBS companies are not subject to local franchise fees and taxes which can add so much as 15% to a cable customer's monthly bill, as they do in the District of Columbia. Also, DBS companies are not saddled with the costs

[1] Video Business Online, "DirecTV parent sees 10% growth next year," www.videobusiness.com/news/111401.

[2] "EchoStar reports Q3 profit on subscriber growth," biz.yahoo.com/rf/011023/n23236477-

of public access studios, institutional networks and free municipal cable hook-ups which are required by most cable franchise agreements.

On cable's side of the competitive ledger, upgraded cable systems can match the programming variety and choice that DBS companies offer, and provide consumers with 7 by 24 local customer service, interactive digital video, cable modem and cable telephony products.

The marketplace will determine which MVPD offers the better package of services with the best price and customer care. And individual consumers will determine which service offering best suits their particular needs. But what is undeniably clear is that consumers have multiple choices and are deciding among them with their pocket books.

NCTA does not take a position with regard to the proposed EchoStar/DirecTV merger. As indicated earlier, cable operators see the Dish Network and DirecTV as very formidable competitors, and compete vigorously with these satellite companies everyday. Moreover, with the additional channel capacity and operating efficiencies that would result from combining these two companies, we have no reason to believe that a 17 million subscriber satellite company will be any less formidable. Charlie Ergen is a fierce and respected competitor, as his track record amply demonstrates.

We believe that antitrust and public policy issues that have been raised about the proposed EchoStar/DirecTV merger are best left to resolution by expert agencies like the U.S. Department of Justice and Federal Communications Commission. NCTA represents cable operators serving over 90% of the nation's cable television customers and more than 200 cable program networks, as well as equipment suppliers and providers of other services to the cable industry. Many of these companies are also suppliers to the satellite industry. Individual member companies may choose to submit comments to the expert agencies, however, the cable industry, as an industry, does not plan to take a position on the merger.

Total dish subscribership (C-Band and DBS) now exceeds 15 percent in 41 states. According to SkyREPORT, Direct-to-Home (DTH) subscribers (all dish customers, including DBS and C-Band) grew from 15.3 million to 17.9 million between September 2000 and September 2001, an increase of 15.6 percent (versus 1 percent for cable). In 41 states, DTH satellite subscribership now exceeds 15 percent of all television homes. As of July 2001, DTH penetration exceeded 20 percent in 31 states, 25 percent in 16 states, 30 percent in 5 states, and 40 percent in 1 state. As mentioned, today most consumers have the choice of two DBS providers in addition to cable, and some have other multichannel video choices as well.

States with Direct-To-Home (DTH) Dish Penetration of Fifteen Percent or More (July 2001)

STATE	% OF TVHH w/DTH
Vermont	41.62
Montana	38.86
Wyoming	34.23
Mississippi	32.97
Arkansas	30.79
Idaho	29.26
North Carolina	28.34
North Dakota	28.10
Missouri	27.12
Kentucky	27.11
Utah	26.96
South Carolina	26.26
West Virginia	26.22
Texas	25.68
Indiana	25.14
New Mexico	25.11
Georgia	24.93
South Dakota	24.59
Tennessee	24.43
Alabama	24.15
Virginia	23.82
Oklahoma	23.48
Maine	23.21
Colorado	22.89
Iowa	22.68
Arizona	22.29

States with Direct-To-Home (DTH) Dish Penetration of Fifteen Percent or More (July 2001)—Continued

STATE	% OF TVHH w/DTH
Wisconsin	21.96
Nebraska	21.38
Oregon	20.97
Minnesota	20.67
Kansas	20.65
Michigan	18.86
Florida	18.75
Louisiana	18.55
Washington	17.82
Ohio	16.76
Nevada	16.49
California	16.47
New Hampshire	16.45
Illinois	16.37
Delaware	15.05

Source: SkyTRENDS SkyMAP July 1, 2001; www.skyreport.com

While DBS has clearly become the chief competitor to cable, a growing number of new competitors have entered the marketplace. Companies like RCN, Knology, WideOpenWest, and others are providing consumers with competitive video and broadband services. Some utilities and incumbent local exchange carriers are also adding video programming to their product line-ups.

Mr. Chairman, the goal of multichannel video competition set by Congress in the 1992 Cable Act has been accomplished.

The Cable Industry's Response to Burgeoning Competition

Cable companies have responded to competition in the video market by aggressively upgrading their facilities and launching new services. Since passage of the Telecommunications Act of 1996, the cable industry has invested nearly $55 billion to deploy broadband plant in order to offer a wide array of advanced services, including digital video, digital music, high speed access to the Internet, and telephony. These upgrades involve rebuilding more than a million miles of cable plant and by year-end 2001, they will be approximately 80 percent complete. As of September 30, 2001, cable had 13.7 million digital video customers, 6.4 million high-speed data customers, and 1.5 million residential cable telephone customers.

Among the new options that cable customers have are digital video services. Cable program networks have already launched some 60 new digital channels, offering consumers additional choice and further program diversity. Examples include the *Biography Channel* and *History Channel International* (from A&E); *Science, Civilization,* and *Kids* (from Discovery); *Noggin, Nick Too,* and *Nickelodeon Games & Sports* (from Nickelodeon); and *style.* (from E!). There are six new Hispanic channels from Liberty Cañales, new music channels from MTV and BET, and separate channels targeting Indian, Italian, Arabic, Filipino, French, South Asian and Chinese viewers from *The International Channel.* There are also many new premium offerings from HBO (*HBO Family, ActionMAX,* and *ThrillerMAX*), Showtime (*Showtime Extreme, Showtime Beyond*) and Starz Encore (*Family, Cinema, Movies for the Soul,* and *Adventure Zone*).

Prices for Cable Programming Services

Despite escalating programming costs (especially higher sports rights fees) and billions spent on system upgrades, cable prices have remained relatively stable on a per-channel basis. For example, in its most recent report the Federal Communications Commission found that cable rates stayed unchanged in the year 2000 on a cost-per-channel basis (*Report on Cable Industry Prices,* FCC 01-49, MM Docket No. 92-266, released February 14, 2001). According to the same report, during the 12-month period ending July 1, 2000, average monthly prices for basic service tiers (BST), cable programming service tiers (CPST), and equipment increased by 5.8 percent. This represents a very slight increase (from 5.2 percent) for the year ending July 1, 1999—during which CPST prices *were subject to FCC regulation* from July 1, 1998, to March 31, 1999.

Industry critics will cite the fact that average monthly cable prices increased 5.8 percent compared to the inflation rate of 3.7 percent during the 12-month period ending July 1, 2000. But their criticism fails to take into account the fact that cable subscribers also received an average of three additional channels of BST and/or CPST programming. In fact, it is the competition from direct broadcast satellite services and other competitive broadband providers that has driven cable operators to upgrade their plant and add the new channels of programming consumers want.

Year-to-year comparisons which fail to consider the increased number of channels that operators provide to customers therefore create a misleading picture. In fact, data from the FCC and General Accounting Office show that the price per channel of cable's video services has *declined* since 1986 when adjusted for inflation:

Price Per Cable Channel, 1986-2000

	12/1/86	4/1/91	7/31/97	7/31/00
Nominal Price per Channel	$0.44	$0.53	$0.63	$0.66
Price Per Channel Adjusted for Inflation (in 2000 dollars)	$0.69	$0.68	$0.68	$0.66

Source: GAO Survey of Cable Television Rates and Services, July 1991; FCC Reports on Cable Industry Prices, released 12-15-97 and 2-14-01; Bureau of Labor Statistics, CPI-U.

This drop in real per-channel cable prices has occurred even though programming costs have skyrocketed since 1986. For example, between 1996 and 2001, the cable industry spent over $46 billion on basic and premium programming—nearly twice the $23.8 billion it spent during the previous six years.

Cable Systems' Programming Expenditures: 1986-2001

Year	Expenditures (in Billions)
1986	$2.030
1987	$2.289
1988	$2.599
1989	$2.918
1990	$3.195
1991	$3.463
1992	$3.811
1993	$4.000
1994	$4.370
1995	$4.963
1996	$5.656
1997	$6.413
1998	$7.466
1999	$8.000
2000	$8.882
2001	$9.800

Source: NCTA Research Department estimate, based on data from Paul Kagan Associates, Inc. and the U.S. Copyright Office.

Cable customers today are receiving more channels and better value for their dollar than ever before. And consumers are using their cable service more than ever. During primetime, ad-supported cable viewership increased from a 7.5 share during the 1985-1986 television season to a 41.7 share during the 2000/2001 television season, according to a Cabletelevision Advertising Bureau analysis of Nielsen data.

Expiration of Restrictions on Exclusive Contracts

Finally, I know this subcommittee has a particular interest in a provision of the 1992 Cable Act that imposed a 10-year restriction on the ability of vertically-integrated satellite cable programming networks to enter into exclusive contracts with cable operators. That restriction is scheduled to sunset in October 2002, unless the FCC finds that "such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."

The prohibition on the ability of vertically integrated programmers to enter into exclusive contracts was enacted in a very different environment. As my testimony indicates, the competitive landscape in the multichannel video market place has changed dramatically since then. In 1992, DBS had no subscribers. Today, DBS serves more than 17 million customers. In 1992, cable operators served 95% of all MVPD subscribers. Today, cable serves less than 78% of multichannel video customers.

And, in a total turnaround of circumstances, the most valuable exclusive rights in subscription television—to the NFL's Sunday afternoon football package—are held by DirecTV, the third largest MVPD. Regulations that were established during a period when there were significantly fewer multichannel video programming alternatives for consumers should be allowed to expire in a competitive environment. In limiting the restriction on exclusive contracts for 10 years, Congress recognized that a competitive marketplace is preferable to regulation. Prolonging the ban disserves competition and diversity by disincenting cable operators and their competitors to develop differentiated programming services.

The dramatic growth over the last decade in the number of multichannel customers subscribing to alternatives to cable is only part of the picture. The increase in diverse program services in which cable operators have *no* ownership interest has totally changed the landscape from 1992. In 1992, there were only 45 non-vertically integrated satellite-delivered services. Today, there are more than 200 national satellite delivered services that have no cable ownership. These networks compete with vertically-integrated networks for viewers, offering a variety of programming genres, such as news, children's, music and general interest programming, among others. While nearly half of all program services were vertically integrated in 1992, that percentage has dropped to 26% today. And no single cable company has ownership interests in more than 10% of these satellite delivered programming services.

Year	Number of Vertically Integrated Services	Percent of Vertically Integrated Services	Number of Non-Vertically Integrated Services	Percent of Non-Vertically Integrated Services	Total Number of Satellite Delivered Programming Services
1992	42	48%	45	52%	87
1994	56	53%	50	47%	106
1995	66	51%	63	49%	129
1996	67	46%	80	54%	147
1997	68	40%	104	60%	172
1998	95	39%	150	61%	245
1999	104	37%	179	63%	283
2000	99	35%	182	65%	281
2001	73	26%	208	74%	281

Source: 1999-2000 FCC Annual Competition Reports; NCTA Research

In contrast, major media conglomerates like Disney, General Electric, Viacom, and News Corp (who respectively own the ABC, NBC, CBS and Fox broadcast networks), are increasing their ownership of cable networks. Each of the major commercial broadcast TV networks today is owned by a media company that has financial interests in 10 to 20 cable networks. Some are nationally distributed channels like CNBC, while others are regional channels like Fox Sports Net. And, as the following chart shows, the stable of broadcast-owned cable networks includes some of the most powerful brands in television, among them ESPN, The Disney Channel, MTV, VH-1, Nickelodeon, Lifetime, the History Channel, and Showtime Networks.

November 2001

BROADCAST NETWORK INVESTMENTS IN CABLE NETWORKS

General Electric/NBC: CNBC
Partial Ownership: A&E; AMC; Biography Channel; Bravo; Fox Sports Net (regional sports networks); History Channel; History Channel International; Independent Film Channel; MSNBC; MuchMusic; Valuevision; WE: Women's Entertainment

Viacom/CBS/UPN: BET Holdings: BET, BET Action Pay-Per-View, BET on Jazz, BET Gospel; The Box; CMT (Country Music Television); Flix; MTV; MTV2; Nickelodeon/Nick at Nite; TV Land; VH1; Showtime; The Movie Channel; TNN: The National Network; The Suite (digital networks): Noggin, Nickelodeon GAS, Nick Too, M2, MTV X, MTV S, VH1 Smooth, VH1 Country, VH1 Soul
Partial Ownership: Comedy Central; Sundance Channel

News Corporation/Fox: Fox Movie Channel; Fox News; Fox Sport Americas; Fox Sports World; FX
Partial Ownership: Discovery Health; Fox Sports Net (regional sports networks); National Geographic; Speedvision

Walt Disney/ABC: ; ABC Family; Disney Channel; SoapNet; Toon Disney
Partial Ownership: A&E; Biography Channel; E!; ESPN; ESPN2; ESPNews; ESPN Classic; History Channel; History Channel International; Lifetime; Lifetime Movie Network; style

CONCLUSION

Mr. Chairman, consumers are benefiting from a rapid and unabated growth of competition in the video market. The convergence of video, voice, and data services in the digital broadband marketplace will only accelerate this trend. Cable will continue to be a leader in providing consumers with choice—not only in video services, but also in high speed Internet services and telephony. At the same time, consumers will be able to choose from among multiple vendors when making their purchases. In this highly competitive environment, companies that succeed will be those who offer consumers the best quality, value, and service. It is not possible to forecast precisely which will be most successful. But one thing that can be said with certainty is that American consumers are sure to be the ultimate winners.

Thank you again for this opportunity to present the cable industry's views. I would be happy to answer the Subcommittee's questions.

Mr. UPTON. Thank you.

Mr. Schnog.

STATEMENT OF NEAL SCHNOG

Mr. SCHNOG. Thank you, Mr. Chairman.

My name is Neal Schnog, and I am the President and part owner of Uvision. We are a small cable TV company with 8,300 customers in rural Oregon.

I am also a board member of the American Cable Association and represent more than 900 independent cable businesses serving more than 7.5 million customers in mostly smaller, rural markets across the United States.

Unlike some larger companies you will hear about, ACA members are not affiliated with program suppliers, but satellite, cable, telephone companies, major ISPs or other media companies. We are little guys.

As a first generation American whose family was given shelter and prosperity by the shores of our great Nation, I cannot express how proud I am to take part in this hearing. But being on this panel, I do not just feel like a regular constituent. I feel like an extra in a movie called "Clash of the Titans."

The American Cable Association represents no goliaths. We speak for the millions of small town customers who are represented by nearly every member of this committee. Competition really means customer choice. No choice; no competition.

The irony here is that the competition and customer choice today, especially in rural areas, are endangered because they are governed by an unlikely cast of players that do not live in rural America and do not care what happens out in our small towns.

Unless there is significant congressional and regulatory review of these issues, the situation is not likely to improve. There are three very important issues that threaten consumer choice in smaller markets and rural America and that will derail the progress to provide advanced services in smaller markets. That is the digital divide we all talk about.

First, vastly increasing control over content, pricing, terms, conditions, and placement requirements by just a few programming giants; Second, the adverse effect in the smaller rural marketplace of the proposed EchoStar-DIRECTV merger which will limit competition in these markets; and Third, the burden of regulation on small or independent cable companies compared to the free regulatory ride enjoyed by the satellite companies.

So who controls what your constituents see? You probably think it is me, but surprisingly enough, it is not. While customers and local franchise authorities do not see it, their choices on what they watch are controlled by five companies or programming cartels. I call them America's own OPEC, the organization of programming extorting companies.

We have seen an explosive consolidation in the programming industry that has led to sharply increased prices, less freedom to offer popular content, and little customer awareness as to why they are forced to buy the channels they do and why their rates go up so much.

For example, ESPN has raised its rates to our members by up to 20 percent each year for the past 5 years. Our customers want ESPN. Fine, but ABC-Disney will not just let us buy ESPN. Oftentimes in order to get the local ABC affiliate, Disney will force us through retransmission consent to take other channels, such as SoapNet and the same for Fox, GE, and CBS.

This might not be so bad if we could offer the programming on an a la carte basis to allow the consumer to choose what they want, but all of the cartel programming companies, like Independent Cable, make us pay for every customer and pay punitive prices if we do not carry many of their services in a bundle, just like they won.

Even more appalling is the fact that these programmers also imbed into their contracts various nondisclosure terms. These provisions prohibit cable operators from telling any customer and even Congress what the terms or rates are for their programming.

Customers will also face less choice as a result of satellite monopoly that would be created from the EchoStar deal. The merger of EchoStar and DIRECT will create the world's largest programming distributor with nearly 17 million customers and give the merged companies nearly 90 percent of the full power, full CONUS satellite transponders that exist.

These two facts, along with the possible sunsetting of the programming access rules would give EchoStar the ability to control access to programming, thereby limiting customer choice and providing enough forward bandwidth that small cable companies would never be able to compete, and many of us have already gone out of business with the satellite as it is.

Already DIRECTV has exclusive contracts for certain sporting events, meaning that Americans can only purchase this programming by buying it from DIRECT. Now imagine what happens if they have the power of the two companies and they start to buy things on an exclusive basis. Millions of consumers would be forced to pay higher rates to get the same programming they used to have.

EchoStar says Congress and the Federal Government should support its merger because it will help satellite compete against cable. However, two facts are clear. EchoStar will have a complete monopoly in the direct broadcast satellite industry.

And, second, my company is not a monopoly in rural America. Rather, we are the competitor to satellite, the monopoly that already exists.

But it is more than that. If the merger is approved, EchoStar will have succeeded in escaping any meaningful regulation whatsoever. They'll go on to be like all the other Goliaths.

So I ask Congress, one, please act to remedy the problems that plague the programming industry.

Two, the EchoStar merger does not advance the interests of rural consumers. So stop it.

And, three, effective competition requires Congress to reduce the regulatory inequities between satellite and cable.

I would like to sincerely thank you, and if you have any questions, we would love to talk.

[The prepared statement of Neal Schnog follows:]

PREPARED STATEMENT OF NEAL SCHNOG, BOARD MEMBER, AMERICAN CABLE ASSOCIATION, PRESIDENT AND GENERAL MANAGER, UVISION, LLC

INTRODUCTION

Thank you, Mr. Chairman.

My name is Neal Schnog, and I am the president, general manager and part owner of UVISION, an independent cable business currently serving 8,300 customers in rural Oregon.

I also serve as a board member of the American Cable Association, which represents more than 900 independent cable businesses serving more than 7.5 million customers primarily in smaller markets and rural areas across the United States. In fact, our American Cable Association members serve customers in every state and U.S. territory and also in nearly every congressional district represented by the members of this committee.

Unlike some larger companies you hear about, ACA members are not affiliated with program suppliers, big satellite, cable and telephone companies, major ISPs or other media conglomerates. We focus on smaller market cable and communications services, often in markets that the bigger companies choose not to serve. Because we live and work in these rural communities, we know how important it is to have advanced telecommunications services available to us.

Just for the record, my small company is not the "giant entrenched cable monopoly" that others talk about so frequently. We're simply a small business in cable that happens to serve customers in rural America. Quite frankly, we're the competitor to what may soon become the "giant entrenched *satellite* monopoly."

Like other ACA members, my company, UVISION, specializes in serving customers in smaller markets and more rural areas. Our company today is on the forefront of providing advanced telecommunications services to customers in these markets. In fact, my small company is now providing digital cable services and high-speed cable modem Internet services to the majority of our customers.

As a first-generation American whose family was given shelter and prosperity by the shores of our great nation, I cannot express how proud I am to take part in this hearing. I hope my testimony will help you serve your constituents by understanding the critical issues facing the multi-video programming and distribution industry. These issues will have a significant impact on all Americans and could have a devastating effect on rural communities. I therefore ask for your consideration and hope you will agree that the industry is in need of congressional and regulatory review.

As you know, most of today's headlines in the communications world are about the large companies—the EchoStar-DirecTV merger, the potential merger of AT&T and Comcast, and the media giants created by the mergers of the 1990s. Being on this panel, I feel like an extra in the movie, *Clash of the Titans.* But, the American Cable Association represents no Goliaths. We here to speak for the millions of small-town customers who are represented by nearly every member of this committee.

To me, the real benefit of this hearing is the opportunity to highlight the current status of customer choice in the multiple-video services market, *because competition really means customer choice.* No choice, no competition. However, the irony here is that the status of competition and customer choice today, especially in rural areas and small towns, is already significantly limited because it is governed by an unlikely cast of players that do not live in rural America, do not focus on rural Americans' needs, and who have found anti-competitive means to extract monopolistic earnings from all Americans.

Unless there is significant congressional and regulatory review of these issues, the situation is not likely to improve. Consumer choice and competition may be wiped out in the wake of the mighty merged communications giants. Let me tell you why.

There are three very important issues that threaten consumer choice in smaller markets and rural America and that will derail the progress to provide advanced services in smaller markets:

- The vastly increasing control of content, pricing, terms, conditions and placement requirements by just a few programming behemoths that truly control what the consumer sees.
- The adverse effect in the smaller, rural marketplace of the proposed EchoStar-DirecTV merger, which will limit current competition in these markets from three current providers (EchoStar, DirecTV, and independent cable) to just one—the merged EchoTV monopoly.
- The disproportionate burden of regulation on smaller, independent cable companies, like mine in rural America, compared to the free regulatory ride enjoyed by the satellite monopoly.

I. Programming

So, who does control what your constituents' see on their TV sets? Surprisingly enough, it isn't a small cable operator like me. While customers and local franchise authorities don't see it, their choices on what they watch are controlled by five companies, or programming cartels. I call them America's own OPEC—the Organization of Programming Extorting Companies. In an unforeseen development, over the past five years we have seen an explosive consolidation in the programming industry that has led to sharply increased prices, less freedom to offer popular content, and little customer awareness as to why they are forced to buy the channels they do.

For example, ESPN has raised its rates to our members by up to 20% each year for the past five years. This while their viewership is declining. Our customers want ESPN. Fine. But ABC-Disney will not let us just buy ESPN. Oftentimes, in order to get the local ABC affiliate, Disney will force us through retransmission consent to take other channels, such as SoapNet. Same for Fox-News Corp., GE-NBC and CBS-Viacom.

This might not be so bad if we could offer the programming on an a la carte basis to allow the consumer to choose what they want. But all of the cartel programming companies make independent cable pay for every customer and pay punitive prices if we do not carry many of their services in a bundle, just like they want.

Consolidation has turned retransmission consent into extortion. These same programming cartels also dictate channel locations and other terms. Even more appalling is that fact that these programmers also embed into their contracts various "non-disclosure" terms. These provisions prohibit cable operators from telling any customer, even the local franchise authority, what the terms or rates are for their programming. Thus, rate increases and unfair bundling practices are kept hidden from the public and even from you, the key federal policy makers who have created this industry. That is not the definition of an open and fully competitive marketplace.

I am sure you all watched the retransmission consent showdown between Time Warner and Disney over this very issue. Imagine the odds that a small system like mine has when negotiating with the programming cartels.

The four or five major programming cartels control the broadcast networks and at least 50 other of the most popular stations. More than 90% of cable systems offer 30 to 90 channels, which, as you can see, are monopolized by the programming cartels.

II. The EchoStar-DirecTV Merger

Customers will also face less choice as a result of the satellite monopoly that would be created from an EchoStar-DirecTV merger.

The merger of EchoStar and DirecTV will create the world's largest multi-video programming distributor with nearly 20 million subscribers and give the merged companies nearly 90% of the full power, full-CONUS satellite transponders that exist. These two facts along with the possible sunsetting of the programming access rules, would give EchoStar the ability to control access to programming, there by limiting customer choice and providing enough forward bandwidth that small cable companies would never be able to compete on an economic basis.

Already, DirecTV has exclusive contracts for certain sporting events, meaning that Americans can only purchase this programming by buying it from DirecTV. Now imagine what would happen after the sunset of the program access rules if the combined DirecTV/EchoStar used its huge leverage to buy hundreds of sporting events and other programming on an exclusive basis. Millions of consumers would be forced to pay higher rates to get the same programming they used to have.

Of course, many would argue that this would not happen because the current programming cartels would not let it happen. After all the programming cartels already control their own distribution arms. But what if the cartels are ready to admit a new member? Deals could be cut so that all the cartel members have access to programming at the expense of small cable. The current cartel members could shut off programming to small cable companies effectively giving our customers to EchoStar/DirecTV in order to bring EchoStar into the cartel. Or worse the cartel could save face by providing access, but charging independent companies usurious rates meaning that there was no real access to programming.

This would give every giant player access to programming but small cable companies and upstart distributors like telephone companies could never again get access to the programming market, further securing the monopolies of the giant communication companies.

The monopoly over satellite slots would further secure EchoStar/DirecTV's new position by allowing them to deliver over 400 channels with no real competition. In order for a small cable company to deliver this number of channels, they would have to spend millions of dollars. This is not economically reasonable where most of our members have less than 1,000 customers. Without being able to provide the same number of channels, many small operators would soon be out of business leaving only one provider in many rural areas.

III. Regulatory Parity

In recent days we have increasingly heard representatives of the EchoStar company saying how Congress and the federal government should support its merger with DirecTV because it will help the satellite monopoly compete against the giant, cable monopoly.

However, contrary to EchoStar's story, two facts are clear:

One, as we have already outlined, EchoStar will have a complete monopoly in the direct broadcast satellite industry and will have the ability to leverage this massive power to the detriment of choice, competition and consumers in rural America.

Second, my company and the nearly 1,000 other small, independent cable businesses in the American Cable Association are not the monopoly in rural America that EchoStar claims. Rather, we are and will be the competitor to the satellite monopoly that will exist in rural America if the merger is approved. We will be the "Southwest Airlines" to the merged satellite giant's "United." And that's why preserving competition in rural markets is vital.

But it's more than that. Right now direct broadcast satellite enjoys favored regulatory treatment that gives it a great advantage in the rural marketplace. If the merger is approved, the giant satellite monopoly will have succeeded in rural markets to escape any meaningful regulation that benefits consumers while ensuring that small business competitors to the giant, like my company and the members of the American Cable Association, have to bear it all. Look at the following list and ask why the following are not required of all providers in the marketplace, particularly if the goal is to promote fairness in competition and the application of fair, public interest regulation to all customers of cable or satellite alike.

Regulatory Burdens on Cable vs. DBS

CABLE	DBS
Must-Carry	Must-Carry (1/102)
Retransmission Consent	Retransmission Consent
EAS	Limited Public Interest Obligations
Tier Buy-Through	
Franchise Fees	
Local Taxes	
Signal Leakage/CLI	
Rate Regulation	
Mandatory Broadcast Basic	
Privacy Obligations	
Customer Service Obligations	
Public Interest Obligations	
Service Notice Provisions	
Closed Captioning	
Billing Requirements	

Regulatory Burdens on Cable vs. DBS—Continued

CABLE	DBS
Pole Attachment Fees	
Public File Requirements	

In smaller markets and rural areas, the regulatory disparity that exists between independent cable and dbs must be addressed if Congress and federal policymakers want to ensure that multiple providers of video service are there to provide choice to consumers.

CONCLUSION

Each one of the foregoing issues directly affect the ability of independent cable companies to (1) provide competition and choice in the smaller markets and (2) to provide advanced new services in the marketplace. If there is no viable competitor to the new giant entrenched satellite monopoly, then there is no chance for consumers in rural America to receive advanced digital services or high-speed cable service as so many of our companies are providing now.

The irony here is that the impact of these issues, if not addressed, will do exactly the opposite of what Congress wants—providing competition and choice for consumers in the smaller and rural marketplaces from multiple providers of video services, digital, high-speed data and more. Instead, these markets may be left with just one provider—the satellite monopoly.

The American Cable Association and its members are committed to working with the Committee to solve these important issues.

I would like to sincerely thank the Committee again for allowing me to speak before you today.

Mr. UPTON. Thank you.

Mr. Phillips.

STATEMENT OF BOB PHILLIPS

Mr. PHILLIPS. Good afternoon, Mr. Chairman and members of the committee.

It is a privilege to appear before you today to present the position of the National Rural Telecommunications Cooperative, NRTC, regarding the state of competition in the cable and satellite industry and the most critical issue, which is the proposed impact of the DIRECTV-EchoStar merger in the marketplace.

From our founding in 1986, it has been NRTC's primary mission to bring state-of-the-art telecommunications services to those who live and work in rural America. NRTC has been involved in every facet of this business, from large dish satellite or C-Band to delivering more than $100 million to used communications to help launch the DIRECTV service.

Today, NRTC, through its participating members, which are rural electric cooperatives and rural telephone systems, as well as private affiliates, such as Pegasus Communications, serves more than 1.8 million rural consumers with DIRECTV service.

First, I would like to urge the committee to continue its fight for program access by carefully monitoring the developments of the FCC. We have formally just urged the Commission to exercise its statutory authority and to extend the October 5th, 2002 sunset of the program access rules that bar exclusive contracts in areas served by cable operators.

Turning to the merger, NRTC believes that this merger as proposed is bad for competition in rural America. It creates a rural monopoly. It eliminates choice, and it eliminates competition. Literally millions of homes in rural America have no access to cable television or digital cable services, making satellite TV their own option for video programming.

I did bring a map today which is included as a chart in my testimony, which shows how there are tens of millions of people who have no choice for video programming other than by satellite, and I would call attention to particularly the red, blue, and the green States on that map which have the lowest penetration of cable, from 30 to 50 percent in some cases.

NRTC's mission is to serve these rural consumers, and today these rural consumers can choose between EchoStar's dish service or DIRECTV. If this merger is approved, their choices go from two providers to one.

Now, the proponents of this merger would argue to you that their promises are going to suffice for competition and that the overall benefits of the merger outweigh the lack of choice in providers which is going to result from this combination.

So instead of a vibrant and competitive satellite TV marketplace which protects competition and choice, EchoStar would promise to protect rural Americans by charging them the same price as urban consumers.

I suggest to you that no price guarantee is going to solve the monopoly problem that this merger creates. It would be hard, if not next to impossible, to enforce any such promise, and in fact, price is not the only issue when you do eliminate choice. What about service quality or what about the choice in content?

The proponents of this merger would also suggest that a benefit will be increased delivery of local TV channels by satellite, and with the approval of the merger EchoStar has offered to increase its capacity dedicated to delivering local markets, but nowhere near the total 210 TV markets.

A Department of Justice expert has testified, and a copy of his testimony is attached to my statement, that each of these merger applications in and of themselves have sufficient FCC licenses and capacity to separately deliver all 210 markets.

Approving this merger will remove all competitive pressure to expand coverage, and it is going to leave one company with the sole power to decide whether or not to deliver all 210 markets.

This merger does also have far-reaching implications for rural America with respect to satellite delivered, broadband Internet service. Rural America is going to be threatened by this proposed merger in that regard. Currently there are already two providers of satellite Internet broadband. DIRECTV offers a service owned by Hughes, which is called DirectWay and EchoStar offers a service which they control called StarBand.

Again, the merger applicants are suggesting to you that forming one broadband satellite provider by creating a monopoly is in the best interest of rural Americans, and I fail to see how that is going to benefit consumers.

Just a few years ago there were four competitors in the satellite market. First Hughes bought Primestar. Then Hughes bought USSB, and now if EchoStar is permitted to buy Hughes, there will be only one. And I suggest that one supplier is a very lonely number for a rural consumer.

As currently proposed, the merger of two highly successful DBS companies with huge market value is so anti-competitive with respect to rural America that it should not be permitted in its current form. If this merger is permitted in its current form, then it would appear to me that there is little left or nothing left, in fact, to antitrust policy and enforcement in the first years of this 21st Century.

I'm grateful for your attention, and I look forward to answering your questions.

Thank you.

[The prepared statement of Bob Phillips follows:]

PREPARED STATEMENT OF BOB PHILLIPS, CEO, NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Good afternoon, Mr. Chairman and Members of the Subcommittee. I appreciate very much the opportunity to discuss the state of competition in the multi-channel video program distribution (MVPD) market.

My name is Bob Phillips, and I am the President and CEO of the National Rural Telecommunications Cooperative (NRTC). NRTC has been fighting for fair access to programming since our founding in 1986. We were proud to represent rural American during the "Program Access Wars" in the early 90's, which set the stage for MVPD competition today.

EXECUTIVE SUMMARYABOUT NRTC.

The National Rural Telecommunications Cooperative (NRTC) is a non-profit national cooperative comprised of more than 1,000 rural utilities and affiliates located in 46 states. For the last 15 years, our primary mission has been to bring rural Americans the same state-of-the-art telecommunications services that are commonplace in more populated urban areas. To this end, NRTC and its members invested more than $100 million toward launching DIRECTV, one of the two dominant DBS operators in the country.

NRTC delivers to rural America the full benefits of competition in the Multi-Channel Video Programming Distribution (MVPD) market, including a diversity of programming choices, service options, and lower prices. Today, NRTC members and affiliates serve more than 1.8 million rural consumers, nearly 20 percent of all DIRECTV subscribers. As the leading distributor of DIRECTV's programming services to rural Americans, NRTC's customers have a strong interest in—and serious questions about—the proposed merger of DIRECTV and EchoStar. Extend the FCC's Program Access Rules.

Given the continued vertical integration and dominant status of the cable industry, continued fair access to programming remains essential for the development of truly robust and viable competition to the heavily entrenched cable industry. To that end, just yesterday NRTC urged the FCC to exercise its statutory authority and to extend the October 5, 2002 sunset of the Program Access rule that bars exclusive contracts in areas served by cable operators.

The Proposed Merger Threatens Viable Competition in the MVPD Market.

Currently, EchoStar and DIRECTV provide competing MVPD programming services to rural Americans. In approximately 20 percent of the U.S., they are the only sources of multi-channel video programming. If the merger is permitted to go ahead, there will be no competition for MVPD services in any household where comparable digital cable services are not available.

There are no Viable Alternatives to DBS in Much of America.

Only three orbital slots for satellites have a signal footprint that allows a high-power DBS satellite to transmit programming to the entire continental United States, so-called full-CONUS slots. Collectively, EchoStar and DIRECTV control all three of these slots.

In addition, in those areas only passed by analog cable, there is no competition for DBS. Analog cable has fewer channels, lower quality, fewer or no pay-per-view movies, significantly higher per-channel cost, and an inability to use new technologies, such as interactive television. Most analysts believe that many rural cable operators will go out of business because they cannot afford to upgrade to digital and cannot effectively compete with EchoStar and DIRECTV using an analog signal.

The other, most-commonly mentioned MVPD alternatives to DBS are also inadequate to compete with EchoStar, should the merger be approved. The C Band "backyard dish" business is dying out. The medium-power DBS provider, Primestar, was purchased by DIRECTV, and is also losing subscribers. Multichannel Multipoint Distribution Service (MMDS) has a shrinking subscriber base that is now around 700,000, and will likely be converted to broadband delivery over time. Satellite Master Antenna Television (SMATV) only serves multiple dwelling units (MDUs), like apartment buildings, which rarely exist in rural America. Not only does Northpoint's terrestrial-based technology interfere with EchoStar's and DIRECTV's DBS signal, there are serious doubts that Northpoint will ever obtain a license or launch service, especially if it is required to pay for its spectrum. Suffice it to say, if this merger is approved, rural Americans will only be able to see what the new EchoStar chooses to deliver.

Promises of "National Pricing" are Insufficient to Protect Rural Customers.

Prices of digital video services will go up in rural America because of this merger. Whether it be video or broadband service, if there is no effective competition, prices will be set by the monopoly provider. The claim has been made that the new monopoly will choose to sell its video service in urban areas such as Manhattan, Chicago and Los Angeles at the same price as rural Missouri, Texas, Virginia and Wisconsin. But this half-made promise raises important questions: Will the proposed merged entity promise to set rural prices at the level of its lowest urban prices? Will the proposed merged entity provide rural consumers new services, such as broadband services, at the lowest urban price? If the proposed merged entity provides urban America with free installation for a thirty day promotion, will rural Americans benefit from the offer?

Currently the set top box technologies used by DIRECTV and EchoStar are incompatible, and the customers' dishes are pointed towards different satellites. We have estimated that the cost of this switchout will be in excess of $5-6 billion, although we have seen much smaller cost estimates proposed. We believe having accurate cost estimates here is critical, because promises to pay without a direct or indirect contribution from the consumers will become increasingly unrealistic as the cost goes up. Does anyone really think the consumers will not be charged, directly or indirectly, for these multi-billion dollar merger related costs? We believe enforcement of the half promise about pricing is a potentially insurmountable problem. No agency of this government is currently enforcing such a promise.

Price Isn't Everything.

But even if some form of "national pricing" can meet the requirement for enforceability and realism, it is only one issue of many that concerns consumers. We know our customers. They are not solely concerned with price alone. Quality of service is equally important. If a subscriber's system is broken, he wants it fixed. If a subscriber has a question about his billing, he wants it fixed. Service under monopolies traditionally declines because of the lack of competition. If you can't go anywhere else, there is no economic imperative to provide good service. No promise solves this problem.

Local-into-Local Service Could be Provided More Efficiently Without a Merger.

EchoStar and DIRECTV have claimed that redundant programming could be eliminated, thus allowing the merged entity to provide local-into-local service in more markets if the merger is approved. If the merger goes forward as proposed, it is unlikely that local-into-local will ever be provided to rural Americans. Today, EchoStar and DIRECTV are fierce competitors. When one offers local-into-local in a particular market, the other usually follows shortly thereafter. Absent the merger, we believe that this competition will likely cause the companies to provide local-into-local to all—or almost all—DMAs. If the merger occurs, we fear that EchoStar will simply stop providing local-into-local after they have reached the top 100 markets because the competition, which is currently forcing them to launch newer and better satellites and to improve compression technology, will cease to exist.

When compared to the cost of the set-top box change out required by the merger, the two non-merged companies could provide local-into-local for a fraction of the cost. On November 26, 2001, DIRECTV launched a satellite able to transmit all 500 or so channels eligible for transmission in markets 41-100. We believe that a fleet of these satellites—enough to meet each company's must-carry obligation—could be ordered, built, and launched for less that the $5-$7 billion that we estimate the swap-out will cost. It could also be completed in less time than we estimate it will take to swap out every subscriber's incompatible set-top box and satellite dish.

Broadband Internet Access Would Be Severely Impacted by Merger.

MVPD and broadband Internet access are inextricably linked. MVPD providers are providing access to the Internet now, and the roles will soon reverse: Americans will receive their MVPD access from the Internet. The proposed merger not only threatens competition in the MVPD market, it also threatens rural Americans' chance to bridge the digital divide.

There are three possible sources of broadband services in rural America: satellite, cable and telephone companies. Because of the sparse population density in much of rural America and the projected failure of many small rural cable providers, satellite is the only economically viable option.

EchoStar and Hughes each owns or controls both Ku-band broadband satellite service providers currently operating. The next generation of broadband satellite services, Ka-band, is just developing, but already, EchoStar is acquiring one potential Ka-band competitor, Visionstar.

The proposed merger would leave control of most broadband satellite services in the hands of a single company, which would be free to charge as much as it wants for the provision of broadband Internet access—as well as video services. As MVPD and broadband continue to converge, this issue will become even more important.

NRTC'S BACKGROUND.

NRTC is a not-for-profit cooperative comprised of 705 rural electric cooperatives, 128 rural telephone cooperatives and 189 independent rural telephone companies located throughout 46 states. For the last 15 years, our primary mission has been to bring to rural America the same state-of-the art telecommunications services that are commonplace in more populated urban areas.

The National Rural Electric Cooperative Association (NRECA) and the National Rural Utilities Cooperative Finance Corporation (CFC) created NRTC to bring valuable telecommunications services to rural communities, just as the rural electric cooperative members of NRECA and CFC brought electric and telephone services to rural America in the 1930's and 40's.

NRTC's family of products and services for rural America includes dial-up and high-speed Internet services, power quality products, utility power quality monitoring system, a nationwide wireless communications network, and e-business applications. But much of our effort to date has been devoted to delivering to rural America the full benefits of competition in the MVPD market, including a diversity of programming choices, service options and lower prices.

CONGRESSIONAL SUPPORT IS THE CRITICAL ELEMENT IN THE FIGHT FOR PROGRAM ACCESS IN THE MVPD MARKET.

As early as 1989, NRTC supported efforts by the Federal Communications Commission (FCC) and Congress to provide fair and non-discriminatory access to satellite delivered programming.[1] At that time, NRTC complained that as a C Band home satellite dish (HSD) distributor to rural America, it was required to pay 400%, 500% or even 800% more than cable operators were required to pay for the same programming.[2]

NRTC was pleased to work with members of Congress to help obtain passage over a Presidential veto of the Program Access provisions in the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act").[3] "Persons in rural areas" were specifically targeted by Congress to benefit from the Program Access rules.[4]

When the FCC implemented the1992 Cable Act, NRTC continued to highlight the fact that as a rural HSD distributor it was unfairly required to pay substantially more than cable operators for the identical programming. To resolve this and related problems, the Commission implemented the Program Access rules, which have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors.

On April 10, 1992, NRTC moved beyond the HSD business and forged an important partnership with DIRECTV, Inc., a unit of Hughes Electronics Corporation. NRTC, its members and affiliates invested more than $100 million toward launching the nation's first and most successful high-power direct broadcast satellite (DBS) system. NRTC's early financial commitment to DBS was absolutely critical to the introduction of this new service across the country.

With its members and affiliates—including Pegasus Communications—NRTC has become the leading distributor of satellite television service to rural America. Today, NRTC members and affiliates serve more than 1.8 million rural consumers, nearly

20 percent of all DIRECTV programming subscribers. This is a responsibility to rural America that we do not take lightly.

The growth of the DBS industry is in large part a result of the FCC's successful implementation of the Congressionally mandated Program Access rules. Particularly in rural America, where DBS is necessarily more popular because cable alternatives are often not available, the Program Access rules have been necessary to preserve and protect competition and diversity in the distribution of video programming.[5]

CONTINUED CONGRESSIONAL OVERSIGHT OF THE CABLE INDUSTRY AND PROGRAMMING IS NECESSARY.

The National Cable & Telecommunications Association (NCTA) maintains that cable faces a robust, fully-competitive video marketplace.[6] Notwithstanding these claims, cable operators and vertically integrated programmers continue to wield an inordinate amount of power over potential competitors in the MVPD industry.

Since the Program Access rules were first adopted by the Commission, the cable industry has maintained its stranglehold on programming necessary for the non-cable MVPD marketplace to develop as a competitive force.

The Commission's latest Cable Competition Report shows that vertically integrated programming services continue to dominate the MVPD market.[7] More than ⅓ of all national programming services are currently vertically integrated with at least one cable Multiple System Operator (MSO). While the cable industry has cited this percentage as a measure of its decreasing influence,[8] the actual number of vertically integrated programming services has almost doubled from 56 in 1994 to 99 in 2000.[9]

Continued access to vertically integrated programming remains absolutely necessary for DBS to continue developing and flourishing as a viable competitive force to cable.[10] Given the continued vertical integration and dominant status of the cable industry, continued access to programming on fair and reasonable terms remains essential for the development of truly robust and viable competition. To that end, just yesterday NRTC urged the FCC to exercise its statutory authority and extend the October 5, 2002 "sunset" of the Program Access rule that bars exclusive contracts in areas served by cable operators.

TO PROPERLY EVALUATE THE STATUS OF COMPETITION AND THE PROPOSED MERGER, THE PERCENTAGE OF HOMES PASSED BY CABLE NEEDS TO BE CONFIRMED.

At the direction of Congress, the FCC has issued an Annual Report in each of the last seven years describing the status of competition in the video programming market.[11]

One of the foundations of the FCC's Annual Reports, and the most widely used measurement of cable availability, is the number of "Homes Passed" by cable.[12] The cable Homes Passed number is intended to reflect the percentage of American consumers who have access to cable services. Conversely, the remaining percentage reflects those consumers who likely have access to MVPD services only through DBS.

In previous Cable Competition Reports, the FCC has unfortunately accepted without review or challenge the cable industry's claim that approximately 97% of homes across the country are passed by cable.[13] However, a joint report released in April of 2000 by the National Telecommunications and Information Administration (NTIA) and the Rural Utilities Service (RUS), titled Advanced Telecommunications in Rural America: the Challenge of Bringing Broadband Service to All Americans ("NTIA/RUS Report"), questions the manner in which the percentage of cable Homes Passed has typically been calculated. The NTIA/RUS Report found that the actual percentage of Homes Passed could be as low as 81%.[14] The Report discusses apparent flaws with the cable industry's long-standing numbers and suggests remedies for a more accurate determination.[15]

A recent New York Times article also shows that the percentage of homes with access to cable could be as low as 78.4%, with more than 25,000,000 households unserved.[16] It graphically illustrates that in approximately 20 states, less than 70% of homes have access to cable.

These facts are beginning to generate concerns on the part of state antitrust officials and others impacted by the potential merger. For example, Missouri's Attorney General, Mr. Jay Nixon, has recently written to U.S. Attorney General Ashcroft, expressing his office's concern that nearly 850,000 homes in his state—fully one-third of Missouri's population—must rely solely upon the proposed merged company for multi-channel video services if the merger is permitted.

As NRTC pointed out to the FCC,[17] widespread acceptance of the flawed 97% Homes Passed number has vastly overstated the status of video competition in rural America. We are particularly concerned about the accuracy of this number, because it is being widely used to describe competition in the MVPD market—and to minimize the impact of the proposed EchoStar/DIRECTV merger on rural America. Proponents of the merger have been quick to embrace the incorrect number. For example, according to a transcript of a "Charlie Chat" on November 12, 2001, Mr. Ergen, CEO of EchoStar, stated that "I don't agree in these kind of circumstances there would be any kind of monopoly at all. We compete against cable companies across the country (. . .) over 96% or 97% is passed by cable so probably almost nobody watching this tonight (via satellite) doesn't have the opportunity to subscribe to cable if they'd like to." [18]

To evaluate the status of MVPD competition, as well as the proposed merger, the number of "Homes Passed" by cable must be established accurately and conclusively—and it must be done on both the nation and the local level. We urge this Subcommittee to require the FCC to independently verify the actual percentage of Homes Passed, and for the U.S. Department of Justice Antitrust Division to also demand careful analysis of this critical question.

SERIOUS CONCERNS ARE RAISED BY THE PROPOSED ECHOSTAR/DIRECTV MERGER.

Mr. Chairman, let me begin by saying that I have a great deal of respect for Mr. Ergen. He has built a successful business in EchoStar. We compete with his company every day as it provides different programming than our DIRECTV product. EchoStar has aggressively priced and provided a strong and competitive service to consumers. But if this merger is successful, EchoStar would become our exclusive wholesale supplier, and the choice in satellite providers throughout rural America would be cut from two to one. That is a serious concern for the rural consumers we represent.

PROGRAMMING DECISIONS WOULD BE MADE BY A SINGLE COMPANY FOR RURAL AMERICA.

Currently EchoStar and DIRECTV provide competing digital video programming services. If the merger is permitted to go ahead, there will be no alternative MVPD provider in any household in the U.S. where comparable digital cable services are not available. As discussed above, the number of households unserved by any type of cable is far more than the 3% mentioned by Mr. Ergen. It could as high or higher than 20% of the homes across the country—or more than 25,000,000 households.

In all of these homes, EchoStar would decide what programming to provide and how much to charge for it. For instance, just last week EchoStar announced that it would no longer offer ESPN Classic or ABC Family channel over its DISH network. If the merger is approved, rural homes that previously enjoyed that programming simply won't see it again. EchoStar could reach a similar decision regarding CNN or Disney or any other programming service that it chooses not to carry.

IN THOSE AREAS NOT SERVED BY DIGITAL CABLE (THE VAST MAJORITY OF RURAL AMERICA), THERE IS NO VIABLE ALTERNATIVE TO DBS.

The latest generation of DBS services operates in the high-power portion of the KuBand and delivers video programming directly to a pizza-sized dish antennas located at the subscriber's home. International treaties limit the KuBand spectrum allocated for DBS service, and the FCC is responsible for assigning all U.S. satellite orbital positions and frequencies. Only three U.S. orbital slots have a signal footprint that allows a high-power DBS satellite to transmit programming to the entire continental United States. These three slots are referred to as full-CONUS slots, and they are located at the 101° W.L. orbital position, at 110° W.L., and at 119° W.L. There are 32 frequencies available at each of the three full-CONUS orbital slots. Collectively, DIRECTV and EchoStar control all of these frequencies at all of these slots.

There are non-full-CONUS orbital slots at 61.5°, 148°, 157°, 166° and 175° W.L. To the extent these slots have been assigned by the FCC, they are either controlled by DIRECTV or EchoStar or are used to provide "niche" programming, such as Dominion's Christian programming from the 61.5° slot. We are unaware of anyone intending to use a combination of non-full-CONUS slots to compete with DIRECTV or EchoStar. Moreover, effective competition from multiple slots would be unlikely because it would take twice the number of satellites to cover the same amount of the country, a huge competitive disadvantage.

In those areas passed only by analog cable (as opposed to digital cable), there is no real competition aside from DIRECTV and EchoStar. Analog cable has far fewer channels (often only 50 or 60), poor picture quality, few or no pay-per-view movies, significantly higher per channel cost, and an inability to use new technologies, such as interactive television. Most analysts believe that many rural cable operators will slowly go out of business if they cannot afford to upgrade to digital and effectively compete with DIRECTV and EchoStar.

We discuss below some of the inadequacies of the most commonly mentioned MVPD alternatives to high-powered DBS service.

1. C Band.

Beginning in the late 1970's, C Band frequency satellites delivered programming directly to households. C Band's low-power signal requires enormous backyard receiving dishes, usually measuring six to eight feet in diameter. C Band services have traditionally been marketed exclusively to rural areas. The price of the dish plus installation generally runs into the thousands of dollars, while the cost of an entry-level DIRECTV or EchoStar system is typically less than $200. Because of C Band's high cost and the unsightly large dishes, the consensus in the industry is that the C Band business will continue to diminish as existing customers replace their larger dishes with smaller, less expensive DBS equipment.

The FCC's recent Cable Competition Reports support this conclusion. The FCC found that between June 1999 and June 2000, the number of C Band subscribers declined from 1.8 million to 1.5 million (a decrease of 17%), probably due to subscribers switching to DBS. Since the release of the Commission's Report, the number of C Band subscribers has further decreased to 850,000, or approximately 1% of the total MVPD market.

2. Medium-Power Satellites.

The next satellite TV technology to emerge after C Band was medium-power DBS. Medium-power providers operated in a different Ku-Band range than high-power DBS. Because this technology operated at a lower power, it was unable to deliver as many channels as high-power DBS, yet its overhead costs were at least as high. In addition, it required satellite dishes approximately 27" to 39" in diameter. With the rise of DIRECTV and EchoStar, medium-power DBS was unable to compete. The last medium-power DBS provider offering service directly to consumers was Primestar, which was purchased by DIRECTV. The Primestar subscribers have been converted to DIRECTV's high-power DBS service. There currently is no medium-power DBS company providing service directly to consumers.

3. MMDS.

Multichannel Multipoint Distribution Service (MMDS) is another dying video technology. MMDS is a ground-based, fixed wireless technology, with its signal transmitted from a large antenna on a high tower to nearby households. Many video systems are analog and do not offer many channels. In addition, and most importantly, MMDS is unavailable in much of rural America because it is not cost effective to build large towers that serve comparatively few rural households. In recent years, MMDS operators have been converting their systems from video to broadband delivery, and in the last few months the FCC authorized mobile uses of the spectrum. Like C Band, MMDS has also shown drastic decreases in the Commission's Cable Competition Reports. The number of subscribers has decreased from 1.1 million in December of 1996 to 700,000 in June of 2000. MMDS holds only .83% of the total MVPD market.

4. SMATV.

Satellite Master Antenna Television (SMATV) Systems serve only multiple dwelling units (MDUs). Generally, an apartment building or other MDU complex has one or more large C Band or medium-power dishes, which the provider then transmits, often through cables, to all of the dwelling units in the complex. SMATV only serves MDUs and thus is not a viable alternative for the vast majority of rural Americans, who tend not to live in multiple dwelling complexes.

5. Northpoint.

Northpoint is a start-up company that does not even have an FCC license. It is seeking a terrestrial license to operate in the same Ku-Band DBS spectrum as EchoStar and DIRECTV, which have opposed the request. It would operate somewhat similarly to MMDS, using large antenna towers to serve nearby households with a clear line of sight to the antennas. There are a number of significant impediments to Northpoint ever coming to market.

One main impediment is that its technology interferes with DIRECTV's and EchoStar's DBS signal. An independent study commissioned by the FCC at the direction of Congress was performed on Northpoint's technology by the MITRE Corp.[19] That study found that Northpoint's technology caused interference to DBS reception. It further found that the interference could be reduced if certain mitigation measures were undertaken, some of which were quite costly. It is unclear whether Northpoint has sufficient financing to undertake these remedial measures.

Another significant impediment is that Northpoint's FCC application seeks a license for free, instead of under the FCC's Congressionally-mandated method of auctioning terrestrial spectrum. Northpoint's CEO has intimated that the company cannot afford to roll out its product if it has to pay for the spectrum like other applicants. It is unlikely that the FCC will, or should, give away valuable spectrum.

Even if Northpoint obtained a license and made it to market, which is speculative at best, it would not be a significant competitor in rural America because of economics. Northpoint's technology, like MMDS, will not be practical in rural America because of the high costs for building numerous large antenna towers that would serve very few rural households.

LOCAL-INTO-LOCAL SERVICE COULD BE PROVIDED MORE EFFICIENTLY WITHOUT A MERGER.

EchoStar and DIRECTV have claimed that as a benefit of the merger, redundant programming could be eliminated, allowing the merged entity to provide local-into-local service in additional markets, instead of just the top 40 markets (DMAs) they are serving today. However, we believe that both DIRECTV and EchoStar could provide local-into-local programming in these additional markets for a fraction of what it would cost to change-out the set-top boxes in connection with the merger.

In the "Must-Carry" litigation filed by DIRECTV, EchoStar and others against the FCC, the Department of Justice filed a declaration by its expert witness Roger J. Rusch.[20] Mr. Rusch stated that it is technically feasible to build a single satellite that could deliver all 1475 local television stations in all 210 DMAs using available "spot-beam" technology. He further added that a single satellite, using existing technology, could be designed that would deliver 1,114 channels (or enough to cover every local station outside of the top 40 markets being carried by DIRECTV and EchoStar) without any modifications to existing set-top boxes.

To deliver local-into-local only in markets 41-100 (and not 41-210), the cost would be even less. While Mr. Rusch believes existing satellites could provide these resources, this could probably be alternatively accomplished by launching only one additional spot-beam satellite, similar to the spot-beam satellite launched by DIRECTV on November 26, 2001. Such a satellite should be able to transmit all 500 or so local television channels eligible for transmission in DMAs 41-100.[21] We estimate the cost of a spot-beam satellite (including launch and insurance) to be less than $250 million.

The proposed merger makes it less likely that local-into-local will ever be provided to the far reaches of rural America. Today, DIRECTV and EchoStar are fierce competitors. When one offers local-into-local in a particular market, the other usually follows shortly thereafter. Without the merger, we believe that this competition will likely cause the companies to provide local-into-local to all, or almost all, DMAs. With the merger, we fear that the companies will simply stop providing local-into-local after they have reached the top 100 markets because the competition, which is forcing them to launch newer and better satellites and to improve compression technology, will cease to exist.

THE PROPOSED MERGER WOULD REQUIRE DISRUPTIVE AND EXPENSIVE EFFORTS TO REPLACE AND RE-POINT MILLIONS OF EXISTING SATELLITE DISHES.

As DIRECTV and EchoStar have acknowledged, their set-top boxes use incompatible technology and one of the company's set-top boxes will have to be switched out. They have estimated that the cost of the change out to the merged company will be $2.5 billion and that the change out could be accomplished in 2-4 years. DIRECTV and EchoStar have stated that the rest of the cost of the change out would be borne by consumers. They have not stated what the total cost of the change out will be or how it will be financed.

We think that the cost of the change out will be approximately $5 to $6 billion. In the near future, experts will be able to provide the most accurate estimate of these amounts. Currently, DIRECTV transmits almost all of its programming from the 101 degree orbital slot. Almost all of its subscribers receive that programming on an 18" round dish. Some DIRECTV subscribers also receive limited programming from DIRECTV's 3 frequencies located at the 110 degree orbital slot. These subscribers cannot use the 18" round dish (which can only receive programming from one orbital slot), but must instead use a slightly larger oblong dish, which allows them to receive programming from two orbital slots.

EchoStar has many subscribers with 18" round dishes, which are generally pointed at the 119 degree orbital slot; however, a significant percentage of EchoStar's subscribers use oblong dishes, which are capable of receiving programming from both the 110 and 119 orbital slots. EchoStar has stated that the merged company will likely have the core cable programming transmitted from the middle, 110 degree orbital slot, with local signals and niche programming transmitted from the 101 degree and 119 degree slots.

For a number of reasons, most analysts believe that DIRECTV boxes and not EchoStar boxes will be changed out: EchoStar uses a standard which is generally considered better than DIRECTV's; security for EchoStar's boxes is designed by a company 50% owned by EchoStar; and EchoStar Technologies would then be the dominant player in set-top box manufacturing.

Assuming that DIRECTV boxes are changed out, we estimate the cost of the change out to be between $5.275 billion to as much as approximately $6.9 billion. We reach this by estimating that there will at least 11.5 million DIRECTV subscribers when the merger is set to close. We further estimate that the cost of the change out would be $450-$600 per subscriber (including cost of box, oblong dish and labor). We also estimate that the cost of repointing EchoStar's 18" dishes from 119 degrees to 110 degrees will be upwards of $100 million. (Note: if the EchoStar boxes are changed out, the costs would likely be more than $4 billion because almost every DIRECTV subscriber would require a service call either to repoint the dish or to receive an oblong dish.)

We also believe that the 2-4 year estimate is optimistic at best. The logistics of having 15 million or so service calls by trained technicians are daunting. Until the change out is complete, both sets of the redundant programming will have to be transmitted (because otherwise existing subscribers using the "old" technology would be "cut-off").

PROMISES OF "NATIONAL PRICING" ARE INSUFFICIENT TO PROTECT RURAL CONSUMERS.

Recognizing that the merger would create a monopoly in rural America, DIRECTV and EchoStar contend that the lack of competition created by the monopoly can be ameliorated through pricing their product on a national basis. We believe that enforcement of this promise would be an insurmountable problem. There is no agency in this government currently enforcing such a promise or equipped to regulate the proposed monopoly.

We believe this promise has been made for its appealing nature, not because it offers meaningful protection for rural Americans. This proposed national price "fix" does not work for at least three reasons, each of which is discussed in more detail below:

1. Prices Actually Will Be Higher.

Since the merged company will be able to charge monopoly prices in rural America, it will likely raise prices significantly in order to benefit from the monopoly. Because DBS monthly subscriber rates are much lower than analog cable on a per channel basis, the merged company could raise prices substantially without hurting subscriber growth in those areas. Similarly, in areas served by competitively priced digital cable, DBS subscriber rates are still generally lower on a per channel basis for anything except basic service. Hence, the merged entity could substantially raise prices for all of its expanded packages (sports, HBO, etc.) while still keeping its price advantage over cable.

Today, prices for DBS services are generally below cable because of intense price competition between EchoStar and DIRECTV. With the merger, this competition would cease and prices would likely go up for every DBS subscriber—rural and non-rural alike.

2. "National Pricing" is Easy To Evade.

There are numerous ways that the merged company could use its monopoly power to charge rural America non-competitive prices, even with national pricing. For example, it could undercharge (or give away) local-into-local programming, which will apparently only be provided to urban America, and offset this subsidy by charging more for basic service that must be purchased by rural households. Urban households would be paying the same for basic plus local-to-local, while rural households would be paying monopoly prices for basic service.

Similarly, the merged company could determine, through its subscriber database, that rural subscribers are much more likely to purchase a particular programming package and then charge non-competitive prices for that package. The merged entity also could subsidize the set-top box or subsidize installation only in urban America, either overtly or covertly (such as through promotions with companies that only have stores in urban America). Rural consumers could be charged more "shipping and handling" for products purchased through the e-commerce function in the set-top box. The list is endless.

3. "National Pricing" Fails To Address Service and Other Problems Inherent In A Monopoly.

Not only will national pricing fail to prevent the merged company from charging rural America non-competitive prices, it will also not eliminate any of the other problems inherent in a monopoly. In particular, as discussed above, there will be no competition spurring the monopoly to provide local-into-local service to rural America or other advanced services. Similarly, there will be no competition regarding customer service. Now, if a DBS provider fails to send a technician to a remote place, the subscriber can change service to the other DBS provider. After the merger, there will be no financial incentive for the monopoly to provide good customer service to rural America. In addition, advances in technology spurred by competition, such as compression technology or the launching of additional satellites, will likely slow greatly. In sum, the merged company will behave like a typical monopoly.

DELIVERY OF BROADBAND INTERNET SATELLITE SERVICES TO RURAL AMERICA ALSO WOULD BE SEVERELY IMPACTED BY THE MERGER.

Mr. Chairman, I know that your focus today is on MVPD competition. But the availability of broadband services is inextricably linked to the offering of video programming. Without a companion video offering, the prospects for a successful broadband offering are weak.

Broadband Internet access—which many in Congress and elsewhere recognize as a key to the future economic development of rural America—is seriously threatened by this proposed merger. There are three possible sources of broadband services in rural America—satellite, cable and telephone companies. Because of the low population density and rough terrain in much of rural America, satellite is the only universally available broadband provider.

There are currently two providers of KuBand broadband satellite services: DIRECWAY, owned by Hughes, and Starband, controlled by EchoStar. The merger of the two companies would create a monopoly in the KuBand broadband market.

More importantly, it also would create a monopoly in the next generation of KaBand broadband market. The KaBand is just developing as a new, emerging market, and it is expected to have greater capacity, faster speeds and lower costs than KuBand.

In a post-merger world, however, the emerging KaBand market would be absolutely dominated by EchoStar. For all practical purposes, other competitors would be frozen out. That effect was felt immediately after the announcement of the merger, when one of the most promising of the potential KaBand providers shut down and funding for others dried-up. Meanwhile, EchoStar is completing its acquisition of Visionstar, another potential KaBand provider.

Rural America will remain on the wrong side of the digital divide if broadband Internet is not available at reasonable, competitive rates. This proposed merger, if approved, would leave EchoStar controlling the availability, breadth and cost of nearly all satellite broadband Internet (and video) services. That's a major problem for rural America.

PAST MONOPOLY CLAIMS BY ECHOSTAR AGAINST ITS PROPOSED MERGER PARTNER MERIT CAREFUL REVIEW.

As recently as two months ago, EchoStar was engaged in a lawsuit which accused DIRECTV of being a monopoly that repeatedly abused its monopoly power. Attached to my testimony you will find a copy of EchoStar's complaint against DIRECTV. I believe you will be particularly interested in reviewing EchoStar's characterization of the uniqueness of the DBS marketplace [1] and their allegations of DIRECTV's abuse of its power which permeate the document. Of course, the proposed merger partners dismissed this suit when they decided to marry their corporations. But if DIRECTV constituted a monopoly, please think carefully about the resulting single entity's overwhelming market power.

ANTITRUST LAW SHOULD BLOCK THIS MERGER AS PROPOSED.

Claims that a merger will generate efficiencies in one market cannot justify or offset anti-competitive effects created by that merger in a separate market. This conclusion follows from the language of Section 7 of the Clayton Act, which prohibits

[1] Of particular interest are paragraphs 26, 28, 34, 52, 56 and 57.

mergers or acquisitions which may substantially lessen competition "...in any line of commerce or...in any section of the country..." Thus, Section 7 presents a legislative conclusion that one section of the country will not be sacrificed to anti-competitive effects in order to generate a benefit for a different section of the country. This hearing reaffirms that conclusion in its own way.

This statutory language was relied upon by the United States Supreme Court in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), where the Court explained that a merger leading to anti-competitive effects in one portion of the country could not be justified by arguable pro-competitive benefits to another section of the country. The Court stated: "If anti-competitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader." The Supreme Court enjoined the proposed merger.

The area of effective competition is the geographic area where customers can practically turn for alternative sources of the product. Anti-competitive effects in one market, such as rural America, cannot be shrugged off or disregarded, even if there is allegedly a benefit in another market.

CONCLUSION.

Mr. Chairman, members of this Subcommittee, the proposed merger of EchoStar and DIRECTV offers bleak options to rural America. Much of rural America has no access to MVPD programming except through high powered DBS services. Just a few years ago there were four competitors in the satellite market. Then Hughes bought Primestar. Then Hughes bought USSB. If EchoStar is permitted to buy Hughes, there will be only one provider—and no competitors.

Rural America deserves a diversity of programming choices and a wide variety of advanced telecommunications services, not a single, monopoly satellite provider. We firmly believe that the merger of two highly successful DBS companies into one monopoly provider is so inconsistent with the interests of rural America that it should not be permitted in its current form.

I appreciate your interest in this important issue and welcome the opportunity to address any questions.

Thank you.

Endnotes

[1] Notice of Inquiry, Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 4 FCC Rcd 3833 (May 1, 1989).

[2] Report, *Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming,* 67 RR 2d 675, 5 FCC Rcd 523, ¶58, fn. 82 (December 29, 1989).

[3] 47 U.S.CA. § 628 *See also* First Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* 72 RR 2d 649, 8 FCC Rcd 3359 (April 30, 1993) ("Cable Act Report").

[4] 47 U.S.C.A. § 548(a); *See also* 135 Cong. Rec. S1215202 (discussing the benefits of the statute to rural consumers).

[5] The highest DBS penetration rates "averaging almost 32%—have occurred in states with substantial rural populations (See, Satellite Broadcasting & Communications Association web site <http://www.sbca.com/mediaguide/factsfigures.htm>). Although the Program Access rules benefit all American consumers, their loss would disproportionately affect rural Americans.

[6] Comments of the National Cable & Telecommunications Association at pages 6-26, 37-40 ("NCTA Cable Comments"), filed in response to Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* CS Docket No. 01-129, FCC 01-191 (Released June 25, 2001) ("2001 Cable NOI").

[7] Seventh Cable Competition Report, ¶181.

[8] NCTA Cable Comments, at page 39-40 (discussing general decrease in vertical integration); See Also, NCTA Press Release, *The Program Access Laws of 1992 are Working: No Further Congressional Action is Needed,* May 2001, obtained from, <http://www.ncta.com/pdf—files/D-Program—access.pdf> (visited November 20, 2001) (stating that vertical integration of cable program networks declined to 35%).

[9] First Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 9 FCC Rcd. 7442,]161, fn. 434 (Released September 24, 1994) ("First Cable Competition Report"). *See also* Seventh Cable Competition Report at ¶173.

[10] The Commission noted that "large cable operators, because of their size and market share, have overwhelming buying power in the programming market that restricts access to independent programming as well as to vertically integrated programming." *Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act,* FCC 00-454 (rel. Jan. 2, 2001), at ¶26 (citing observations by EchoStar).

[11] See Communications Act of 1934, as amended, 47 U.S.C. § 548(g).

[12] "Homes Passed" is defined as the total number of households capable of receiving cable television service (*see* Seventh Cable Competition Report, n. 12.

[13] See First Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 9 FCC Rcd. 7442, 7451, ¶18 (stating that 96% of homes were passed by cable); See, Third Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 12 FCC Rcd. 4358, 4368, ¶13 (stating that 96.7% of homes were passed by cable); See, Fourth Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 13 FCC Rcd 1034, ¶14 (stating that 97.1% of homes were passed by cable). *See also* Fifth Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 13 FCC Rcd 24284, ¶16 (stating that 96.5% of homes were passed by cable); See Also, Sixth Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 15 FCC Rcd 978, ¶19 (stating that 96.6% of homes were passed by cable); And See, Seventh Cable Competition Report, ¶18 (stating that 96.6% of homes were passed by cable).

[14] National Telecommunications and Information Administration and Rural Utilities Service, *Advanced Telecommunications In Rural America: The Challenge of Bringing Broadband Service to All Americans,* April, 2000, fn. 62 ("NTIA RUS Report").

[15] As the NTIA/RUS Report points out, the calculation of cable passage rates can be dramatically impacted by three basic, different sets of statistics: 1) Housing Units; 2) Households; and 3) TV Households. A "Housing Unit" is defined as a house, apartment, mobile home, group of rooms, or single room, that is occupied (or, if vacant, is intended for occupancy) as separate living quarters. A "Household" is a currently occupied "Housing Unit." A "TV Household" is defined as a home with at least one television. In arriving at its 97% figure, the cable industry may by comparing "apples to oranges," by counting Housing Units—not TV Households—as a percentage of TV Households. The NTIA/RUS Report points out that when a cable provider does not serve a house, it has no easy way to distinguish among a household without a TV, a household with a TV, or an unoccupied housing unit. The cable provider knows only that a Housing Unit is passed. The NTIA/RUS Report concludes, therefore, that a comparison of Homes Passed to Housing Units is especially useful in determining cable passage rates. NTIA/RUS Report, at fn. 62.

[16] *Look, Up in the Sky! Big Bets on a Big Deal,* N.Y. Times, October 30, 2001, at C-1. The article states that 115.9 million households have access to DBS programming, whereas only 90.9 million households have access to cable services. With a 78.3% passage rate, the number of unserved households equals more than 25,000,000. Sources for the article are cited as: NCTA, the Census Bureau, SkyRESEARCH, Satellite Broadcasting and Communications Association of America, and Kagan World Media.

[17] Comments and Reply Comments of NRTC, filed in response to 2001 Cable NOI. NRTC also addressed the accuracy of the Homes Passed statistic in its Comments filed in the Commission's Sixth Annual Cable Competition Report (See, Comments of the National Rural Telecommunications Cooperative, CS Docket No. 00-132, ¶¶8-15 (submitted September 8, 2000)).

[18] Rule 425 filing by EchoStar with Security Exchange Commission, November 16, 2001, p.5.

[19] MITRE Technical Report, *Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band,* the MITRE Corporation (April, 2001).

[20] Declaration of Robert J. Rusch, *Satellite Broadcasting and Communications Association of America, et al, v. Federal Communications Commission et al.,* Civil Action No. 00-1571-A (U.S.D.C., E.D. Va., May 23, 2001).

[21] On November 29, 2001, the President authorized funding for the administration of the Launching Our Communities Access to Local Television Act of 200 (the "LOCAL Act"), Pub. L. No. 106-553 (2000), which created a loan guarantee program for the provision of local service to unserved and underserved areas.

Mr. UPTON. Thank you.

STATEMENT OF JARED E. ABBRUZZESE

Mr. ABBRUZZESE. Hi. Good afternoon, Mr. Chairman. Thank you for the opportunity to testify before the committee.

My name is Jared Abbruzzese, and I am Chairman and Acting CEO of WSNet, a satellite facilities based wholesale provider of digital video programming services, headquartered down in Austin, Texas.

Today what I will try and do is briefly touch on a lot of the subjects that were brought up today by the committee.

WSNet offers satellite facilities-based wholesale programming and technology services to over 1,200 small, private cable and rural cable TV companies nationwide, representing almost 4,000 local cable TV systems. WSNet's role is that of an enabler. We enable these small operators to deploy advanced video service technologies that they otherwise would not have access to because of the unique demographics that are associated with the rural market.

These multiple services include prepackaged, pre-digitized video services, new technologies that allow small rural cable operators to upgrade their service offering so that they can provide more channels developed over their existing cable plant at a fraction of the cost than they would otherwise be able to do if they had to incur the cost of upgrading their plant directly.

In addition, WSNet offers its cable operators a satellite delivered direct to the home service of more than 200 digital video channels.

The 1992 Cable Act was successful in creating an environment that allowed for the number of households with access to pay TV services to go to 87 million households that are served today. The act was also helpful in greatly expanding the availability of new upgraded digital video and data services.

The act, however, was less than successful in creating the desired goal of increasing the number of competitive multi-channel TV service providers and slowing the increased cost of cable TV services.

These shortcomings can mainly be attributed to two factors, the first being the restructuring, consolidation, ongoing consolidation of the programming industry, and the second being the consolidation of the cable TV industry.

In response to the 1992 Cable Act, most vertically integrated programming companies immediately de-vertically integrated themselves. After a series of divestitures, restructurings, and consolidation, there now exists 5 to 7 major programming companies. Most of these operate free of the 1992 act restrictions governing program access and pricing.

These programmers can now decide when, for how much, and to whom they wish to sell their commercially critical programming content. In effect, those entities who do not have millions of customers worth of buying power can sometimes find that the access to critical programming is delayed; it's overpriced; it's packaged with unwanted services, or even denied.

In light of these concerns, WSNet would respectfully ask this committee and the Congress to consider imposition of expanded program access rules.

Regarding the status of MVPD, in 1996, the approximate 72 million households that were pay TV customers, the largest seven cable TV companies had 42 million, or 58 percent of the overall customer base. The three DBS providers at the time controlled about 3.9 million customers, or 5 percent.

And during that time local private cable and rural cable TV companies—and the smaller operators controlled about 26 million or 36 percent of the total market.

Since 1996, there has been a massive consolidation effort on the part of the largest TV cable companies. Not only have these cable TV companies become dramatically larger, but just as importantly, as Mr. Terry indicated, they have systematically consolidated franchise assets around large metropolitan areas through acquisitions and trade amongst each other.

In prior years, a large metropolitan area may have several cable TV companies operating adjacent franchise areas. Today you will generally find one dominating the area. This gives them tremendous pricing power and control over the content of the area.

The results of this industry consolidation since 1996 are impressive. Of the approximately 87 million households today that are currently paid TV customers, the largest seven companies now control 65 percent, or almost 57 million customers, an increase of 35 percent in 5 years.

The two remaining high powered DBS companies now control 19 percent of 17 million customers, a staggering 356 percent increase in 5 years. This is with two large DBS competitors competing against each other. Obviously their respective service offerings are quite vibrant.

During this same period of explosive growth in the market share for both the large cable providers and the DBS guys, the smaller rural and local cable TV companies have seen their market share shrink by almost 48 percent, to about 13.4 million customers. Clearly since 1996 the smaller cable TV operators have been steadily losing both market share and customers. The decline, again, can be contributed to the lack of ability to upgrade their services and increase the number of channels.

Typically rural cable companies have 30 to 40 analogue channels. There are currently three companies that provide satellite, facilities based digital video operating today in the U.S. The two largest are EchoStar and DIRECTV. They operate high powered DBS satellites. The third is WSNet utilizing medium powered KU band satellites.

If the announced merger or the announced EchoStar and Hughes DIRECTV merger goes through, the combined entity will control 100 percent of all three U.S. licensed high powered DBS full CONUS, which means it sees all 48 States, contiguous States, in the U.S.

In addition, it will also control more than 55 percent of the two remaining usable high powered DBS semi-conus locations. In short, the merged entity will control virtually all of the U.S. high powered capacity available and licensed.

Clearly the merged entity will be a daunting giant with vast competitive weapons at its disposal. WSNet has not been able to and cannot find commercially viable, high powered DBS capacity in the United States, and it is the much preferred technology.

Largely in response to this extraordinarily controlled that a merged EchoStar and DIRECTV entity will enjoy, WSNet has sought the only high powered alternative in existence in North America recently, and filed for landing rights to the FCC from two Canadian high powered DBS lots. It should be noted that that capacity is currently committed to Canadian companies and it's highly questionable as to whether we will ever be able to use it.

Mr. Chairman, even considering the intimidating realities posed by a merged entity, we believe at WSNet that the EchoStar-DIRECTV combination can be good for competition in the larger markets, but I think I have to underscore at this point in creating an entity that can compete in the larger markets, we will also be creating or allowing the creation of an entity that will be a de facto monopolist in that role in the smaller markets unless certain conditions and modifications are attached to this to assure that there is competition not only in large markets, but also in the rural and small markets in America, and that's the only way that these people, the 20-some odd million households in rural America enjoy the same competitive benefits as those people that live in the large urban markets.

Thank you, Mr. Chairman.

[The prepared statement of Jared E. Abbruzzese follows:]

PREPARED STATEMENT JARED E. ABBRUZZESE, CHAIRMAN AND ACTING CEO, WORLD SATELLITE NETWORK, INC.

World Satellite Network, Inc. ("WSNet") a satellite based, wholesale provider of digital video programming services headquartered in Austin, Texas and its Chairman and Acting CEO, Jared E. Abbruzzese, submits the following written statement in response to a request to testify before the hearing on *The Status of Competition in the Multi-Channel Video Programming Distribution Marketplace* by the Subcommittee on Telecommunications and the Internet on Tuesday, December 4, 2001.

As a satellite-facilities based wholesale provider, WSNet serves small private cable and rural cable television companies nationwide. WSNet competes in multichannel video markets by offering a variety of programming services and technologies to these operators. First, WSNet operates the third, and newest, nationwide direct-to-home ("DTH") television platform in the United States. Aside from Echostar and DIRECTV, WSNet is the only other satellite facilities based multichannel video programming distributor (MVPD) in operation today. Using the WSNet digital satellite platform, small cable operators can provide multi-channel video service to households within their service area not currently reached by their wired facilities by installing a satellite dish on their subscriber's home allowing them to receive approximately 200 channels of video and music. In addition small system operators (typically less than 150 homes passed) may upgrade their existing wired service with all-digital satellite channels and continue to provide local channels via their wired facilities.

Second, WSNet's satellite platform also is used to provide a unique, cost-effective, digital upgrade for smaller cable systems, particularly in rural areas. By taking advantage of WSNet's all-digital satellite platform, small cable system operators (including Satellite Master Antenna Television [SMATV] operators) can upgrade their systems by replacing all of their analog cable channels (excluding local channels) with a digital format, dramatically expanding the number of channels offered. Each analog channel replaced can then be used to deliver ten to twelve digital channels. This means that systems with limited bandwidth (i.e 330 MHz) can move from offering 35 channels to over 200 channels, and still have bandwidth available to eventually support high speed data. By taking advantage of Quadrature Amplitude Modulation (QAM) technology and taking advantage of an all-digital satellite delivery and authorization, the capital expense of existing plant can be significantly reduced. This eliminates a major barrier that rural cable companies have faced in trying to compete with DBS providers over the last six years. This enables them to deliver approximately 200 channels of high quality, digital video and audio programming to cable system operators at a fraction of the capital cost of traditional video delivery mechanisms.

Additionally, WSNet continues to be a leading wholesale provider of analog television programming and equipment to private cable operators and wireless cable operators in the United States. As of May 31, 2001, WSNet served approximately 1,200 operators who collectively served over 750,000 video subscribers.

The 1992 Cable Act and the 1996 Telecommunications Act were successful in increasing the number of households with access to pay-TV services to about 87 million households today. The environment that the Acts created was also helpful in expanding the availability of new upgraded digital video and data services.

These Acts however, were less than successful in creating the desired goal of increasing the number of competitive multi-channel TV services providers and in slowing the increasing cost of cable TV services. These shortcomings can mainly be attributed to two factors; the first being the restructuring and consolidation of the programming industry and the second being the consolidation of the cable TV industry.

CONSOLIDATION OF PROGRAMMING PROVIDERS

In response to the '92 Act, most vertically integrated companies de-vertically integrated themselves. After a series of divestitures, restructurings, and consolidations, there now exists seven major programming companies (AOL/Time Warner, Liberty Media, News Corporation, Viacom, GE/NBC, Disney, and Vivendi) most of these now operate free of '92 Act restrictions governing pricing and program access. A list of the core programming services and their ownership structure is included in Appendix A. After beginning as affiliates of the large Multiple System Operators (MSOs), the recent restructurings by AT&T and other cable companies have now created independent companies. However a major shift that has occurred now has the major broadcasters owning significant positions in many of the cable programmers. Thus, these programmers can decide how, when, for how much, and to whom they wish to sell their commercially critical programming content. In effect, those entities who do not have millions of customers worth of buying power, can sometimes find that access to critical programming is delayed, over-priced, packaged with unwanted services or even service maybe denied. In light of this, WSNet would ask this Committee to consider the imposition of expanded program access rules.

CONSOLIDATION OF MVPD DISTRIBUTION

Regarding recent consolidation of the cable TV distribution industry, in 1996, of the approximately 72 million households that were pay TV customers at the time, the 7 largest cable TV companies had 42.1 million or 58% of the overall customer base. The 3 DBS satellite service providers at the time controlled about 3.9 million customers or about 5% of the total market. During this period, the remaining cable companies, consisting of primarily local private cable, rural cable TV and smaller operators controlled about 26 million customers or about 36% of the total market at that time.

Table 1: 1996 MVPD Subscriber Summary [1]

Rank	MVPD Providers	1996 Subscribers	% of Total	Cumulative % of Total
1	TCI	15.9	22.1%	22.1%
2	Time Warner	10.8	15.0%	37.1%
3	Continental/US West	4.4	6.1%	43.1%
4	Comcast	3.9	5.4%	48.6%
5	Cox	3.0	4.2%	52.8%
6	Cablevision	2.5	3.5%	56.3%
7	DirecTV/USSB (DBS)	2.1	3.0%	59.3%
8	Adelphia	1.6	2.2%	61.4%
9	Primestar (DBS)	1.5	2.1%	63.5%
10	Jones Intercable	1.4	1.9%	65.4%
11	HSD	2.3	3.2%	72.2%
12	MMDS	1.2	1.7%	68.9%
13	SMATV	1.1	1.5%	67.3%
14	Echostar (DBS)	0.3	0.4%	65.8%
15	Other Cable Operators	20.1	27.8%	100.0%
	Total	72.0	100.0%	

[1] Figures based on 1996 and 1997 FCC Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming and WSNet estimates using Skyreports.

Since 1996, there has been a massive consolidation effort on the part of the largest cable TV companies. Not only did the large cable companies consolidate to become larger, they also, and just as importantly, systematically consolidated franchise assets surrounding large metropolitan areas through acquisitions and trades with each other. The net result of this activity is that today you will rarely find more than one of the top cable TV operators servicing a single large metropolitan area, whereas before, you would find them operating in adjacent franchises within a given metropolitan market. This new strategy rewarded them with tremendous buying and pricing power.

One result is that, of the approximately 87 million U.S. households that are pay-TV customers today, the largest 7 cable TV companies now control 65% or almost 56.9 million customers (an increase of almost 35% in 5 yrs.). The two remaining high-powered DBS satellite companies now control service to about 19% or 17 million customers (a staggering 400% increase). During this period of explosive growth in market share for both the large cable TV operators and the two high-powered DBS operators, the smaller local and rural cable TV companies have seen their market share shrink by almost 48% to about 13.4 million customers.

Table 2: 2001 MVPD Subscriber Summary [2]

Rank	MVPD Providers	Sep 2001 Subscribers	% of Total	Cumulative % of Total
1	AT&T	13.7	15.8%	15.8%
2	Time Warner	12.6	14.5%	30.2%
3	DirecTV (DBS)	10.3	11.8%	42.1%
4	Comcast	8.4	9.7%	51.8%
5	Charter	7.0	8.0%	59.8%
6	Echostar (DBS)	6.4	7.4%	67.1%
7	Cox	6.5	7.5%	74.6%
8	Adelphia	5.7	6.6%	81.2%
9	Cablevision	3.0	3.4%	84.6%
10	Mediacom	1.6	1.8%	86.4%
11	Insight	1.6	1.8%	88.3%
12	HSD	0.9	1.1%	90.7%
13	SMATV	1.2	1.4%	89.6%
14	MMDS	0.6	0.7%	91.4%
15	Other Cable Operators	7.5	8.6%	100.0%
	Total	87.0	100.0%	

[2] Figures based on WSNet estimates using Skyreport and earnings reports for periods ending September 2001.

Obviously, since 1996 the smaller cable TV operators have been steadily losing market share and losing in absolute numbers of customers, primarily due to the two high-powered DBS providers. This is largely due to the fact that until WSNet began to provide its wholesale satellite solutions, the smaller operators could not offer either the number of channels nor the enhanced digital services that the satellite video providers could.

Consolidation of Satellite Spectrum

There are currently three companies that provide digital video, satellite facilities-based services operating in the U.S. The two largest, Echostar and DIRECTV, operate utilizing high-powered DBS satellites, and the third, WSNet operates utilizing medium-powered KU band satellites.

If the announced Echostar and Hughes/DIRECTV merger goes through, the combined entity will control 100% of all 3 of the U.S. licensed, high-powered DBS, full-conus orbital locations (means each one can broadcast to all of the U.S.). In addition, they will also control more than 55% of the only 2 remaining useable high-powered DBS semi-conus orbital locations (each broadcasts to ½ the U.S.). In short, the merged company will control virtually all of the U.S. high-powered DBS satellite assets (over 130 high-powered DBS transmitters). In addition, Echostar/DIRECTV will combine substantial other satellite assets in other frequency bands. Clearly, the merged company will be a daunting giant with vast competitive weapons at its disposal.

This continues a trend of satellite consolidation since 1996. Initially there were going to be six other potential DBS providers (in both high-powered and medium power) including Primestar, United States Satellite Broadcasting Company, Inc. (USSB), Alphastar, AskyB (a joint venture between MCI/Worldcom and News Corporation), Dominion Video Satellite, and Continental Satellite Corporations (CSC). In a continued effort to consolidate the spectrum both Echostar and DIRECTV have either acquired or obtained the rights to control virtually all of the U.S. high-powered orbital slots.

The U.S. medium powered Ku-Band orbital capacity is also undergoing the same type of consolidation. Of the 33 frequencies that are currently approved for use, there are currently 35 satellites in use, not including the DARS radio satellites. There are currently four companies that control the US orbital slots, Hughes, Loral Skynet, SES Americom, and Echostar. Telesat has control over the Canadian frequencies. After a merger between Echostar and Hughes/DIRECTV, the combined entity will control 16 different satellites and have operational control over 13 of the orbital positions. The table below shows the orbital positions and satellites currently in use.

Table 3: Ku-Band Orbital Slots (Medium and High Power) [3]

Slot	Power	Oribtal Slot Licensee	Satellites	Number
61.5°W	High	EchoStar	Echostar 3	1
72.0°W	Medium	SES Americom	AMC 6	1

Table 3: Ku-Band Orbital Slots (Medium and High Power)[3]—Continued

Slot	Power	Oribtal Slot Licensee	Satellites	Number
74.0°W	Medium	Hughes/PanAmSat	SBS 6	1
79.0°W	Medium	SES Americom	AMC 5, SatCom C1	2
81.0°W	Medium	SES Americom	SatCom K2	1
82.0°W	High	Telesat (Canada)	Not In Service	0
83.0°W	Medium	EchoStar	Not In Service	0
85.0°W	Medium	SES Americom, XM Radio	AMC 2, XM Roll	2
87.0°W	Medium	SES Americom	AMC 3	1
89.0°W	Medium	Loral Skynet	Telstar 4	1
91.0°W	High	Hughes/PanAmSat, Telesat	Galaxy 11, Nimiq 1	2
93.0°W	Medium	Loral Skynet	Telstar 6	1
95.0°W	Medium	Hughes/PanAmSat	Galaxy 3R	1
97.0°W	Medium	Loral Skynet	Telstar 5	1
99.0°W	Medium	Hughes/PanAmSat	Galaxy 4R	1
101.0°W	High	DirecTV (U.S.), SES Americom	Directv 1R/2/3, AMC 4	4
103.0°W	Medium	SES Americom	AMC 1	1
105.0°W	Medium	SES Americom	G-Star 4	1
107.3°W	Medium	Telesat	Anik F	1
109.2°W	Medium	SatMex (Mexico)	Not In Service	0
110.0°W	High	DirecTVEchoStar	Echostar 5, Direct 1	2
111.1°W	Medium	Telesat	Anik E2	1
113.0°W	Medium	Loral Skynet, SatMex	Solidaridad 2	1
115.0°W	Medium	XM Radio	XM Rock	1
116.8°W	Medium	Loral Skynet, SatMex	SatMex 5	1
118.7°W	Medium	Telesat	Anik E1	1
119.0°W	High	DirecTVEchoStar	Echostar 4/6, DirecTV 6	3
121.0°W	Medium	EchoStar	Not In Service	0
123.0°W	Medium	Hughes/PanAmSat	Galaxy 10R	1
129.0°W	Medium	Loral Skynet	Telestar 7	1
148.0°W	High	EchoStar	Echostar 1	1
155.5°W	Medium	Hughes/PanAmSat	PAS 5	1
175.0°W	High	EchoStar	Not In Service	0
33 Slots				37

[3] Lyngemark Satellite (www.lngsat.com) and WSNet company esearch.

Echostar's combined capacity of both medium and high powered Ku-band frequencies could make it very difficult for both programmers and alternative providers, since many are dependent on Hughe's PanAmSat as their current provider.

WSNet has not been able to, and currently cannot find any commercially viable high-powered DBS capacity in the U.S. While high-powered DBS is the much-preferred technology, WSNet must compete utilizing 17 leased transmitters of medium-powered KU band capacity operated from two different satellites. These medium-powered transmitters can only provide service to WSNet and its customers, through a 34"-36" receive dish, an antenna more than twice the size of the 18" receive dish of Echostar and DIRECTV, impacting the overall cost-effectiveness of any solution any independent operator can provide.

Largely in response to the extraordinary control that a merged Echostar and DirecTV will enjoy, effectively dominating the U.S. high-powered the DBS market; WSNet sought out the only possible high-powered alternative in existence in North America and recently filed with the FCC for landing-rights from two Canadian high-powered DBS satellites. It should be noted that all of the capacity from both Canadian DBS locations are currently committed to Canadian operators and it is highly questionable as to whether these satellites would be useable in the U.S.

POTENTIAL IMPACT TO LOCAL BROADCASTING

Even considering the intimidating realities posed by a merged entity, WSNet believes that the Echostar/DIRECTV combination can be good for competition; positioning it well for competing with big cable TV companies in the large markets. Unfortunately, we also believe that as currently structured, an undesired consequence of this merger could be the further elimination competition in the smaller and especially the rural markets. It is also evident that any further negative impact on the small local and rural cable TV operators could have a corresponding negative impact on the 800-1,000 local broadcasters who also rely on these operators to reach large portions of their markets.

Table 4: Local-into-Local Station Carriage Requirements

	4 Major Networks	Other Networks[1]	All Networks	Secondary Network Stations[2]	Total All Stations	% of All Stations
Top 40 DMAs	159	138	297	145	442	28.3%
Top 100 DMAs	398	282	680	293	973	62.4%
>100 DMAs	324	123	447	140	587	37.6%
All DMAs	722	405	1,127	433	1,560	100.0%

As illustrated in Table 4, there are 1,560 non-digital television broadcast stations within the United States.[4] Within the top 40 Designated Marketing Areas (DMAs) there are 442 network stations, and within the top 100 DMAs there are 973 stations. Based on EchoStar's proposal to expand local-into local service to the top 100 DMAs, they would have to carry 973 total stations, provided must-carry provisions and that duplicated network stations within a DMA be carried. This is an addition of 812 new channels on top of the 161 local channels they currently transmit.[5] This is more capacity than DIRECTV currently has with its existing satellite base. There are three solutions to this problem that EchoStar could elect.

First, they could significantly expand their existing satellite capacity by launching new satellites in their licensed DBS frequencies with spot-beam technology, allowing them to add more channels to the limited frequencies by directing certain stations into specific footprints, allowing them to gain the additional capacity required to carry all the stations with these DMAs.

Second, they could vigorously fight, as they have done in the past, any must-carry legislation, with the hope of overturning the requirement in a court of law. This would significantly reduce the need for new satellites to support the must-carry requirement.

A third option that they could push the limits on the interpretation of the must-carry regulations in DMA's with large footprints. One approach would be to carry a national PBS channel (as they do now), eliminating the need to carry the 422 local PBS stations that support many local communities. If they chose to carry a local PBS feed in the DMA, they could then choose not to broadcast the 243 local PBS stations that cover multiple cities in 179 DMAs.[6] This approach could be expanded with the network broadcast stations as well. For example, in the Phoenix DMA, Echostar currently broadcasts the four networks (ABC, CBS, NBC, and FOX) that originate from Phoenix, Arizona. They do not carry the secondary NBC Affiliate (KNAZ-TV) in Flagstaff, even though it falls within the Phoenix DMA, since they already carry Phoenix's NBC affiliate KPNX-TV. Another example is in the Denver DMA, where there are 6 secondary major network stations in addition to the main Denver affiliates. For example, while they carry Denver's ABC affiliate KMGH-TV, they do not carry the other ABC affiliates within the DMA such as K57CR from Rifle, Colorado, KNFR out of Rawlins, Wyoming or K36AF from New Castle, Colorado. If these secondary networks are not carried, 293 different stations could be adversely affected and consumers in their communities would have to depend on regional news versus local news. Many of these secondary affiliate stations are carried by small local cable companies in rural America. Should a EchoStar/DirecTV merger be approved, it is imperative that EchoStar not be allowed to bypass or avoid the legislative requirements for a comprehensive must-carry implementation. If this means that EchoStar would support fewer than the top 100 DMAs, then that is a business decision they must make. But to allow EchoStar to loosely interpret or legally challenge the must-carry rules would significantly affect many small local broadcasters.

Even given a merged EchoStar's ability to successfully meet the comprehensive must-carry requirements in the top 100 DMAs, the fact still remains that 14+ million households in rural America will not get the chance to see the 587 (37.6% of all broadcast stations) stations located outside the top 100 DMAs. The potential impact to these small stations and their local communities could be devastating. Many of the states outside the top 100 DMAs are subject to severe weather. Key tornado states like Kansas, Texas, Oklahoma, and Nebraska, along with severe winter weather states in the upper West such as North and South Dakota, Montana, Wyoming, and Idaho in addition to hurricane risk states such as Florida, Alabama, Mississippi and Louisiana along with the eastern seaboard of North and South Carolina

[4] Warren Communications News, Television & Cable FactBook 2001
[5] Lyngemark Satellite, last updated 2001-12-01—http://www.lyngsat.com/
[6] Based on WSNet analysis of local station data from Television & Cable FactBook 2001.

are all subject to losing access to the local emergency broadcast network. Many households in these areas have poor off-air reception and rely on their local cable companies to carry their local broadcasting stations. Since a merged EchoStar would not carry these stations, it is critical as a condition to this merger, that local cable operators be supported in delivering a comprehensive digital satellite service in conjunction with their local channels. The local cable operators must have access to all the same programming provided by EchoStar along with the ability to compete both by providing service via their existing wired service and if it is too expensive to reach a remote home, with a satellite dish.

CONCLUSION

In conclusion, WSNet believes that the Echostar/DIRECTV merger should go forward with the addition of some modifications that would afford WSNet permanent access to enhanced satellite facilities. This accommodation should be accomplished in a way that does not materially diminish Echostar/DIRECTV's ability to compete aggressively with the large cable TV companies. WSNet is confident, that an enhanced satellite facilities commitment combined with the suggested modifications to the program access rules, will provide the best opportunity to ensure that real competition will exist in all markets in the U.S.

Appendix A

Popular National Video Programming Services by Ownership [6]

Programming Service	2000 Subs (mil. HHs)	Core Channel	Launch Year	MSO Ownership (%)	Owner Type	Tier
A&E (Arts & Entertainment).	79.4	Yes	1984	Disney (37.5), Hearst (37.5), GE/NBC (25).	Broadcaster ...	Basic
ABC Family (formerly Fox Family Worldwide).	79.3	Yes	1977	Disney (100)	Broadcaster ...	Basic
American Movie Classics (AMC).	75.9	Yes	1984	GE/NBC (53), Cablevision (27), MGM (20).	Broadcaster ...	Basic
Animal Planet	66.3	Yes	1996	Liberty (49), Cox (24.5), Newhouse (24.5), Hendricks (2).	Independent ...	Basic
BET (Black Entertainment Television).	63.4	Yes	1980	Viacom (100)	Broadcaster ...	Basic
BET on Jazz	8.4	Yes	1996	Viacom (100)	Broadcaster ...	Expanded
Bloomberg Information Television.	6	Yes	1995	Bloomberg (100)	Independent ...	Expanded
Bravo	50.4	Yes	1980	GE/NBC (52.8), Cablevision (27.2), MGM (20).	Broadcaster ...	Expanded
Cartoon Network	69.3	Yes	1992	AOL (100)	MSO	Basic
Cinemax		Yes	1980	AOL (100)	MSO	Premium
CMT (Country Music Television).	44.7	Yes	1983	Viacom (100)	Broadcaster ...	Basic
CNBC	75.6	Yes	1989	GE/NBC (100)	Broadcaster ...	Basic
CNN	80.3	Yes	1980	AOL (100)	MSO	Basic
CNN Headline News	76.2	Yes	1982	AOL (100)	MSO	Basic
CNN/SI	16	Yes	1996	AOL (100)	MSO	Expanded
CNNfn (The Financial Network).	16.5	Yes	1995	AOL (100)	MSO	Expanded
Comedy Central	69	Yes	1991	Viacom (50), AOL (37), AT&T (13).	MSO	Basic
Court TV	51.1	Yes	1991	AOL (58), Liberty (42)	MSO	Basic
C-SPAN	79.4	Yes	1979	Independent	Independent ...	Basic
C-SPAN2	60.7	Yes	1986	Independent	Independent ...	Basic
Discovery Channel	80.8	Yes	1985	Liberty (49), Cox (24.5), Newhouse (24.5), Hendricks (2).	Independent ...	Basic
Discovery Health	21.5	Yes	1999	Liberty (49), Cox (24.5), Newhouse (24.5), Hendricks (2).	Independent ...	Expanded
Disney Channel	68.2	Yes	1983	Disney (100)	Broadcaster ...	Basic
E! Entertainment	66.7	Yes	1990	Comcast (90), Liberty (10)	MSO	Basic
Encore		Yes	1991	Liberty (100)	Independent ...	Premium

Appendix A—Continued

Popular National Video Programming Services by Ownership [6]

Programming Service	2000 Subs (mil. HHs)	Core Channel	Launch Year	MSO Ownership (%)	Owner Type	Tier
ESPN	80.5	Yes	1979	Disney (80), Hearst (20)	Broadcaster	Basic
ESPN Classic Sports (formerly Classic Sports Network).	30	Yes	1995	Disney (80), Hearst (20)	Broadcaster	Expanded
ESPN	274.1	Yes	1993	Disney (80), Hearst (20)	Broadcaster	Basic
ESPNEWS	20	Yes	1996	Disney (80), Hearst (20)	Broadcaster	Expanded
Flix		Yes	1992	Viacom (100)	Broadcaster	Premium
Food Network	54.5	Yes	1993	EW Scripps (64), Tribune (29), AT&T (5), Others (2).	Independent	Basic
Fox Health Network	21.5	Yes	1999	AT&T (49), Cox (24.6)	MSO	Expanded
Fox News Channel	57.5	Yes	1996	News Corp. (100)	Broadcaster	Basic
FOX Sports Net (5 channels).		Yes	1995	News Corp. (100)	Broadcaster	Basic
FX	57	Yes	1994	News Corp. (100)	Broadcaster	Basic
FXM: Movies from Fox	13	Yes	1994	News Corp. (100)	Broadcaster	Expanded
Game Show Network	31.2	Yes	1994	Liberty (50), Digital (50)	Independent	Expanded
Golf Channel	31.9	Yes	1995	Comcast (54.7), News Corp (30.9), Times Mirror (8.6), Others (5.8).	MSO	Expanded
Goodlife Television Network (formerly Nostalgia Channel).	10.1	Yes	1998	Concept Comm. (71), Others (29).	Independent	Expanded
Great American Country	14.7	Yes	1995	Jones International Networks	Independent	Expanded
HBO (Home Box Office)		Yes	1972	AOL (74.5), AT&T (25.5)	MSO	Premium
History Channe	l69.6	Yes	1995	Disney (37.5), Hearst (37.5), GE/NBC (25).	Broadcaster	Basic
Home & Garden Television (HGTV).	67.1	Yes	1994	EW Scripps (100)	Independent	Basic
Home Shopping Network (HSN).	66.9	Yes	1985	Vivendi (45), Liberty (21), Others (34).	Independent	Basic
Independent Film Channel	14	Yes	1994	GE/NBC (52.8), Cablevision (27.2), MGM (20).	Broadcaster	Expanded
Inspirational Network	14.6	Yes	1990	INSP (100)	Independent	Expanded
International Channel	10.2	Yes	1990	Liberty (90)	MSO	Expanded
Lifetime Television	78.8	Yes	1984	Disney (50), Hearst (50)	Broadcaster	Basic
M2: Music Television	21.2	Yes	1996	Viacom (100)	Broadcaster	Expanded
MSNBC	61.4	Yes	1996	GE/NBC (50), Microsoft (50)	Broadcaster	Basic
MTV "X"	21.2	Yes	1996	Viacom (100)	Broadcaster	Expanded
MTV: Music Television	77.3	Yes	1981	Viacom (100)	Broadcaster	Basic
Newsworld International		Yes	1994	Vivendi (45), Liberty (21), Others (34).	Independent	Expanded
Nickelodeon	79.8	Yes	1979	Viacom (100)	Broadcaster	Basic
Outdoor Life Network	26	Yes	1995	Cox (33), Comcast (30), AT&T (4).	MSO	Expanded
Ovation: The Arts Network	21.5	Yes	1996	AOL (4.0)	MSO	Expanded
Playboy TV		Yes	1982	Playboy	Independent	Premium
QVC	76.9	Yes	1986	Comcast (57), AT&T (43)	MSO	Basic
Sci-Fi Channel	67.3	Yes	1992	Vivendi (45), Liberty (21), Others (34).	Independent	Basic
Showtime		Yes	1976	Viacom (100)	Broadcaster	Premium
Sneak Prevue	32	Yes	1991	Gemstar (100)	Independent	Expanded
SoapNet	6	Yes	2000	Disney (100)	Broadcaster	Expanded
Speedvision	33	Yes	1995	Cox (33), Comcast (30), AT&T (4).	MSO	Expanded
Starz!		Yes	1994	Liberty (88), Others (12)	Independent	Premium
Style	10	Yes	1999	Comcast (89.6), Liberty (10.4)	MSO	Expanded
TBS	81.4	Yes	1976	AOL (100)	MSO	Basic
TechTV	23	Yes	1998	Vulcan Ventures	Independent	Expanded
The Hallmark Channel (Odyssey Channel).	27.5	Yes	1993	Crown Media	Independent	Expanded

Appendix A—Continued

Popular National Video Programming Services by Ownership [6]

Programming Service	2000 Subs (mil. HHs)	Core Channel	Launch Year	MSO Ownership (%)	Owner Type	Tier
The Weather Channel (TWC).	78.5	Yes	1982	Landmark Communications	Independent	Basic
TLC (The Learning Channel).	76.8	Yes	1980	Liberty (49), Cox (24.5), Newhouse (24.5), Hendricks (2).	Independent	Basic
TNN: The National Network (formerly The Nashville Network).	78.8	Yes	1983	Viacom (100)	Broadcaster	Basic
Toon Disney	17.8	Yes	1998	Disney (100)	Broadcaster	Expanded
Travel Channel	49.8	Yes	1987	Liberty (49), Cox (24.5), Newhouse (24.5), Hendricks (2).	Independent	Basic
Turner Classic Movies (TCM).	47.2	Yes	1994	AOL (100)	MSO	Basic
TV Guide Channel	54.6	Yes	1988	Gemstar (100)	Independent	Basic
TV Land	55.5	Yes	1996	Viacom (100)	Broadcaster	Basic
USA Network	80.4	Yes	1980	Vivendi (45), Liberty (21), Others (34).	Independent	Basic
VH-1	74.2	Yes	1985	Viacom (100)	Broadcaster	Basic
WGN-C	51.1	Yes	1978	Tribune Media	Independent	Basic
Women's Entertainment (formerly Romance Classics).	25	Yes	1997	GE/NBC (52.8), Cablevision (27.2), MGM (20).	Broadcaster	Basic

Mr. UPTON. Thank you.
Mr. Pagon, welcome.

STATEMENT OF MARSHALL W. PAGON

Mr. PAGON. Mr. Chairman and members of the committee, I thank you for the invitation to appear before you today. My name is Mark Pagon. I am the Chief Executive Officer of Pegasus Communications Corporation.

I founded Pegasus in 1991. Sine then we have grown to become America's tenth largest multi-channel video provider. Today we provide digital satellite TV or DBS to more than 1.5 million rural households in 41 States. We are the only major cable or satellite provider in the United States exclusively focused on service to rural communities.

The binding lesson of my professional experience is that competition has worked extremely well in providing American consumers choice, innovation, and value in multi-channel video.

The first DBS system was sold in July 1994 in Cowboy Maloney's Consumer Electronics Superstore in Jackson, Mississippi. That first subscriber lives in a rural area outside of Jackson and is a Pegasus customer.

In the 7 years since, DBS companies have grown to serve more than 17 million subscribers. As a point of reference, it took the cable industry 32 years to sign up 17 million customers.

Almost 10 million rural homes, 1 in 4, now have a satellite dish. In Montana and Vermont, the ratio is approaching almost 1 in 2.

As a result of DBS, digital television is now more prevalent in rural areas than in America's most affluent urban communities.

The simple truth is that the satellite and cable industries are more competitive than they have ever been. Today the majority of American have a choice between a cable company an two DBS service providers. Even for the almost 20 million homes not passed by cable, there is still a choice of two satellite companies.

The cost of becoming a multi-channel subscribers has never been lower. Seven years ago a new customer had to spend almost $1,000 to become a DBS subscriber. Today you can become a DIRECTV, EchoStar, or Pegasus customer without any initial up front payment.

Perhaps the most compelling indication of how competitive this market is can be seen in how the cable industry has responded to competition from the DBS providers. When DBS was first launched in 1994, cable companies did not offer digital video or cable broadband. In the 7 years since, the cable industry has spent $50 billion to upgrade their facilities to enable the delivery of these new services.

Without the competitive threat of two or more DBS providers, it is unlikely that the cable industry would have done this. In short, competition among the cable and satellite industries is working very well for the American consumer.

However, while competition among the satellite and cable industries is working, the announced merger of Hughes Electronics and EchoStar Communications threatens to eliminate competition in the DBS industry and to replace it with a satellite monopoly.

EchoStar and General Motors acknowledged publicly that the proposed merger would create a satellite monopoly and that millions of rural households will be left without any choice in multichannel video. While EchoStar and General Motors have also publicly committed to resolving antitrust issues that may be raised by Congress, the FCC and the Department of Justice, they have to date offered no specific proposals that would assure the continuation of competition in the DBS industry.

Indeed, Mr. Ergen has indicated that a consent decree that requires such a result is a deal breaker. This is the central issue concerning the merger. Will American consumers, especially the 20 million rural homes not passed by cable, continue to have a choice of satellite providers?

We need a clear and specific statement of intent from EchoStar on this subject. I, therefore, pose the following simple question to Mr. Ergen: will you commit to take the steps necessary to assure that real and viable competition will continue in the DBS industry prior to completing your merger?

If the answer is yes, the proposed merger should be given fair consideration. If the answer is anything short of yes, the proposed merger should be rejected quickly and as anti-competitive and harmful to rural consumers.

Mr. Chairman and members of the committee, I again thank you for your invitation to participate in this hearing. In addition to my written statement, I would like to submit for the record letters from the National Grange and the National Cattlemen's Beef Association.

Thank you.

[The prepared statement of Marshall W. Pagon follows:]

PREPARED STATEMENT OF MARSHALL PAGON, CHIEF EXECUTIVE OFFICER, PEGASUS COMMUNICATIONS CORPORATION

Mr. Chairman and Members of the Committee, I thank you for the invitation to appear before you today.

My name is Mark Pagon. I am the Chief Executive Officer of Pegasus Communications Corporation.

To say that a hearing on the state of competition in the cable and satellite industries is timely would be an understatement. The announced merger of Hughes Electronics and Echostar Communications, the two remaining facilities based satellite competitors, and the imminent prospect of a merger of AT&T Broadband, America's largest cable company, with Comcast, Cox or AOL Time Warner and likely further consolidation in the cable industry, make the present an especially important time to be evaluating the record of competition in the cable and satellite industries.

I have spent my entire professional life in efforts to expand choice in multi-channel video programming for those living in rural and underserved areas. In the 1980's and early 1990's, I did this by building and operating cable systems in rural areas of New England, the Middle Atlantic, the Southeast and Puerto Rico. Since 1994, I have committed most of my time and effort to providing digital satellite television (DBS) to rural areas of the United States.

I founded Pegasus in 1991. Since then we have grown to become America's 10th largest multi-channel video provider. Today we provide digital satellite TV (DBS) to more than 1.5 million rural households in 41 states. We are the only major cable or satellite provider in the United States *exclusively* focused on service to rural communities.

The abiding lesson of my professional experience is that competition has worked extremely well in providing American consumers choice, innovation and value in multi-channel video.

Competition has generated two waves of innovation in the distribution of multi-channel video in the United States. In the late 1970's and 1980's, the innovators were cable companies. Over the last decade, the innovators have been DBS providers. In each instance, consumers and shareholders have benefited significantly. In both instances, however, success has encouraged a process of consolidation that will, if unchecked, succeed in creating cable and satellite monopolies that have as their goal the elimination of competition.

In 1975, the average American home had access to less than four channels. Virtually all viewing was devoted to CBS, NBC and ABC. Choice was therefore limited to what the management of those networks decided their viewers should see.

Cable changed that in the 1980's by creating *cable* networks such as TBS, CNN, ESPN, MTV, Discovery, CSPAN and CNBC and giving consumers access to 30 to 50 new channels. By doing so, cable went from a small sector of marginal importance in the media industry to an industry serving almost 70 million homes.

Over the last decade, DBS has been the innovator by being the first to provide American consumers *digital* multi-channel video. Like cable before it, the DBS business was not built by established media companies—cable companies, the broadcast networks or vertically integrated entertainment companies—though they each were well situated to take the risks to do so.

No, DBS has been built by the entrepreneurs testifying before you today:

- Eddy Hartenstein, whose vision brought DBS technology into existence;
- Charlie Ergen, who has bootstrapped Echostar into America's second largest DBS company through aggressive competition and nimble negotiation and who will become the controlling shareholder in the $40 billion combination of Echostar and Hughes Electronics if their merger is successfully completed;
- Bob Phillips and the NRTC, whose members (including Pegasus) provided over $100 million of seed capital to the launch of DIRECTV when GE, News Corporation, Cablevision Systems and other established media companies balked at the risk of such an unproven technology; and
- My company, Pegasus, which has grown to serve almost 10% of all DBS subscribers by focusing on rural markets that the big cable and satellite companies don't care about.

Today, Americans who subscribe to DBS or to digital cable have access to seven national broadcast networks, more than 200 national cable networks and over one hundred pay per view movie, digital audio and sports channels.

The first DBS system was sold in July 1994 in Cowboy Maloney's consumer electronics superstore in Jackson, Mississippi. That first subscriber lives in a rural area outside of Jackson and is a Pegasus customer.

In the seven years since, DBS companies have grown to serve more than 17 million subscribers. As a point of reference, it took the cable industry 32 years (1949-1981) to sign up 17 million subscribers.

Almost 10 million rural homes—one in four—now have a satellite dish. In Montana and Vermont, the ratio is approaching one in two. As a result of DBS, digital television is now more prevalent in rural areas than in America's most affluent urban communities.

According to the FCC, from 1999 to 2000 DBS grew by 28.86%, gaining over 2.9 million new subscribers. During the same period, cable grew by only 1.51%.

DBS companies have been successful, because we have created real and vibrant competition to cable. However, we would not have been able to do so without Congressional, FCC and Department of Justice support to ensure access to cable programming and DBS orbital spectrum and to prevent efforts by cable companies and others to frustrate such access.

The passage of the Satellite Home Viewer Improvement Act (SHVIA) in 1999, which granted satellite companies a license to deliver the signals of the local television broadcast stations, has also been instrumental in furthering competition between cable and satellite providers. Since the passage of SHVIA just two years ago, DIRECTV and Echostar have made local TV via satellite available in 40 of America's largest TV markets—markets that include almost 70 million American TV households.

There remain 170 TV markets that today still do *not* have access to their local TV stations via satellite. This is the single most important impediment to DBS becoming an even more effective competitor to cable.

Some would have you believe that there is not enough orbital spectrum for competing satellite providers to provide local TV via satellite to smaller TV markets. I believe that these arguments are factually wrong and have been advanced primarily because it would be inconvenient for Echostar and DIRECTV to provide local TV in more TV markets while arguing that spectrum scarcity is the reason why the Must Carry provisions of SHVIA should be thrown out by the Federal Courts. I am confident that when the Must Carry litigation is finally resolved, the DBS industry will admit that adequate spectrum exists to provide satellite delivery of *all* local TV stations. I believe that when the DBS industry owns up to this fact and commits itself to this goal, satellite access to local TV will become a reality for all American TV homes.

Despite the festering issue of access to local TV stations in rural markets, the simple truth is that the satellite and cable industries are more competitive than they have ever been. Today the majority of Americans have a choice between a cable company and two DBS service providers. Even for the almost 20 million homes not passed by cable, there is still a choice of two satellite companies.

The cost of becoming a multi-channel subscriber has never been lower. Seven years ago, a new customer had to spend almost $1,000 to become a DBS subscriber. Today, you can become a DIRECTV, Echostar or Pegasus DBS customer without *any* initial upfront cost.

Perhaps the most compelling indication of how competitive this market is can be seen in how the cable industry has responded to competition from the DBS providers. When DBS was first launched in 1994, cable companies did not offer digital video or cable broadband. In the seven years since, the cable industry has spent almost $50 billion to upgrade their facilities to enable the delivery of these new services. Cable now provides digital video to 13 million homes and cable broadband to another 7 million American households. Without the competitive threat of two or more DBS providers, it is unlikely that the cable industry would have done this.

In short, competition among the cable and satellite industries is working very well for the American consumer. There is no reason to expect that competition will not continue to be the best means to assuring consumers more and better services at increasingly lower costs.

While competition among the satellite and cable industries is working, the announced merger of Hughes Electronics and Echostar Communications, the imminent prospect of a merger of AT&T Broadband with Comcast, Cox or AOL Time Warner and likely further consolidation in the cable industry threaten to create satellite and cable monopolies that will eliminate competition.

Just last week at the Western Cable Show, Ted Turner predicted that the cable industry would consolidate to just two companies in the next twelve months.

Let us consider the proposed merger of Hughes Electronics (currently a wholly-owned subsidiary of General Motors) as an example of the imminent threat to continued competition in these markets.

The proposed merger would create the largest multi-channel video provider in the world, serving 17 million American households. Echostar and General Motors project that the merger will create "efficiencies" equal to more than 50% of the revenues of the combined companies! ($5 billion of *annual* efficiencies for a company with combined revenues of $9 billion annually.)

In so doing, however, the merger would also:

- Eliminate facilities based competition in the DBS industry;
- Eliminate choice in multi-channel service providers for as many as 20 million rural homes;
- Reduce choice for another 95 million homes from two satellite providers and one cable company to just one of each; and
- Combine in one company 100% of the DBS satellite spectrum from which ubiquitous coverage of the 48 contiguous states can be provided, thereby preempting future facilities based DBS competition.

This merger, if approved without material modifications, would create a formidable satellite monopoly. Such a result would be directly contrary to the central premise of US anti-trust law and policy of the past 100 years.

That central premise is to entrust the public interest to the efficacy of competitive markets rather than to the benevolence of monopolists. The key provision of Section 7 of the Clayton Act reads as follows: "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, . . . another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

Echostar and Hughes acknowledge publicly that the proposed merger will reduce choice in the distribution of multi-channel video. They acknowledge publicly that it would create a satellite monopoly and that millions of rural households will be left without *any* choice in multi-channel video.

Echostar and General Motors have also publicly committed to resolving all antitrust issues that may be raised by Congress, the FCC and the Department of Justice. Unfortunately, they have to date offered no specific proposals that would convey an intention to assure the continuation of competition in the DBS industry. Indeed, Mr. Ergen has indicated that a consent decree that requires such a result is a "deal breaker".

This is the *central* issue for consumers, for manufacturers, for programmers, for those (such as Pegasus) who compete in the satellite industry and for policy makers concerning this merger. We therefore need a clear and specific statement of intention from the parties to the proposed merger on this subject.

I therefore pose the following simple question to each of Echostar and General Motors:

Will you commit to the continuation of real and viable competition in the DBS industry and to take the steps necessary to assure this prior to completing your merger?

If their answer is yes, then I suggest that their proposed merger be given fair consideration.

If their answer is anything short of yes, then I suggest that their proposed merger be rejected quickly as anti-competitive and unambiguously contrary to US anti-trust law and policy.

Mr. Chairman and Members of the Committee, I again thank you for your invitation to participate in this hearing.

Mr. UPTON. Without objection, that will be included as part of the record.

Thank you.

Mr. Fiorile.

STATEMENT OF MICHAEL J. FIORILE

Mr. FIORILE. Thank you, Mr. Chairman and committee members.

My name is Michael Fiorile, and I am President and CEO of the Dispatch Broadcast Group based on Columbus, Ohio.

I am here today to tell you how competition, current competition in the DBS market will be totally eliminated by an EchoStar-DIRECTV merger. The merger would harm consumers and broadcasters on a number of levels.

First, a DBS monopoly would completely end the competition that currently exists between satellite companies today, depriving consumers of future innovations and price battles that we see that competition has otherwise yielded, in particular, in rural America.

Second, the merger would end any hope of expanding local-to-local television service into a majority of television markets.

And, third, the merger could lead to more disruptions in local television stations and the delivery of those stations, just as it has occurred with the cable gatekeepers recently. An EchoStar-DIRECTV merger would severely restrict choices for vast numbers of people.

EchoStar asserts that decisions regarding this merger should be viewed in the context of the entire MVPD market. However, it was just a few months ago in a Federal antitrust suit against DIRECTV that EchoStar itself defined the relevant market as "the high powered DBS market," nothing that satellite-to-home broadcast service constitutes a stand alone market.

This merger should be held to that same standard. The combined company, as previously mentioned, would control every single full CONUS DBS frequency in the continental United States. And even if DBS were interchangeable with cable, which it is not, the merger would be a bad deal in the end for consumers.

Competition between the two DBS companies has yielded a tremendous amount of consumer benefits. DIRECTV, for one, has taken the lead in offering high end sports and movie programming. EchoStar, on the other hand, responded to the innovation with aggressive competition, as we've heard, in price and in other service offerings.

EchoStar's 1996 entrance into the market slashed the price then of buying a satellite dish by hundreds of dollars, and today consumers, as you have heard, have opportunities to get free dishes through numerous promotions in places like Blockbuster when you rent a movie or at Sears or at your grocery store, for that matter, and many, many other opportunities through local retailers.

For consumers with access to cable, the proposed merger represents a reduction from three competitive options to two, in essence. And as most cable subscribers have only one cable option as it is, worse yet for tens of millions of viewers without access to cable, particularly in rural areas, this merger would remove one of the two competitors, giving EchoStar a perfect monopoly in those areas.

Under this proposed monopoly, consumers in 110 U.S. television markets would never receive local news, local sports, or local weather through satellite. Once these two companies stop competing against each other, we lose the incentive for them to try to gain advantage by adding local-to-local in new markets or through the competitive pricing we've seen.

While EchoStar claims that it will offer local-to-local in 100 markets, the broadcast industry has little faith in this claim. Right after, as was mentioned earlier, the ink had dried on the 1999 Satellite Home Viewer Act, EchoStar challenged the compromise legislation by trying to get to court to invalidate "carry one, carry all" mandates, despite promises to the contrary.

Further based on a trumped up claim of inadequate signals, EchoStar initially denied carriage to the many broadcast stations it is obliged to carry. The FCC has since determined these challenges are largely baseless.

EchoStar claims they do not have the capacity to provide local-to-local in all markets, but with today's technological advancements they, in fact, could easily provide local into local in all 210 markets without this merger.

Finally, a DBS monopoly as proposed will also adversely affect negotiations between local broadcasters and the DBS industry over retransmission consent. We all remember the nightmare when a cable company in New York cutoff the local ABC affiliate from their customers. In fact, you can expect the same type of abuse to occur by now creating a second monopoly gatekeeper.

The tremendous advancements in technology and programming and in pricing in the DBS industry have been driven principally by one thing, and that is by competition. Despite the track record, DBS companies are asking you to give up on competition and instead rely on their promises to get these benefits in the future.

We urge you to continue to rely upon competition in the marketplace. In fact, it is working, and we look for a continuation of this DBS competition to foster the competition that all of the committee members have talked about.

Thank you.

[The prepared statement of Michael J. Fiorile follows:]

PREPARED STATEMENT OF MICHAEL J. FIORILE, PRESIDENT AND CEO, DISPATCH BROADCAST GROUP

A. INTRODUCTION

As President and CEO of Dispatch Broadcast Group, I am pleased to appear before the U.S. House of Representatives Subcommittee on Telecommunications and the Internet to discuss the status of competition in multichannel video programming distribution ("MVPD").

Dispatch Broadcast Group owns two commercial television stations—WBNS-TV, Columbus, OH and WTHR-TV, Indianapolis, IN. Both television stations are on the air with a digital signal, with WBNS-DT as the only digital signal in the Columbus, OH market. Our other broadcast interests include WBNS-AM/FM, Columbus, OH, Radio Sound Network, Ohio News Network, SkyTrak weather and Dispatch Interactive Television.

Additionally, I am currently the Vice Chairman of the National Association of Broadcasters Television Board, and serve as Vice Chairman of the NAB DTV Task Force.

B. THE ROLE OF THE BROADCASTING INDUSTRY AND THE IMPACT OF CABLE AND DBS ON BROADCASTERS

As this committee is well aware, the broadcasting industry has historically provided free, over the air local programming and news within the United States. The advent of cable and satellite television as multi-channel video programming distributors has made cable systems and satellite carriers, the "gatekeepers" of programming, particularly local programming, throughout the United States.

The available data demonstrates that while millions of U.S. consumers (particularly those with lower incomes) continue to rely on over-the-air broadcast television reception for their delivery of video programming, the majority receives local TV signals through a MVPD service.

According to data in the Fall 2001 Home Technology Monitor Ownership Report prepared by Statistical Research, Inc. ("Home Technology Report")[1], a total of 77 million television sets (or approximately 27.3% of the 283 million sets in the U.S.) are *not* connected to any MVPD service and receive all broadcast signals over-the-

[1] This Report, issued twice a year by Statistical Research, Inc., is a comprehensive survey of television, telephone and computer equipment in U.S. homes. This estimate of the number of broadcast-only television sets is derived from information in the Home Technology Report and from Nielsen's estimates of the number of U.S. television households.

air. This leaves the rest of the sets attached to cable, satellite, or another MVPD service.

Even for television households subscribing to an MVPD service, broadcast stations remain a very significant source of local, diverse programming—and it is the carriage of the local television stations that has substantially benefited the MVPD services. Particularly in this era of increasing consolidation in the cable industry, the broadcast stations carried on cable systems continue to provide a guaranteed minimum of local and diverse voices for subscribers. The Federal Communications Commission explicitly recognizes that most programming carried on any cable system is "either originated or selected by the cable system operator, who thereby ultimately controls the content of such programming." *Report and Order* in MM Docket Nos. 91-221 and 87-8, 14 FCC Rcd 12903, 12953 (1999). Moreover, according to the Commission, cable systems "typically do not serve as *independent* sources of local information; most of any local programming they provide is originated" by broadcast stations, which "are the dominant source of *local* news and information." *Memorandum Opinion and Second Order on Reconsideration* in MM Docket Nos. 91-221 and 87-8, FCC 00-431 at ¶22 (2001) (emphasis in original).[2] Given these views, it would be inappropriate to discount the important role that broadcasters play in the provision of local, diverse programming to *all* television households, whether or not they subscribe to an MVPD service.[3]

The role of broadcasters will be enhanced as the digital television ("DTV") transition moves towards completion. DTV is our future, and will offer consumers more choices, better picture and sound quality, and ancillary services. Currently, there are 221 TV stations broadcasting a digital signal, reaching 78% of the U.S. TV households. By the FCC mandate of May 2002, NAB estimates nearly two-thirds of the commercial TV stations will be on the air with a digital signal—and the rest will not be far behind.

DTV allows broadcasters to provide High-Definition television programming ("HDTV")—the highest quality digital signal with several times the picture quality of current analog television—or Standard-Definition television ("SDTV")—where consumers can additional channels of programming. Digital broadcasters also will have the ability to provide ancillary services—such as datacasting—in addition to their digital signals. Thus, there are increased opportunities for consumers with DTV, and NAB has consistently advocated that Congress and the FCC need to take steps to facilitate the transition to bring these benefits to consumers as soon as possible.

Broadcasters are committed to our role as the main source of local programming to all viewers whether they receive it free, over-the-air or through a MVPD service. However, as we have found—both historically and looking ahead to the future—the "gatekeeper" role cable and DBS abuse with regard to programming access has a substantial impact on the broadcasting industry.

C. THE CABLE INDUSTRY HAS ABUSED ITS "GATEKEEPER" ROLE

1. Digital TV

The monopoly position enjoyed by local cable systems in local markets underscores the harm to consumers from the lack of competition. Over 70% of the U.S. television households are connected to cable. Thus, cable serves as the dominant gatekeeper for broadcasters, and other programming providers. This "gatekeeper" role is one that cable has abused time and again.In 1992, Congress passed the Cable Act.[4] As part of that comprehensive piece of legislation, Congress reimposed the "must carry" obligation on cable operators in order to preserve free, over-the-air broadcasting, and give local broadcasters control of the use of their signals by cable systems and other distributors. Additionally, the 1992 Cable Act required "retransmission consent." Thus, MVPDs can only retransmit a broadcast signal with consent of the originating station. The cable industry resisted the new must carry obligations, appeal-

[2] *See also Report and Order,* 14 FCC Rcd at 12933 (noting that "diversity of viewpoints in local news presentation" is "at the heart" of the Commission's "diversity goal").

[3] Congress has expressed similar concerns about cable subscribers retaining access to local, diverse information sources. See H.R Rep. No. 628, 102d Cong., 2d Sess. at 56 (1992) (consumers who "rely on cable television for video services" should "not be deprived of the programs presented by their local television stations," which include local news and information); 47 U.S.C. § 532(g) (authorizing FCC to "promulgate any additional rules necessary to provide diversity of information sources," once cable systems reach a specified subscriber level).

[4] Cable Television Consumer Protection & Competition Act of 1992, Pub. L. No. 102-385 (Oct. 5, 1992).

ing to the U.S. Supreme Court. However, the Court found the must carry obligation constitutional in 1997.[5]

Now, as we move into a digital world, the cable industry is up to its old tricks. It is fighting any attempt to impose digital must carry obligations—despite the Supreme Court ruling. Additionally, the desire of cable gatekeepers to control access to consumers also is reflected in the current lack of agreements between cable operators and broadcasters for the carriage of DTV signals. Cable operators generally will not respond to broadcaster inquiries about cable carriage of DTV signals, and only a handful of actual carriage agreements have consequently been negotiated.[6]

The reluctance of cable operators to even discuss carriage of DTV signals clearly demonstrates that cable systems have "systemic reasons" for limiting the access that broadcasters and other competitors have to consumers.[7] Without a majority of U.S. households having access to local DTV signals, the pace of the DTV transition—and broadcasters' ability to compete—is drastically impaired.

2. Interactive TV

The development of new technologies, such as interactive television ("ITV"), will only expand opportunities for the cable operators, and disadvantage competitors, because the cable systems control the optimal distribution platform for digital, interactive services.[8] The delivery of digital ITV requires a mechanism to link all of the interactive elements (*i.e.* video, audio, and data) once they reach the subscriber. Cable operators in the digital environment will be able to control this vital linking of the various elements through their creation of electronic program guides (EPGs). The EPGs will consequently become a powerful mechanism by which cable operators can favor or disfavor whatever interactive content and services they choose. In an interactive environment, a cable operator will be able to disadvantage the programming of competitors by blocking, interfering with or degrading the ITV enhancements associated with that programming. Discrimination in a variety of technology related matters—such as EPGs, screen displays, channel assignment and position, caching of information, and downstream and return path bandwidth and transmission speed—could also occur. Thus, the growth of digital ITV will only expand opportunities for cable operators to discriminate against unaffiliated entities and competitors—including broadcasters.

3. Carriage Agreements

Cable operators wield their market power in other ways, too. For example, some cable systems have attempted to restrict the amount of programming that cable networks can stream directly to consumers over the Internet.[9] If these types of agreements are forced on cable networks in return for cable carriage, the provision of video on the Internet will be significantly impeded—adversely impacting both consumers and competitors. These agreements to block Internet video stem from cable's attempt to protect its power in the MVPD market. This same approach could be taken with respect to broadcast interactive triggers or data and other new services in digital.

NAB also observes that cable operators' attempts to use carriage agreements as vehicles to restrict the Internet streaming of video programming seem inconsistent with at least the intent, and arguably the terms, of Sections 616 and 628 of the

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[5] *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180 (1997). See also *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622 (1994).

[6] *See* Comments of NAB/MSTV/ALTV filed with the FCC in CS Docket Nos. 98-120, 00-96 and 00-2 at 17-26 (filed June 11, 2001) (explaining that cable has increased incentives not to carry DTV broadcasters and that cable carriage of DTV broadcasters will not happen without must carry).

[7] *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 201-202 (1997) (cable systems have the incentive to disadvantage broadcast competitors "in favor of programmers . . . less likely to compete with them for audience and advertisers").

[8] The cable platform has the upstream and downstream bandwidth to provide the high-speed connection necessary for the full range of ITV services, in addition to its dominance in the MVPD marketplace.

[9] For example, Charter Communications wanted to insert a clause in its carriage agreement with ESPN that would have effectively prevented ESPNews from video streaming its content on the Web. *See, e.g.,* L. Moss, *ESPN to Charter: You're Out,* Cable World at 7 (May 28, 2001); L. Rich, *Kicking and Streaming,* The Industry Standard (June 11, 2001); S. Schiesel, *Charter Removes ESPNews from Some Cable Systems in Dispute,* The New York Times, Section C, Page 2 (July 2, 2001). Other cable system operators are similarly "pushing for guarantees that programmers won't offer content over the Web." L. Moss, *Operators Back Charter in Web Dispute,* Cable World at 1 (June 4, 2001). Charter, AT&T Broadband, Time Warner Cable and Comcast have been identified as the cable system operators attempting to limit streaming by programmers the most strictly. *See* R.T. Umstead and S. Donohue, *Making Tense Times Worse, Charter Raises "Stream" Bar,* Multichannel News at 1 (June 4, 2001).

Communications Act. Section 616(a) directs the Commission to prevent cable operators from "coercing" any programming vendor "to provide . . . exclusive rights against other multichannel video programming distributors as a condition of carriage on a system." 47 U.S.C. § 536(a)(2). If, "as a condition of carriage," a cable operator attempts to obtain exclusive rights to a cable network's programming so as to prevent its distribution via the Internet, then a question of compliance with the Communications Act arises.[10]

Congressional concern with efforts by cable operators to deny competing distributors access to programming directly led to passage of Section 628 of the Communications Act. This section makes it unlawful for "a cable operator" to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor" from providing certain programming "to subscribers or consumers." 47 U.S.C. § 548(b). Cable operators' current efforts to "hinder significantly or to prevent" the distribution of cable network programming to "consumers" via the Internet are entirely in keeping with the cable industry's history of using its control over programming to the disadvantage of competing distributors, and are obviously contrary to Congress' intent in passing Section 628.

2. Cable-Broadcast Cross-Ownership

Finally, there is yet another avenue where cable would like to further its gatekeeper role: through the elimination or relaxation of the cable-broadcast cross-ownership ban. The rule's fate is part of a pending court case before the U.S. Court of Appeals for the D.C. Circuit.[11] NAB supports retention of the ban. If a cable operator were allowed to own and operate local stations, there would be nothing stopping it from giving preferential treatment to its own stations, and perhaps diminishing carriage of local stations owned by other entities and manipulating channel positioning. Cable would, of course, argue that the must carry statute prevents such discrimination from occurring. However, while there is an analog must carry rule in place, there is no digital must carry obligation at this time. Thus, digital TV stations could suffer such discrimination.

The cable-broadcast cross-ownership rule is different than other cross-ownership bans because in no other cross-ownership situation is there the potential for one competitor to eliminate or hamper the ability of another competitor to reach the public. Cable is unique because, "by virtue of [its] ownership of the essential pathway" to consumers' homes, it can, "silence the voice of the competing speakers with a mere flick of the switch."[12] Retaining the cable-broadcast cross-ownership ban is necessary to keep cable's market power reigned in to a limited degree.

D. A MERGER TO MONOPOLY IN DIRECT BROADCAST SATELLITE SERVICE WILL HARM BROADCASTERS AND CONSUMERS

The history of cable as the dominant gatekeeper provides a lesson in the abuse of market power and—harm to consumers. The proposed merger of the only two DBS carriers, Hughes and EchoStar, directly will harm broadcasters and consumers in forging another monopoly, this time in satellite broadcast distribution, as well as in reducing needed competition to cable. Competition between the only two satellite carriers has proven beneficial to both broadcasters and consumers in innovation, service, pricing, and in particular the growth of local-to-local satellite service. Those benefits will be lost if this merger proceeds.

3. The Direct Broadcast Satellite (DBS) Industry's Track Record with Local Stations: A Consistent Pattern of Abuse and Lawlessness

In every aspect of their dealings with local TV stations, the DBS industry—and particularly EchoStar—has shown a shameful disrespect for obedience to law. Since EchoStar and DirecTV have 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 they may make today to obtain government blessing for a merger to DBS monopoly.

[10] Section 616(a) also prevents cable operators from utilizing carriage agreements "to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly." 47 U.S.C. § 536(a)(3). Unaffiliated cable programming networks could contend that cable operators' use of carriage agreements to restrict Internet streaming unreasonably restrains their ability to compete.

[11] *Fox Television, National Broadcasting Company, Viacom, CBS, Inc, & Time Warner v. FCC,* No. 00-1222 (consolidated with No. 00-1263, 00-1381, 00-1326, 00-1359) (Oral Arguments heard Sept. 7, 2001).

[12] *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 656 (1994).

i. 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.[13]

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.

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. 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-

[13] For the first few years of this exercise in lawbreaking, DirecTV and EchoStar hid behind a small, foreign-owned company called PrimeTime 24. *See CBS Broadcasting Inc. v. PrimeTime 24,* 48 F. Supp. 2d 1342, 1348 (S.D. Fla. 1998) ("PrimeTime 24 sells its service through distributors, such as DirecTV and EchoStar . . . [M]ost of PrimeTime's growth is through customer sales to owners of small dishes who purchase programming from packagers such as DirecTV or EchoStar."). Starting in 1998 (for EchoStar) and 1999 (for DirecTV), the two companies fired PrimeTime 24 in an effort to dodge court orders to obey the Copyright Act.

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.[14]

ii. 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: 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. Satellite Home Viewer Act of 1999 ("SHVIA"). 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, embodied in the SHVIA, 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."[15]

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 cherrypick 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 prom-

[14] Declaration of Mark Jackson, Senior Vice President, EchoStar Technologies, ¶¶ 17, 19, 20, 21 (executed Oct. 11, 2000) ("Jackson Decl.") (claiming that EchoStar can only terminate 6,000 to 10,000" per day); Declaration of James DeFranco, Executive Vice President and Director for EchoStar Communications Corp. (executed Oct. 11, 2000) ("DeFranco Decl.") at ¶¶ 18-21 (describing EchoStar's proposed time frame and alleged need for lengthy period for shut off process).

[15] SBCA Comments, *In Re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* CS Docket No. 00-132 (filed July 2000) (quoting industry analyst).

ises 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.

iii. 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.*

iv. EchoStar's Brazen Proposal to Defy 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).

Both in its original decision in early 2001 and on reconsideration in August 2001, the Commission made absolutely clear that satellite carriers could *not* place "disfavored" stations "on a satellite . . . that would require a subscriber to purchase equipment additional to what is needed to receive other local stations in the same market." *Id.,* ¶ 40.

In an extraordinary slap in the face to Congress and to the FCC, EchoStar announced in late October—just before the merger announcement—that EchoStar is considering doing *exactly* what the Commission said it could not do: purporting to "satisfy" its carry-one-carry-all obligations by putting disfavored stations on a completely different satellite that requires viewers to buy new equipment. EchoStar Analyst Presentation (Oct. 23, 2001) (statements of President & Chairman Charlie Ergen).

Even more recently, EchoStar filed a request with the FCC to move one of its backup satellites to a location far over the Pacific, apparently for the purpose of carrying out this sham "compliance" technique.

In short, EchoStar is evidently considering a new method of openly defying the will of Congress and the FCC, *even when it has twice tried and failed to get permission to do what it now proposes to do.* The lesson for a possible merger to DBS monopoly is clear: no matter how explicit a governmental directive may be, EchoStar will resist with all of its powers if what Congress or the Executive Branch has ordered does not fit with EchoStar's preferred business plan of the moment.

v. 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 Broad-*

casting, 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.

4. EchoStar/DirecTV Merger Will Eliminate Competition in Satellite Television Service and Reduce Competition in Multichannel Video Programming Distribution Against Cable.

Over the past several years, competition between EchoStar and DirecTV has contributed directly to the success of DBS. This competition not only has taken place in regard to price, but also in service offerings, customer service policies, marketing strategies, and technical innovations. The merger would eliminate competition over such items as the development of advanced set-top boxes and the delivery of high-definition programming and lead to fewer programming options and higher prices for consumers.

In rural areas not currently served by cable, the result would be a single multichannel video provider in those areas. Furthermore, as DBS increases its stranglehold on rural customers, many rural cable systems are likely to go out of business. A recent report by a prominent satellite analyst at Credit Suisse First Boston has determined that approximately 8,270 cable systems serving roughly 8.2 million subscribers located primarily in rural territories will become extinct over the next five to eight years as a result of DBS competition. In fact, the CEO of Pegasus Communications recently stated that DBS might become the only programming option for rural customers in the near future. *See Communications Daily,* p. 5 (October 9, 2001). In sum, millions of rural customers could be at risk and subject to the monopolistic tendencies and practices of a combined Echostar/DirecTV.

Even in markets where cable is currently available, American consumers would go from three competitive options to two because in most areas of the U.S., most consumers are served only by one cable system. Economic literature indicates that two competitors in a market will behave in an oligopolistic fashion and not compete on the basis of price, thus, allowing this merger is likely to lead to increased prices for consumers.

EchoStar has suggested that the merger will not threaten competition because DBS operators compete in the broader MVPD market, which includes cable. Indeed, Mr. Ergen, himself, has acknowledged that "[i]f the market is satellite only, then I wouldn't approve this deal." *See The Wall Street Journal,* Echostar's Ergen Starts Campaign to Get Approval for DirecTV Deal, B6, Oct. 31, 2001. However, in its antitrust lawsuit filed against DirecTV last year (which EchoStar recently dropped), EchoStar defined the relevant market as the "high-power DBS market" noting that "satellite-to-home broadcast services constitute [] a stand-alone market, distinctly separate from the cable business." *See Echostar Communications Corp. v. DirecTV Enters., Inc.,* Civ. No. 00-K-212 (D. Colo.). Accordingly, NAB respectfully suggests that this committee closely examine any claims by EchoStar aimed at lessening antitrust concerns.

For example, in an attempt to alleviate these concerns, EchoStar has proposed to adhere to a nationwide pricing plan with equal pricing for rural and urban customers. NAB believes that any such behavioral remedy would not mitigate the inherent competitive harm resulting from a merger of EchoStar and DirecTV. Behavioral remedies are ineffective because they require constant monitoring and incentivize the merging companies to seek loopholes to avoid the intended relief—EchoStar's past behavior makes this more likely to occur.

More fundamentally, however, a decree that only guarantees unilateral pricing in rural communities vis-à-vis metropolitan markets ignores many other forms of competition, such as improved and differentiated product offerings, marketing strategies, and customer service policies. Thus, under the proposed remedy, there would be no adequate method to ensure that the level of service (*i.e.,* number, type, and variety of channels) provided to rural areas would equal that offered to urban markets. Not surprisingly, antitrust authorities strongly disfavor behavioral consent decrees similar to that offered by EchoStar since marketplace competition is always preferred to a regulatory solution.

EchoStar's proposal also could not replicate the unique competition that exists between these two firms today. EchoStar has garnered a reputation as the pricing "maverick" that has marketed its lower priced offerings to increase market share. By contrast, DirecTV is known as the provider of premium programming services (*e.g.,* exclusive sports packages and high-end pay-per-view services). After the consummation of the proposed deal, the merged firm would have no incentive to engage in this behavior, and consumers would suffer. Moreover, EchoStar and DirecTV each have proven to be very effective competitors against cable when operated under separate ownership. DBS currently wins 6 out of every 10 new DBS/cable subscribers, with EchoStar gaining roughly six million, and DirecTV over ten million subscribers over the last seven years. *See 2000 Annual Assessment* at ¶61-67. Even more compelling, both companies have become profitable. In light of this competitive history, EchoStar's claim that it needs this merger to compete with cable seems disingenuous, at best.

5. The EchoStar/DirecTV monopoly will be a fatal blow to local-to-local in rural America

If EchoStar and DirecTV are allowed to merge, consumers in 110 U.S. television markets will likely never receive local news, sports and weather via satellite. Charlie Ergen, who will serve as Chairman and CEO of the combined company, has publicly stated that the company will offer local signals in only 100 markets—virtually all in the top 100. Therefore, satellite's earliest and most loyal customers located in rural America will be denied the opportunity to receive their local broadcast signals. In fact, consumers located in non-cabled areas will have no choice to receive local signals via any MVPD platform.

Two and a half years ago the DBS industry faced tough legal, technical and financial obstacles preventing the delivery of local signals, but today none of those obstacles exist for either DirecTV or EchoStar. The passage of SHVIA creating a statutory compulsory copyright eliminated local-to-local's legal obstacle. Previous DBS industry consolidation, the resulting concentration of spectrum and subscribers, the licensing of the Ka-band, and technological advances, such as digital compression, statistical multiplexing, and spot beam satellites, have virtually eliminated the technical and financial hurdles for DirecTV and EchoStar. Unfortunately, other potential third-party local-to-local providers continue to face significant technical and financial obstacles. If the EchoStar/DirecTV monopoly cherry-picks the top 100 markets, those obstacles magnify. Third-party local-to-local providers face the following barriers to entry:

No available CONUS DBS spectrum: DirecTV and EchoStar already control all prime DBS spectrum—resulting in existing spectrum concentration. In 1997, there were five DBS licensees with high-powered DBS Ku-band satellite capacity within the coveted full CONUS (*contiguous U.S.*) orbital arc that covers the entire U.S. The five included:

1) DirecTV,
2) EchoStar,
3) American Sky Broadcasting (ASkyB), a joint venture of MCI and News Corp.,
4) Tempo Satellite, Inc., a subsidiary of TCI Satellite Entertainment and later rolled into PrimeStar, Inc. (PrimeStar), and
5) United States Satellite Broadcasting (USSB).

Entering 2000, only DirecTV and EchoStar remained. During 1999, ASkyB was merged into EchoStar, and DirecTV acquired USSB and PrimeStar. With this consolidation, EchoStar's full CONUS satellite capacity increased 125% and DirecTV's increased 70%, giving each tremendous capacity.[16] In addition, DirecTV's and EchoStar's experience with technological innovations such as digital compression, statistical multiplexing and spot beam satellites further expanded their capacity. As a result, both DirecTV and EchoStar currently have enough DBS Ku-band broadcast spectrum to carry their premium programming and all local television signals.

Even without the DirecTV/EchoStar monopoly, spectrum concentration already exists—EchoStar and DirecTV are licensees of all high-powered DBS, full CONUS Ku-band spectrum. As a result, no full CONUS, DBS spectrum is available for any potential third-party local-to-local provider.

[16] EchoStar is also a licensee of DBS frequencies at five high-powered, non-CONUS orbital slots, 11 at 61.5° WL, 24 at 148° WL, 1 at 166° WL and 32 at 175° WL.

Limited availability of CONUS Ka Slots: Hughes and EchoStar dominate CONUS Ka-band licensees, adding to existing spectrum concentration. When the Federal Communications Commission first issued Ka-band licenses in 1997, many projected Ka-band as the answer to local-to-local with its higher frequencies suitable for spot beam satellites and CONUS locations adjacent to the coveted DBS spectrum. Utilizing the capacity in just one Ka slot, spot beam satellites and today's digital compression rates, all local stations in all markets could be carried. Although Hughes and EchoStar are licensees of five full-CONUS Ka-band orbital slots (Hughes at 99°, 101° and 103° and EchoStar at 113° and 121°) and eight non-CONUS Ka-band slots, DirecTV and EchoStar have chosen to ignore this capacity for local-to-local. Meanwhile, other potential local-to-local providers have struggled to lease or license Ka CONUS capacity.

The limited rural marketplace: A rural, standalone local-to-local plan is not economically viable. Markets 101 through 210 account for only 15% of U.S. TV households—making it difficult for a third-party to develop an economically viable business plan. Licensing or leasing an orbital slot; designing, building and launching a spot beam satellite; building uplink facilities; creating a backroom support operation; and manufacturing and subsidizing consumer hardware will cost a third-party local-to-local provider hundreds of millions of dollars.

In addition, it is not practicable to develop any local-to-local, standalone plan without partnering with a DBS provider. The two primary reasons are the need for a consumer-friendly, marketable product—*consumers want one dish, one receiver and one bill*—and the economics of marketing, subsidizing consumer hardware and building a backroom operation to support a separate local-to-local plan.

Proprietary transport and conditional access systems limit any third-party local-to-local provider's ability to reach the DirecTV and EchoStar subscriber bases in a consumer-friendly manner without the cooperation of DirecTV and EchoStar. Since 1997, both DirecTV and EchoStar have refused to cooperate with a potential third-party local-to-local wholesaler. In addition, when Pegasus Communications Corp., one of DirecTV's largest rural distributors, proposed a possible local-to-local rural plan, DirecTV again refused to cooperate.

A Long Lead Time: A local-to-local satellite business will require 30-36 months before revenues. The time to acquire spectrum, to design, build and launch a satellite, and to begin operations is approximately 30-36 months.

The bottomline. NAB vigorously supports local-to-local in all 210 markets, but understands the enormous economic and technical hurdles faced by any third-party business focused exclusively on markets 101 through 210. Without a larger potential market base and without the cooperation of DirecTV and EchoStar, NAB believes that no third-party provider can leap these hurdles to provide local news, sports and weather to 110 underserved markets in rural America, representing more than half of the U.S. TV markets.

4. Local-to-local will benefit more from a competitive satellite marketplace with two DBS providers than from the DirecTV/EchoStar monopoly.

Today DirecTV and EchoStar offer local-to-local in 41 and 36 TV markets respectively. Due to the competitiveness between the two providers, many of those markets overlap. *See* Appendix A. As one provider added a market, the other followed suit. Throughout the history of DBS, DIRECTV and EchoStar have driven each other to the benefit of consumers. Other examples of this "leapfrogging" competitiveness include:

- The introduction of the $199 receiver.
- Free installation offerings.
- Consumer hardware lease programs.
- Development of advanced digital receivers, which include interactive offerings and personal video recorders.
- Expansive ethnic and niche programming.
- Multiple broadband offerings.

In addition, EchoStar and DirecTV have invested in innovative, start-up companies to gain access to new technologies and programming.

Prior to the merger announcement, both DirecTV and EchoStar had already stated plans to expand their local-to-local coverage to 60 markets using spot beam satellites. However, NAB believes that the fierce competitiveness that exists between DirecTV and EchoStar, combined with each provider's enormous satellite capacity and the desire to differentiate its product, will ultimately drive DirecTV and EchoStar to offer more local markets independently than together—either by utilizing their existing DBS and Ka-band capacity or by partnering with a third-party to deliver markets 60 and above. With the DirecTV/EchoStar merger, this competitive "one upmanship" disappears.

The bottomline. The NAB believes that more consumers will have access to their local news, sports, and weather via satellite with two DBS platform providers than with one for the following reasons:

- Capacity for local-to-local is not the issue. DirecTV and EchoStar each have sufficient DBS Ku satellite capacity to offer *all* local markets via satellite. Further, both DirecTV and EchoStar have Ka capacity, suitable for local-to-local, adjacent to their DBS spectrum—allowing them to develop a consumer-friendly product. In fact, with one CONUS Ka slot and well-designed spot beam satellites, a provider could offer all local stations in *all* markets.
- The merged entity has capped its local-to-local plan at 100 markets, mostly in urban America, abandoning rural subscribers.
- Based on prior dealings, there is no guarantee that the merged entity will actually ever offer 100 markets.
- Due to the previously outlined barriers to entry, a third party local-to-local plan for markets 101 to 210 is economically unviable.
- As a result, it is unlikely that rural, underserved consumers will ever have access to local news, sports and weather via satellite if there is only one DBS platform provider.
- Consumers have reaped enormous benefits from the intense competition between DirecTV and EchoStar, including diverse programming options, lower prices, and advanced technologies.
- That competition has already resulted in the carriage of 41 and 36 local markets by DirecTV and EchoStar respectively.
- Prior to the merger, both DirecTV and EchoStar had stated they planned to expand their local-to-local offerings to 60 markets.
- Since late 1999, local-to-local has driven DirecTV and EchoStar subscriber growth.
- Continuing competitive pressures to differentiate the DirecTV and the EchoStar brand will drive DirecTV and EchoStar to add more markets via their own capacity or in cooperation with a third-party provider—resulting in carriage of more than 100 markets.
- A successful third-party wholesale provider offering universal local-to-local service is more likely if it not dealing with a DBS monopoly. The potential to negotiate with two DBS platform providers is more likely to result in the development of a viable business plan.

5. A DirecTV/EchoStar monopoly eliminates a local broadcaster's leverage for retransmission consent.

Local broadcasters, particularly those in smaller markets, fear dealing with a monopoly when granting retransmission consent based upon prior experience with cable and based upon the contentious history between broadcasters and the DBS industry. With two competitive DBS providers, broadcasters maintain some leverage to gain favorable retransmission terms. That leverage is eliminated with one.

6. A DirecTV/EchoStar monopoly is unnecessary to expand local-to-local

As previously noted, both DirecTV and EchoStar have sufficient DBS spectrum to carry *all* stations in *all markets.* Both DirecTV and EchoStar have Ka spectrum located adjacent to their DBS spectrum, which could also be used to offer *all* stations in *all* markets. With these options, expanding local-to-local coverage is simply not a justification for a DBS monopoly.

E. CONCLUSION

Broadcasters will continue to fill the pivotal role of providing critical local news and programming. That role is threatened by the "gatekeeper" roles played by both cable and DBS systems. Broadcasters want to insure that local programming and news is made available in all markets and that it is best served by competition between EchoStar and Direct TV and between the satellite companies and cable systems. Consumers have long benefited from competition among local broadcasters and there is no reason why the same should not be true for the DBS carriers and cable systems.

Appendix A

Local Markets on DBS

Market	DirecTV	EchoStar
Albuquerque	√	√
Atlanta	√	√

Appendix A—Continued

Local Markets on DBS

Market	DirecTV	EchoStar
Austin	√	√
Baltimore	√	√
Birmingham	√	√
Boston	√	√
Charlotte	√	√
Chicago	√	√
Cincinnati	√	√
Cleveland	√	√
Columbus, OH	√	√
Dallas/Ft. Worth	√	√
Denver	√	√
Detroit	√	√
Greensboro	√	√
Greenville/Spartanburg	√	√
Houston	√	√
Indianapolis	√	√
Kansas City	√	√
Los Angeles	√	√
Memphis	√	√
Miami	√	√
Milwaukee	√	√
Minneapolis/St. Paul	√	√
Nashville	√	√
New York	√	√
Orlando	√	√
Philadelphia	√	√
Phoenix	√	√
Pittsburgh	√	√
Portland, OR	√	√
Raleigh/Durham	√	√
Sacramento	√	√
St. Louis	√	√
Salt Lake City	√	√
San Antonio	√	√
San Diego	√	√
San Francisco	√	√
Seattle	√	√
Tampa/St. Petersburg	√	√
Washington, DC	√	√
West Palm Beach	√	√

Source: DirecTV and EchoStar Consumer Websites

Mr. UPTON. Thank you.
Mr. Hartenstein.

STATEMENT OF EDDY W. HARTENSTEIN

Mr. HARTENSTEIN. Thank you, Chairman Upton, members of the subcommittee.

I appreciate the opportunity to present our views. The last time DIRECTV appeared before this subcommittee was in April 1998. We had barely been in business for a little over 3 years, just had a little over 3 million customers, and a lot has changed.

Just 8 days ago, and a quarter billion dollars incrementally more investment on behalf of DIRECTV and Hughes, we successfully launched a new high power spot beam satellite that will enable the must carry obligation in all 41 major marketplaces that we are in today to begin offering all local stations.

Now, notwithstanding the success we've had over the last 7 years, we feel that it's important to combine our businesses with EchoStar's Dish Network to enable us to offer consumers a stronger competitive alternative to the market dominant cable operators.

There are a number of developments and changes and challenges in the MVPD marketplace that motivated our decision. Cable is still the dominant technology for the delivery of video programming to consumers, with 80 percent of all video subscribers receiving their program from the franchised cable operator, while DBS subscribers combined represent only 17 percent.

The cable MSOs, or multiple system operators, have engaged in regional clustering, mergers, and trades, all viable business practices, and this consolidation has strengthened their ability to compete by lowering operating and programming costs and facilitating the provision of related services, such as cable modems, high speed Internet access, and telephony.

Digital cable has in the last 2 years become very widely available. Before the advent of that, DBS providers had a distinct advantage over analog cable in terms of picture quality and channel capacity. Today, where digital cable is available, consumers believe that the picture quality and programming choices offered by cable and DBS, digital cable, are essentially the same.

Finally, the advent of the must carry deadline has caused us to reexamine the issue of DBS spectrum constraints. Today EchoStar and DIRECTV each carry more than 200 identical national channels of entertainment, news, sports programming, as well as more than 140 identical local broadcast stations in 35 common markets that we share.

After the must carry takes effect in just 26 more days, our two companies will be required to carry a total of more than 300 identical local broadcast stations while still serving just those 35 common markets.

That is 500 redundant duplicated channels of spectrum. That would be 500 more channels that we could spread among other services and local television stations across the country.

It became clear to us the most efficient use of the limited DBS spectrum could be achieved by a merger and only achieved by a merger between EchoStar and DIRECTV. Channels will need to be broadcast once instead of twice to reach all consumers, and this will enable the transmission to consumers of additional programming that just cannot be delivered today.

Local channels in about 100 markets, a wider variety of programming up to a dozen high definition television channels, new interactive services, more foreign language programming, more pay-per-view options, and improved service to Alaska and Hawaii, all things we need to do to continue to be competitive with our competition, cable.

It was these market realities that convinced our parent companies, Hughes Electronics and General Motors, and us that a merger with EchoStar could be both pro competitive and pro consumer. Combined we will be able to provide a greater variety of services and better value to urban, suburban, and rural customers alike.

This will make us a much stronger competitor to cable in the MVPD market and bring the benefits of this robust competition to the current cable customers, as well as our own.

Let me turn to a couple of statutory and regulatory obstacles that are inhibiting our ability to compete with local cable operators.

First, as we said in the comments we filed yesterday, and Bob indicated that the NRTC did as well, the program access provision prohibiting exclusive cable contracts with vertically integrated programmers will continue to be necessary to protect competition after 2002. We hope the FCC will not allow that provision to sunset.

Second, all of our efforts to bring a robust cable alternative to the marketplace will be undermined if DBS subscribers suddenly started to suffer service outages due to interference from terrestrial wireless services, such as these proposed by Northpoint.

Our concern has always been about interference, not competition, and yesterday we, along with EchoStar, suggested to the FCC that the immediately adjacent spectrum band in frequency, the exact same amount of spectrum, the CARS band, is better suited and available for service such as Northpoint.

Finally, our penetration rates in apartment buildings and condominiums continue to lag behind that of single family homes. We believe the FCC, through the Cable Act of 1992, has the ability to alleviate those barriers to entry and has yet to do so. We would hope that Congress asks to help rectify this situation.

As I mentioned at the outset, there have been significant changes in the MVPD market in the 3 years since we last appeared here, and we think the next step in the evolution of the MVPD market is the approval of the pro competitive merger of DIRECTV and EchoStar's Dish Network, as well as the extension of the program access law's prohibition on exclusive cable contracts in the loopholes such as those employed by Comcast in not delivering via satellite, via cable, to prohibit us and others from having access to that programming.

We appreciate the opportunity here today for us to share our views and look forward to questions you have after.

Thank you.

[The prepared statement of Eddy W. Hartenstein follows:]

PREPARED STATEMENT OF EDDY W. HARTENSTEIN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, DIRECTV, INC.

Chairman Upton, Mr. Markey, and members of the Subcommittee, thank you for inviting me to appear before you today. I appreciate the opportunity to present our views on the status of competition in the multichannel video programming distribution (MVPD) marketplace and to discuss our proposed merger with EchoStar.

The last time DIRECTV appeared before this Subcommittee in April 1998, we had been in business for three and three-quarter years and had 3.45 million subscribers nationwide. Today, having celebrated our seventh anniversary this summer, we have more than 10.3 million customers.[1]

We are offering local network stations in 41 major metropolitan markets (see Attachment A) which represent more than 61 percent of the television households in the country. Just eight days ago, we successfully launched a new high-power spot beam satellite. The DIRECTV 4S satellite will enable us to make the most efficient use of our existing capacity in order to meet the must carry obligation imposed by the Satellite Home Viewer Improvement Act (SHVIA) in all 41 markets.

[1] Of the 10.3 million DIRECTV subscribers, 1.8 million are served through the National Rural Telecommunications Cooperative (NRTC) and its members and affiliates.

Given the success we have had over the last seven years, you might ask why we feel that it is important to combine our business with EchoStar's Dish Network to enable us to offer consumers a stronger competitive alternative to the market dominant cable operators. There were a number of developments and challenges in the MVPD marketplace that motivated our decision.

- Cable television still is the dominant technology for the delivery of video programming to consumers. Eighty percent of all subscribers to multichannel video services receive their programming from a franchised cable operator,[2] while DBS subscribers still represent only 17 percent of all MVPD subscribers.[3]
- The cable multiple system operators (MSOs) have engaged in regional clustering, mergers and trades.[4] The result of this consolidation is that the ten largest cable operators now serve close to 90 percent of all U.S. cable subscribers.[5] This consolidation has strengthened cable's ability to compete by lowering operating and programming costs and facilitating the provision of related services, such as cable modem service and telephony.[6]
- Digital cable has become widely available.[7] Before the advent of digital cable, DBS providers had a distinct advantage over analog cable in terms of picture quality and channel capacity. Today, where digital cable is available, consumers believe that the picture quality and programming choices offered by cable and DBS are essentially the same.
- Cable has aggressively launched cable modem service, and is able to offer an attractive bundled video/high-speed Internet access product to consumers[8] that neither DIRECTV nor EchoStar can match today.
- Finally, the advent of the must carry deadline has caused us to re-examine the issue of DBS spectrum constraints. Unlike cable, DBS has bandwidth limitations that constrain growth in service offerings. Today, EchoStar and DIRECTV each carry more than 200 identical national channels of entertainment, news and sports programming, as well as more than 140 identical local broadcast stations in 35 markets. After must carry takes effect on January 1, 2002, the two companies will be required to carry a total of more than 300 identical local broadcast stations, while still serving just those 35 markets.

It became clear to us that the most efficient use of the limited DBS spectrum could be achieved by a merger of EchoStar and DIRECTV. Channels will need to be broadcast once, instead of twice, to reach all consumers. This will enable the transmission to consumers of additional programming that cannot be delivered today—local channels in about 100 metropolitan areas, a wider variety of programming, up to 12 HDTV channels, new interactive services, more foreign language programming like the DIRECTV PARA TODOS™ Spanish-language service we offer today, more pay-per-view options and improved service to Alaska and Hawaii.

It was these market realities that convinced our parent companies, Hughes Electronics and General Motors, and us that a merger with EchoStar would be both pro-competitive and pro-consumer. We are committed to working with both the FCC and the Department of Justice as they evaluate the merger. In the end, we hope both agencies conclude, as we did, that the combined company will be able to provide a greater variety of services and better value to urban, suburban and rural consumers alike. This will make us a much stronger competitor to cable in the MVPD market and bring the benefits of this robust competition to the more than 67 million cable subscribers,[9] as well as to our own customers.

During the pendancy of the merger, we will continue to operate as separate companies. We are continuing to attract new subscribers, and to provide our existing customers with the same high quality service they have come to expect.

Let me turn to a couple of other issues. Several statutory and regulatory obstacles are inhibiting our ability to compete with local cable operators.

Extension of the Program Access Law's Prohibition on Cable Exclusive Contracts

As I have said on many occasions, without Congress' passage of the program access provision of the 1992 Cable Act, I would not be here before you today. That provision allows cable's competitors to gain access to cable-affiliated programming,

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[2] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventh Annual Report,* CS Docket No. 00-132, FCC 01-1, ¶5 (released Jan. 8, 2001).
[3] *Cable Industry Outlook,* Deutsche Banc Alex Brown at 32 (Sept. 6, 2001).
[4] *Seventh Annual Report* at ¶¶15, 35.
[5] *Id.* ¶15.
[6] *Id.*
[7] *Id.* ¶¶17, 41; *see Cable Industry Outlook,* Deutsche Banc Alex Brown at 16 (89.271 million digital-ready homes at the end of the second quarter of 2001).
[8] *Seventh Annual Report* at ¶¶11, 48-49.
[9] *Id.* ¶7.

such as CNN, Headline News, HBO, and Discovery Channel. Without this programming, we cannot compete. This was true in 1992 when the program access law was passed, and remains true today.[10]

The program access provision prohibiting exclusive contracts between cable operators and vertically-integrated programmers is scheduled to expire in October of next year, unless the FCC finds, in a proceeding it began last month, that the provision continues to be necessary to "preserve and protect competition and diversity in the distribution of video programming."[11] Using recent events as a likely indicator of future cable industry behavior, I can predict with some confidence that this provision of the program access law will continue to be necessary to protect competition after 2002, and to ensure that subscribers to video services other than cable continue to receive the programming they've been enjoying for some time now.

In particular, Comcast, the nation's third largest cable operator, has refused to negotiate with DIRECTV or EchoStar for carriage of Comcast SportsNet, the Philadelphia-area regional sports network. Comcast's action has disenfranchised tens of thousands of Philadelphia-area DIRECTV subscribers and hundreds of thousands of other DIRECTV subscribers who enjoy out-of-market sports. Comcast has used what it perceives to be a "loophole" in the exclusivity prohibition provision of the program access law, claiming that because it has chosen to distribute Comcast SportsNet using terrestrial rather than satellite facilities it does not have to make the regional sports network available to its DBS competitors.

DIRECTV's experience with Comcast SportsNet is not an isolated one. There is every indication that other cable operators are contemplating similar strategies given the regional clustering to attempt to evade the exclusivity prohibition of the program access law, particularly with regard to regional sports networks. Thus, it is our hope that the FCC will conclude that the cable exclusivity prohibition continues to be necessary, and that Congress will consider tightening the law to ensure that cable operators cannot evade the law simply by delivering programming by terrestrial means instead of via satellite, as Comcast is attempting to do. The law should be revised to cover programming owned by cable operators, no matter the delivery mechanism they choose.Improved Access for MDU Residents

Our penetration rates in apartment buildings, condominiums, and other multiple dwelling units (MDUs) continue to lag behind our single-family home rates. The FCC has not yet taken full advantage of the preemptive authority Congress intended to convey in the 1992 Cable Act with respect to restrictive covenants and other impediments, including exclusive, long-term cable contracts, that prevent both MDU owners and renters who do not have exclusive use of areas suitable for antenna installation from subscribing to alternative video services such as DIRECTV. For years, DIRECTV has urged the Commission to amend its rules to require landlords, condominium associations, and other homeowner groups to provide access to at least two multichannel video services to residents who do not have exclusive use of areas suitable for antenna installation. I do not believe Congress ever intended to discriminate against residents of multiple dwelling units (MDUs) by depriving them of the benefits of competition available to single-family homeowners, and we would ask Congress to help rectify this situation.

Ill-Advised Spectrum Sharing Proposals

All of our efforts to bring a robust competitive alternative to cable to the marketplace will be undermined if the primary spectrum used by DBS operators to downlink programming to subscribers across the United States is invaded by terrestrial wireless point-to-multipoint services such as those proposed by Northpoint Technology. One of the top reasons consumers switch from cable to DBS is the pristine and reliable signal of DBS. Millions of U.S. consumers who use and rely upon the DBS service could see increased interference in the form of longer and more frequent service outages if a mass market fixed wireless service is introduced into the DBS band. Today's happy customers could easily become tomorrow's unhappy constituents if, as a result of an ill-considered government action, they begin to see increased service interruptions.

Let me assure you that our opposition to the deployment of a terrestrial service in the DBS band has nothing to do with fear of facing another competitor. We compete every day against the cable giants, so it's ridiculous to say that we're afraid of competition. And we will compete against these proposed terrestrial services if they're properly located in a different spectrum band, such as the immediately adjacent Cable Television Relay Service (CARS) band or the band used by the Instruc-

[10] *Id.* ¶15 ("In 2000, one or more of the top five cable MSOs held an ownership interest in each of 99 vertically integrated national programming services.")
[11] 47 U.S.C. §548(c)(2)(D).

tional Television Fixed Service (ITFS) and Multichanel Multipoint Distribution Service (MMDS), as we suggested in the FCC filing we made yesterday. Our only concern is protecting the level of service our customers have come to expect and which we have spent hundreds of millions of dollars to ensure. The extensive efforts Congress has undertaken to increase cable competition will be undermined if the FCC allows the spectrum intended for DBS use to be shared with terrestrial fixed wireless services.

Before I conclude, I wanted to let you know about an exciting initiative we've recently undertaken. As a company, we believe in public service. That is why we launched DIRECTV GOES TO SCHOOL™, a public service initiative that provides public and private schools around the country with free access to our SCHOOL CHOICE™ programming package. Participating schools receive more than 60 channels of educational programming, including such networks as CNN, Discovery Channel, The History Channel, A&E, The Learning Channel, and of course, C-SPAN, which teachers can use to enhance their lesson plans. In addition, we provide free-of-charge to participating schools special issues of DIRECTV—The Guide™, which includes feature articles on the educational programming offered in the SCHOOL CHOICE package. The program is available to schools in all 50 states and the District of Columbia.

Conclusion

As I mentioned at the outset, there have been significant changes in the MVPD market in the three years since we last appeared before this Subcommittee. We think the next step in the evolution of the MVPD market is the approval of the pro-competitive merger of DIRECTV and EchoStar's DISH Network, as well as the extension of the program access law's prohibition on exclusive cable contracts.

I appreciate the opportunity to share my views.

ATTACHMENT A

DIRECTV CUSTOMERS IN THE FOLLOWING METROPOLITAN MARKETS CAN RECEIVE LOCAL BROADCAST CHANNELS:

Atlanta, Austin, Baltimore, Birmingham, Boston, Charlotte, Chicago, Cincinnati, Cleveland, Columbus, Dallas/Ft. Worth, Denver, Detroit, Greensboro, Greenville/Spartanburg, Houston, Indianapolis, Kansas City, Los Angeles, Memphis, Miami/Ft. Lauderdale, Milwaukee, Minneapolis/St. Paul, Nashville, New York, Orlando/Daytona, Philadelphia, Phoenix, Pittsburgh, Portland, Raleigh/Durham, Sacramento/Stockton/Modesto, Salt Lake City, San Antonio, San Diego, San Francisco/Oakland/San Jose, Seattle/Tacoma, St. Louis, Tampa/St. Petersburg, Washington, D.C., and West Palm Beach.

Mr. UPTON. Thank you. Thank you very much.

Mr. Ergen.

STATEMENT OF CHARLES W. ERGEN

Mr. ERGEN. Thank you, Mr. Chairman and distinguished members of the committee.

Thank you for inviting our company to testify today on video competition issues, in particular about the merger, proposed merger of EchoStar and Hughes.

First, a little history of our company. We started over 21 years ago as a small business digging holes and putting in a large dish when only about 1,000 dishes existed, and we were relegated to farmers and ranchers and people who didn't have television.

After about 10 years, we realized that our dish was too big and too expensive, and if we really wanted to grow our business, we would have to effectively compete against the cable industry.

In doing so, we found out about some FCC spectrum and applied for high powered DBS satellites. Over the period of the next 6 years we designed and financed and launched high powered satellites and started Dish Network in 1996 to compete against cable not only in big cities, but wherever cable existed.

There were lots of numbers thrown around in the committee hearings both this morning and today, but according to the FCC, 96.6 percent of the country is passed by cable. So customers have an option of cable, leaving only about 3.5 million homes who do not have access to table. Some people have said it is a little higher. I have heard as much as 9 million at the committee today, but the vast majority of people do have access to cable in America today.

The first thing I think this committee has to do is to look at what is the relevant market that we compete in, and I have heard from the broadcasters here today that we are a monopoly of some kind in the video business.

But the fact of the matter is the Department of Justice in 1998 through the Primestar merger review defined our market, the MVPD market, as cable and satellite. We have several competitors in that, both the C-Band big dish owners. We heard from WSNet today. We have cable over-builders, such as RCN, and we have, of course, the satellite companies and cable.

Combined this merger with EchoStar and Hughes only will be 17 percent of that MVPD market, hardly a monopoly by anybody's standard, and yet the dominant cable incumbent will be 80 percent of that market, and where they have clustered in cities sometimes can be upwards over 90 percent in that particular community.

Once you get past the emotion of the market that we are in, then we also realized that cable since the advent of DBS, 1994, the price increases have been at 2.5 to 3 times the rate of inflation. If we were such a dominant competitor against the entrenched monopoly, we certainly would have held those prices down.

We have not been able to do that, and our sole charter at EchoStar has been how do we go out there and hold those prices down and give customers a better deal.

Because of the barriers to competition with digital cable now and broadband access, we realize that the only way to do that was to merge our two companies. The big savings, the big thing we can do from an economic point of view in a market with recession and capital markets demanding efficiencies and productivity is to combine our spectrum together.

Eddy mentioned that we duplicate over 500 channels of TV. Over 90 percent of our spectrum is repeated wastelessly. I do not believe that is what the FCC had in mind for the spectrum, and I believe that what we can do is take that spectrum and quit duplicating that spectrum so that we can go out and compete against cable.

We have also been burdened by the must carry rules under SHVIA, and contrary to what had been mentioned by the broadcasters, EchoStar, in fact, testified to this committee, I think, on three different occasions about our opposition to must carry and the burden.

It makes no sense to us on January 1st to carry 36 different Home Shopping channels. They are exactly the same. They have absolutely no local new, weather or weather alerts, and are not anything but a 24 hour commercial channel when we already carry a national Home Shopping channel. I do not believe consumers are asking for that, and it inhibits our ability to compete.

So let me just get to the point. This merger has tremendous benefits for consumers. First and foremost, access to the spectrum will allow us to increase our local markets from a minimum, by a minimum of 60 markets to at least the top 100 and at least one city in every State.

Second, we can jump start high definition television. Broadcasters have had the spectrum for many, many years, have now filed for extensions on that broadcast, on that spectrum. We believe with satellite and our merger we can do at least 12 channels of HDTV, which jump starts this new technology in a way that broadcasters haven't been able to do.

Broadband Internet access for all consumers. In my opinion, he economics of broadband, the capital markets and the touch technical challenge ahead, the only way we can bring broadband to rural America is to combine these companies and combine our technologies to one standard platform. Not only will we be able to bring broadband to rural customers, but we will be able to compete in the cities where perhaps Excite at Home suddenly is taken off cable companies and there is no place for people to turn.

Finally, there will be a new array of programming choices, things such video on demand that the cable industry is already actively doing, interactive services so that people in rural America get the same interactive services at all of these band widths.

And finally, we are cognizant of the fact that in some parts of rural America, whether it be several million homes or 4 or 5 million homes, there may be less choices for consumers. That's why we've offered a nationwide pricing mechanism which we already do. Both of our companies already do this today.

We are willing to commit to continue to do that in whatever way the regulatory officials would like us to so that people in rural America get all of the benefits of broadband, high definition television, local-to-local, and true competition with cable at the very lowest price of anywhere in the country.

I would like to thank you for allowing me to appear today, and I will be happy to answer any questions that you might have.

[The prepared statement of Charles W. Ergen follows:]

PREPARED STATEMENT OF CHARLES W. ERGEN, CHAIRMAN AND CEO, ECHOSTAR COMMUNICATIONS CORPORATION

Mr. Chairman, Mr. Markey, and distinguished members of this Subcommittee, on behalf of EchoStar Communications Corporation, I want to thank you for inviting our company to discuss video competition issues and how the merger of EchoStar Communications Corporation (EchoStar) and Hughes Electronics Corporation (Hughes) will promote competition and provide much needed benefits for American consumers. We would also like to outline for you why we believe the merger should and will win antitrust approval from the Department of Justice (DOJ) and regulatory approval from the Federal Communications Commission (FCC).

I. ECHOSTAR'S LONG HISTORY OF COMPETING AGAINST CABLE

EchoStar started 21 years ago providing large, C-band satellite TV dishes to rural Americans. The demand grew quickly as consumers, schools and businesses sought television service in areas untouched by cable or off-air network TV signals. In 1996, we launched the small dish satellite TV service called DISH Network to provide competitive television services to urban and suburban consumers as well as those in rural areas. Since its debut, EchoStar's DISH Network has been the leader in the pay television industry in offering low prices for superior, digital television products. Other notable items about EchoStar include the following:

a) EchoStar began lowering its prices for satellite TV equipment to offer affordable or even free equipment and switched its annual programming fees for consumers to monthly rates, all in an attempt to compete better with cable companies.

b) Today, DISH Network offers consumers four main programming packages starting with America's Top 50 for $21.99 per month for over 60 channels that include the best in entertainment, sports, news and children's programming. The top programming package available from DISH Network is America's Everything Pak for $69.99 which offers 200 channels, including premium movie packages such as the popular HBO and Showtime.

c) We have been ranked number one in 2 of the last 3 years in the J.D. Power and Associate's customer satisfaction survey among satellite and cable TV subscribers.

d) A study by the University of Michigan Business School also rated EchoStar's DISH Network number one in overall customer satisfaction in 2001.[1]

e) We currently have 6 high-power direct broadcast satellites in orbit, and we expect to launch three more satellites within the next 2 years to expand our local TV channel service, to comply with must-carry rules and to offer other services.

f) We have invested billions of dollars and extensive technological resources to compete vigorously in the marketplace with cable and to make satellite technology affordable and accessible for all Americans.

II. OVERVIEW OF PROVIDING EFFECTIVE COMPETITION TO CABLE

The planned merger with Hughes resulting in the new EchoStar will be a huge advance in our long-standing mission to compete with the dominant and entrenched cable companies. Satellite TV providers have limited, scarce spectrum to broadcast programming, and right now, DISH Network and DirecTV each broadcast hundreds of duplicate channels. For instance, both companies broadcast the same two C-SPAN channels, the same Disney channels, and so on. The merger will end this wasteful redundancy and offer consumers more programming such as the following: local broadcast channels available via satellite to more markets; greatly expanded high-definition television programming; pay-per-view and video-on-demand services and educational, specialty and foreign-language programming; and other new and improved product offerings, including interactive TV services. The merger will also allow us to reduce the rates we pay programmers which will create greater value for consumers, especially by ending the practice of programming providers charging satellite TV companies higher rates than they do cable companies. The combined company will also help bridge the rural/urban "digital divide" through the rapid development of an affordable, satellite-based, two-way, always on, high-speed Internet access product available to both rural and urban areas. New and better products, efficient operations, and more vigorous competition are precisely those things that the antitrust laws are meant to promote. That is why we believe that this merger will win the support of the DOJ and FCC.

We want to talk to you today about how Congress can spur competition in the MultiChannel Video Programming Distribution (MVPD) marketplace. Specifically, Congress should: (1) support the efforts of EchoStar and Hughes in combining their satellite TV resources and spectrum to create an aggressive competitor to cable; and (2) continue to address and improve upon the role of program access regulation in preserving a competitive and diverse MVPD landscape; and (3) encourage new entrants to the MVPD market without damaging the viability of existing providers.

III. THE PROPOSED COMBINATION OF ECHOSTAR AND HUGHES WILL ALLOW SATELLITE TV TO BECOME A TRULY EFFECTIVE COMPETITOR TO CABLE

Providing competition against cable remains the single most important focus of satellite TV. DirecTV and DISH Network are the nation's third and sixth largest MVPD providers, which after the merger would consist of about 15 million combined subscribers, or 17% of the MVPD market. By contrast, the dominant and entrenched cable companies control about 80% of the MVPD market with nearly 70 million subscribers, according to the FCC's *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming.*[2] In fact, the top 10 largest cable firms such as AT&T, AOL-Time Warner, Comcast, Charter, and others account for over 61 million cable customers.[3]

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[1] Source: American Customer Satisfaction Index, University of Michigan Business School, August 2001.

[2] FCC's Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, published January 2001.

[3] Source: Cablevision Magazine Database, October 22, 2001. Basic subscriber counts are provided by MSOs and systems to Cablevision Magazine.

1.) Satellite TV Faces Barriers to Effective Competition Against Cable

Satellite TV has worked diligently to compete with cable by offering technologically superior products and services, such as 100 percent digital channels and expansive channel choices. However, despite satellite TV's lower pricing and better products, EchoStar and Hughes' ability to compete with cable has been hampered by several barriers, such as the following:

1) We are constrained in offering local broadcast TV channels and other desirable programming to consumers due to constraints on scarce and limited satellite spectrum allocated by the government,
2) We have a small market share of customers compared to cable operators which creates difficulties in purchasing necessary programming from cable programmers at reasonable rates,
3) The burden of complying with must-carry rules, which force satellite TV providers to add hundreds of less popular channels in markets where we carry local network TV channels,
4) Satellite companies today do not have a high speed Internet service option that can effectively compete against cable's bundled Internet and video services.

This competitive imbalance has permitted cable companies to maintain their dominant market share while raising their prices an average of 6% per year over the last 10 years, more than twice the rate of inflation[4]. At the same time, satellite TV has maintained low monthly rates for service with minimal rate increases and even then, well below the rate of inflation. Satellite TV equipment prices have dropped, and the equipment has even been offered for free in competitive promotions. In contrast to cable's recently announced round of rate increases, our recent "I Like 9" promotion offered consumers over 100 channels for only $9 a month for one year.

Over the past several years, to its credit, the cable industry responded to the competitive threat of satellite TV by introducing new products like digital cable, broadband, and telephony. The only way to remove the barriers to competition for satellite TV and realize a more competitive marketplace is by taking advantage of the extraordinary efficiencies and synergies created by combining EchoStar and Hughes. Currently, the two satellite TV providers broadcast approximately 200 of the same entertainment, news and sports channels, and with the advent of must carry rules on Jan. 1, 2002, both satellite TV companies will broadcast over 300 more of the same local and national TV channels for a total of over 500 duplicated channels. In other words, approximately 90% of the DBS spectrum will be wastefully repeated. These redundant transmissions are an inefficient use of limited, scarce satellite spectrum, and they prevent satellite TV providers from delivering other much needed content, such as local TV channels into more local areas or more high definition TV channels.

2.) Benefits of Proposed Merger

By eliminating this duplication, we will be able to offer hundreds of new channels of attractive content such as high definition television and local channels in more markets. This extraordinary increase in capacity will permit satellite TV to offer a wide variety of additional programming and services to consumers, including these benefits:

a) The new EchoStar will expand local network television coverage from the current 42 markets the companies serve to over 100 markets, with local TV channels offered in at least one city in each state, including Alaska and Hawaii. This will provide local TV service to about 85% of U.S. households. This increase in the ability to serve local communities will eliminate the reason that consumers cite most often when deciding not to subscribe to satellite TV—the inability to receive their local broadcast channels.
b) The efficiencies from the merger will also allow the new EchoStar to offer more bandwidth-intensive HDTV programming with a minimum of 12 different channels. By offering a critical mass of HDTV programming, satellite TV could help jumpstart HDTV adoption, which has stagnated due to lack of the necessary bandwidth and the slow conversion by broadcasters and cable operators to this new medium. Our commitment to HDTV will provide incentives for programmers to increase HDTV programming, for manufacturers to market their HDTV sets more aggressively, for consumers to buy more HDTV sets, and for competitors like cable and network broadcasters to upgrade their HDTV capabilities, all resulting in lower prices for equipment and more HDTV channel choices for consumers.

[4] Source: Kagan World Media.

c) As a result of the merger, the efficiencies that are created will make more bandwidth available for additional pay-per-view services as well as the necessary bandwidth and equipment development needed to compete against cable's new video-on-demand technologies.
d) Provide increased educational programming such as tele-medicine for rural areas, as well as more specialty and foreign-language programming,
e) The additional bandwidth will also allow the development of new and expanded interactive services such as localized weather and traffic, detailed point-and-click news and sports information, and television commerce shopping.
f) The merger will also allow the new company to expedite the introduction of affordable, always-on, two-way, high-speed satellite Internet access.

The enhanced product offerings enabled by the merger will make satellite TV a much stronger competitor to cable and will force cable to respond in a similar manner. The American consumer ultimately wins by having a better satellite TV competitor to cable in the MVPD landscape.

IV. PROGRAM ACCESS RULES BROUGHT REAL COMPETITION AND SHOULD BE PRESERVED AND STRENGTHENED

The program access statute that Congress enacted in 1992 is a true policy success story. No single governmental act is more responsible for the success of the satellite TV industry and for MVPD competition generally. We cannot offer consumers a competitive product if we do not carry the programming that consumers expect, including cable-owned networks. In fact, as was the case when Congress enacted the statute in 1992, many of today's highest rated program networks are owned in part or wholly by cable operators, including HBO, TNT, and CNN. By prohibiting cable-owned programmers from refusing to sell their product to us, the program access law opened the door to meaningful competition against cable.

Congress gave the FCC the ability to either let this prohibition on exclusive contracts sunset next year or to extend it. As we told the FCC yesterday in our comments concerning this proceeding, we believe that the prohibition on exclusivity is as important today as it was when Congress first enacted it. First, the fully competitive market that Congress envisioned stemming from the program access rules has not yet materialized. Cable remains the dominant platform and has an incentive to withhold programming from companies that take away its subscribers. We see this most clearly in the regional sports networks, which I will describe in more detail, where cable refuses to sell popular programming to satellite TV companies, giving up a huge potential source of revenue in order to hobble a competitor.

Second, the ability of satellite TV to compete would be severely undermined by exclusive deals covering popular networks that are vertically integrated with cable operators and exclusive deals covering relatively minor networks. In both instances, consumers would be left with less than the full complement of channels. One of our industry's primary competitive advantages is that of price—offering the American consumer the same or more for less money. That is the competitive pressure Congress sought to impose on the cable industry. However, if we are forced to offer fewer channels for less money, our ability to effectively compete against cable evaporates.

Third, EchoStar is not vertically integrated with program producers. Because we do not own or create the programming content, we are totally dependent on an open and competitive programming market to serve our customers.

Fourth, even after EchoStar and Hughes combine, the dominant and entrenched cable industry collectively will still control about 80% of the MVPD market and will be able to invest jointly in programming ventures much more heavily than the new EchoStar ever could. Such programming, if allowed to be a cable exclusive, would be leveraged to the disadvantage of satellite TV providers and consumers.

Cable's activities in the regional sports programming context not only shine light on how far cable is willing to go to undermine satellite TV competition, but they expose a shortcoming in the existing law that Congress and the FCC should address. Specifically, the 1992 statute defined the relevant programming as "satellite cable programming," meaning that the cable operator receives programming at the headend via satellite. That was an accurate technological description in 1992, but today with the abundance of terrestrial fiber, many cable operators are delivering programming to the headend terrestrially, thereby avoiding the program access rules.

Comcast, for example, is a dominant cable company that owns two-thirds of the Philadelphia Flyers, the Philadelphia 76ers, and holds a stake in the Philadelphia Phillies while also holding investments in the teams' arenas and other related interests. In 1997, it launched its own sports network called Comcast SportsNet, which owns the rights to the televised games of each of these popular sports teams. Comcast refuses to make this wildly popular sports network available to its competitors in the Philadelphia market, using the program access loophole as protection.

Cablevision, which provides service in the New York area, owns the New York Rangers, Knicks, and their TV home, the Madison Square Garden Network. In early 1999, Cablevision revised its sports programming distribution system from satellite to terrestrial so as to preclude RCN's carriage of their sports network. Last year, RCN filed a complaint against Cablevision because Cablevision would not provide access to the Madison Square Garden Network, claiming a terrestrial exception from the program access rules.

EchoStar's inability to provide local team sports programming has a direct effect on our ability to compete in these markets. Just as we would not be able to compete effectively with cable nationwide if we did not offer HBO, we cannot compete effectively in Philadelphia if we do not carry the Flyers or 76ers.

Congress and the FCC can address these anomalies in the competitive landscape by closing the terrestrial loophole and extending program access rules. Technology has changed since 1992 and the law should reflect that. The means of delivering programming should not determine whether the MVPD market is competitive.

V. NEW ENTRANTS SHOULD BE PERMITTED TO ENTER THE MVPD MARKET PROVIDED THEY DO NOT CAUSE SPECTRUM INTERFERENCE

According to the FCC, only 3.4 percent of rural American homes are not passed by cable,[5] constituting a small amount of homes. While the majority of these homes will have a choice between video services provided by the National Rural Telecommunications Cooperative (NRTC) and their affiliates, the new EchoStar or other MVPD providers such as the C-Band providers, we are sensitive to the concern that competition in rural America could potentially be reduced. That is why we have committed to nationwide pricing where all consumers, including rural Americans, will get the same price benefits from the intense competition occurring in urban areas. We offer nationwide pricing today and we're willing to commit to this going forward so that rural areas will get the advantages of competitive prices occurring in urban areas for more entertainment channels, high definition television, greater access to local TV channels, specialty and educational channels and high speed Internet.

1. The New EchoStar Will Compete Against Many Others

The new company will also continue to honor DirecTV's contract with the NRTC, which gives the co-op and its corporate partner, Pegasus, the ability to offer competitive DBS service from a single orbital position that covers the entire country. This will not change with the merger. In addition, consumers will be able to purchase service from DISH Network, which will likely continue to offer its brand name in these regions, and from its established network of dealers who have proven extremely effective at serving rural America. It is our hope that Pegasus and NRTC will continue to sell their product and continue to be aggressive in their territories as a competitive participant in the MVPD marketplace.

There will be other competitors in this region besides the NRTC. C-Band, which offers a new digital service driven by Motorola, is strong in rural America. Cablevision and Dominion are video providers who also have FCC licenses to offer satellite TV service and have announced plans to expand their MVPD services in the near future. Proposed terrestrial and other wireless spectrum technologies, such as MMDS and those proposed by Northpoint Technologies, will also offer additional options for rural customers. EchoStar is not opposed to any of these technologies or similar competitors. However, like any other wireless licensee in other spectrum frequencies, such as cellular services or digital services offered by network broadcasters, we are opposed to having interference from other providers within the same spectrum in which we operate.

2. Interference of Satellite TV Signals Hurts Competition

While EchoStar does not oppose the emergence of new competitors in the MVPD market, we are opposing the proposal by Northpoint, one of the companies seeking to enter the multichannel delivery market by using "wireless cable technologies" because NorthPoint's current proposal would interfere with the satellite reception of our established satellite TV customers. EchoStar's concerns about the electrical interference that Northpoint would cause to our customers' satellite TV signals have

[5] Source for number of rural consumers unserved by cable: FCC's *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Footnote #80, December 1.* Assessment released January 2001.

been confirmed by an independent arbiter: after conducting tests required by Congress, the MITRE Corporation has concluded that such a new service would threaten "significant interference" for the satellite TV service, and that the benefit of any mitigation methods must be weighed against their cost as well as the interference that would remain.[6] In the spirit of constructiveness, not obstruction, EchoStar has recently filed with the FCC a petition suggesting alternative frequencies, including the "CARS" frequencies—which are "next-door neighbors" to satellite TV frequencies as well as the MMDS frequencies, in an effort to find a suitable home for Northpoint's plan.

The FCC has identified the CARS spectrum as a suitable place to increase spectrum usage. CARS spectrum is not currently used to serve consumers directly, eliminating any major interference concerns. Like the satellite TV spectrum, the CARS spectrum can be used to deliver MVPD service. Also similar to satellite TV spectrum, the CARS spectrum is used for point-to-point and point-to-multipoint technology, suggesting that a directional service like that proposed by Northpoint would be feasible on a spectrum-sharing basis. Finally, like satellite TV, CARS offers a full 500 MHz of spectrum, meeting one of the conditions sought by Northpoint.

With our filing yesterday concerning this proposed solution, we hope that Congress will see that we are not opposed to competition. Rather, we welcome the competition, so long as it does not interfere with satellite TV service for approximately 15 million Americans receiving service from the new EchoStar.

VI. CONCLUSION

Competition in the MVPD marketplace is developing but will only reach fruition if satellite TV is allowed to become a truly effective competitor to the dominant and entrenched cable companies. Through the proposed combination of EchoStar and Hughes, a continued ban on exclusive agreements between cable-owned programmers and the cable operators, an improved program access rule addressing the terrestrial loophole, and a reasonable approach to allowing new MVPD competitors without damaging existing ones, Congress can help make truly effective competition a reality and provide new product benefits to the American consumer.

On behalf of EchoStar, I thank you for allowing us to testify here about our proposed merger and other video competition issues, and we look forward to working closely with Congress and the appropriate governmental agencies in their reviews.

I am willing to answer any questions.

Mr. UPTON. Well, thank you all. Thank you all very much.

At this point we are going to proceed. My suspicion is we may have two rounds of questions based on the number of members right here, and I would note that we have other ongoing committee business as well. I think we will go to 5 minutes per member, and we will see where that takes us at the end.

Thank you again for your testimony, and I wrote down a number of questions that I have for all of you. Let me just tell you where my perspective is, and I say this as someone who has been home every week certainly since September 11th, and in this capacity I have been able to witness much of the telecommunication industry not only in my district, but around the country as well.

And I am pleased where they have gone in terms of technology and what is available in people's homes and businesses. There is a disparity between a good number of parts of the country in terms of what is here and what may be there. As I look at this proposed deal, I would have to say that I am thinking about the consumer because I want the consumer to have HDTV. I want the consumer to have access to high speed Internet access or broadband.

I know in my own household the number of channels that are available, whether it's my own kids at age 10 and 14, my wife, or myself. I look at the advances that are coming with interactive TV.

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[6] Source: The MITRE Technical Report: Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz band. April 2001.

I am excited about the technology changes that we have seen, and I also know as a supporter of must carry, we need to have local broadcast channels carried in local markets. This is very important.

Mr. Ergen and Mr. Hartenstein, when you talk about providing local channels on your services, does that mean that, as an example, in my home county in Michigan, if I had a decent antenna, I could pick up an affiliate of CBS and ABC, NBC and an affiliate from both Chicago, South Bend, and maybe Kalamazoo, and Grand Rapids.

As you provide local stations on your network, how do you pick and choose between what I can get over the antenna versus what you count as local?

Mr. HARTENSTEIN. We are very specifically limited as satellite operators. Depending on where you live as to what local stations we can deliver based on where you live. Those are DMAs, designated and specified, and have the purview of the rights through the broadcasters. I can't tell you exactly what you might also pick up, if it might be Kalamazoo, if it might be another station with an off air antenna. That would vary from almost house to house.

If you life in the Chicago defined area, we would be able and only able to deliver the Chicago local stations,a nd that's what, in fact, we would do and will do in 26 days from now in addition to the ones that we're delivering today.

Mr. UPTON. Well, how do you all answer the charge that Mr. Fiorile makes? That is you say that if the merger comes about you are going to provide local to local in at least 100 markets, perhaps the technology to go the full route. How do we believe you in saying that when, in fact, as Mr. Fiorile indicated in his testimony the challenge that has happened in the court is you have tried to undermine that in those specific cases where you provide local broadcasting now?

How is that a guarantee? When you say you are going to provide local to local, there is a very compelling argument in terms of how the deal ought to proceed if, in fact, you are able to deliver that. But, if, in fact, the track record shows that you have challenged it in court and you have tried to undermine your obligations now, how is it that we would take it to the next step to believe it will, in fact, come about?

Mr. HARTENSTEIN. Our point was this. When SHVIA came about in 1999, and members of your committee were key in bringing that about, we in general supported the passage of it, although we did not agree with all of the terms. We were very clear that we did not support the provision in the bill, such as must carry, because we think it is (a) an infringement on our First Amendment rights, and also it prevents us from serving more markets.

As Mr. Ergen indicated, we would under the strictest of interpretations of that have to replicate every Home Shopping channel in every market that we serve.

Mr. UPTON. We can understand why people do not want 30.

Mr. HARTENSTEIN. Right, and we stand prepared today and have launched the facilities at considerable expense and have others under construction as has EchoStar to provide satellites to be compliant with that. Our continuation of our action through the courts is to challenge that provision. We will abide by that.

Mr. UPTON. I am one of those non-lawyers in the room.

Mr. HARTENSTEIN. So am I.

Mr. UPTON. So is what you are saying that your deal is not to provide 30 Home Shopping channel stations coming in, but in fact, to provide the local ABC, the NBC, the major affiliates within the region? Those you are absolutely in favor of having carried on your new system.

Mr. HARTENSTEIN. Absolutely.

Mr. UPTON. Without the redundancy of a number of other stations that, in fact, have exactly the same program.

Mr. HARTENSTEIN. Exactly.

Mr. ERGEN. I might just add, I think, and I am surprised the broadcasters are against this because when we put our company is launching two high powered satellites, we have spent over $500 million to do it, and so has DIRECTV, to comply with must carry. In doing that, we still believe we can get to these 100 markets or maybe a few more, and why the broadcasters would be against 500, on the one hand, they are talking about must carry and attacking us. On the other hand, they are denying 500 of their members' the ability to go up on satellite and have their service go into homes.

And it does include all of the broadcast networks. In fact, it covers all high powered stations today. We do think the law has some constitutional challenge. I noticed that broadcasters, cable companies, for example, have challenged the ownership cap limits. It happens in business all the time. That is why we have three branches of government.

But we will abide by the law as the judiciary, you know.

Mr. UPTON. Let me just ask, and I think this merits a little discussion. So with the prerogative of the chairman, I am going to allow the time to stop for a moment.

Take that time keeper at Michigan State, a lesson from them.

Pegasus claims in their testimony that you have got the capacity already to provide. You have the spectrum space; you have the capability to provide all of the local stations now. Is that true?

Mr. ERGEN. I think Pegasus is referring to an engineering study done by a gentleman who did an engineering study that basically failed to take into consideration that we would have to change out all of our systems to do so and uses some advanced technology that we do not believe is ready for the market yet.

Believe me. If I could build a satellite that would broadcast every station in America, I would do it as a business person, but engineers sometimes get caught up in details of with enough money and enough time you can do anything.

I mean, we would put people on the moon that could commute to work, but it would be a long community. You know, we do not do that because it is not practical, and I think that study was just not a practical study.

Mr. UPTON. Mr. Pagon, do you want to comment on that?

Mr. ERGEN. By the way, I might mention that Pegasus does have some orbital spectrum and K band, and if all of this technology they agree with, they could certainly build their own satellites today to do exactly that.

I have no seen them start construction of that like we have in the past.

Mr. PAGON. The study to which Mr. Ergen refers is on the record in the must carry litigation in Federal court. The Department of Justice's own expert witness is the party in question. He is a very well respected and longstanding expert in the satellite arena, and all that he reflected was that if you built one spot beam satellite appropriately with contiguous beams covering the contiguous 48 States with as few as 12 frequencies, you could provide ubiquitous coverage. You could provide coverage for all 210 television markets, not just 100, within the constraints of the existing technologies, MPEG-2 technologies.

If, in fact, you were to do so in the context of MPEG-4, which is our current technology—MPEG-2 is a technology which exists in the DIRECTV and DISH Network systems today, but it is about 10 years old—you could do with fewer frequencies, perhaps half as many frequencies.

So in terms of the costs to do so, it would require significant expenditure for a new satellite, but a new satellite would cost $250 or $300 million perhaps. The companies have proposed in their mergers that they are going to spend as much as $3 to $5 billion in changing out equipment over the next 5 years as a result of conforming their technologies together. So $250 or $300 million seems a relatively modest expenditure to extend local-to-local to all television markets.

Mr. UPTON. Thank you, sir.

Mr. ABBRUZZESE. Mr. Chairman, may I just add something quickly, if I might? There are 16 to 1,800 local broadcasters in the United States. So carrying 500, while it is impressive, there are still close to 1,000 that will be left out in the cold under the current proposal.

What WSNet does by working with local operators, primarily small local cable operators, is we facilitate them providing more channels so that they can compete against Charlie Ergen and Eddy Hartenstein, but also it allows them to continue to carry the local programming services and deliver it to their neighborhoods.

And in Kalamazoo, Michigan, WSNet, what it would do is providing currently pre-digitized programming to services and private cable operators in Kalamazoo today, and it affords them to also have enough space to carry the local programming services. So God help us if there was some tragedy or weather tragedy about to occur in Kalamazoo. The local emergency broadcasting system would be heard by everybody where it would not unless it hit Chicago first over EchoStar, and the same would occur down in Fancy Gap, Virginia where Congressman Boucher is from.

Mr. BOUCHER. Boucher.

Mr. ABBRUZZESE. Boucher. Sorry. Excuse me. It is a very complicated name. I apologize.

But we have a relationship down there where the local channels are carried, again, and the local programming is carried by the cable company there who has expanded service offered through WSNet.

So, I mean, there is an answer here for local programming, and it exists today in the marketplace if we just do not let these entities get squashed by this giant that we are talking about creating today.

So there is an answer. It does not require spot beams. It does not require a lot of new things.

Mr. UPTON. I know my time has expired. We will come back to this, but I want to yield to Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman, and I want to say thank you to these witnesses for enlightening us today.

Mr. Ergen, I am intrigued by the possibility that this merger might enable EchoStar to offer a more robust and durable and perhaps less expensively priced, high speed Internet access service, and that would be a tremendous advance for people in rural America.

There are tens of millions of Americans who do not have any broadband opportunity. They include the 3.5 million homes that are not passed by cable. Other homeowners live in a place where the cable company offers a service, but it does not offer cable modem service, and chances are that those same residents also would not have access to DSL. They are in a rural area typically and well beyond the DSL research of the local telephone company.

So tens of millions of Americans do not have a broadband opportunity at all.

I might note that the heads of the major technology companies in the United States from Bill Gates to Andy Grove and a number of others have recently said that a revival of the technology sector in our economy depends upon providing broadband to homes and businesses throughout the Nation and that the best thing that could happen for a spark of the technology sector, which in turn could spark an American economic revival, would be an aggressive and sustained deployment of broadband.

And perhaps you are bringing us a partial answer to that and a way that we could make that happen. Let me ask you how the merger with DIRECTV would enable EchoStar to offer that more durable broadband service, and in particular, how does it enable you to offer that service in a way that it is priced comparatively to the cable modem service and to DSL service?

Mr. ERGEN. Okay. Well, again, it is all about economies of scale. I agree with you that broadband is not in rural America and it is hard for small communities of less than 10,000 to bring jobs to those communities or to encourage businesses to come without broad band.

I saw a recent study where only 5 percent of communities under 10,000 have any kind of high speed access. We can do that really overnight after we build and launch new generations of satellites to do that.

Hughes is a leader in that technology. We have done some things with that technology. Both of us are looking at billions of projects or billions of dollars. Yet we spread that in non-standard systems across different subscriber bases, and what we believe needs to be done given the state of the capital markets today where the money is dried up and all of the broadband companies that have tried to do satellite have yet to fulfill that dream, is to combine those resources and spread that fixed cost at a cost or subscriber basis of 15 million.

That essentially cuts the cost in half from each company individually doing it and puts it on a standard plat form. That allows us to be competitive in rural America and give somebody in rural America exactly the same opportunity of somebody in Boston.

But more importantly, it also allows us to compete in the cities with a robust, two-way system, and I think that is critical. We are not in just the video business anymore. The cable industry has made great inroads and is clearly the leader in broadband today over phone companies and satellite.

Mr. BOUCHER. Let me ask you the reverse side of that question. If this merger is not consummated, what will that do to your ability to become a viable broadband offeror and competitor with cable?

Mr. ERGEN. At least from our company's perspective I do not believe the capital is available in today's market to take the risk, and we have taken a lot of risk as a company, as people know, starting with the Chinese rocket back in 1996. So we are not averse to risk.

But I do not think that we could take the risk to spend the several billion dollars to provide broadband to rural. I think we would have to partner up with the phone company. In some case, maybe we would have to sell to the phone company because that is really the only alternative we would have.

And I am just a big believer in broadband as being the next thing that will bring efficiency and technology and productivity to America.

Mr. BOUCHER. Mr. Phillips, just excuse me. I need to inquire of Mr. Ergen with regard to a couple of other matters. I will come to you in a second round.

The other thing that I find so interesting about the prospects of this merger is that it will immediately more than double the number of local television markets that have local-into-local services. That number is about 40 today. You have committed to move to 100 markets very shortly after the merger is consummated.

My question is designed to give you an opportunity to respond to those who have said, “But what about the other 110 local markets?” How should people in the other 110 local markets that still will not have local-into-local service view this merger, and what can you say to them in terms of how this merger improves the long term prospects for them to get this service also?

Mr. ERGEN. Well, first of all, I think the only hope that those people in the other 110 markets have is for this merger, and I just do not want to over promise this committee. I have been testifying for many years here now, and I believe when you look at the track record of what we have testified as a company, we have done each and every thing that we have said we were going to do.

So that is why we have committed to 100 today. Our engineers are working together and seeing what we can do to get beyond that.

The key is, the key is by putting this merger together we will end up in a standard system several years from now, and when you do that, there then are economies for other people to come in perhaps and use that same standard to go across the other 100 markets.

For example, the rural loan guarantee that you and others have gotten through is a great thing because now that billion dollars in the loan guarantee would never be enough to replace all of the boxes out there that would need to be done to get in the standard. But because our company is going to do that at no charge to consumers because of the efficiencies of this merger, it will allow companies, perhaps like the NRTC or Pegasus, to go out and provide that service, and I am certain things can be done there. We certainly would look at it as a company as well.

So I am cautiously optimistic that we ultimately will get to all of the market with this merger, but I do not want to over promise.

Mr. BOUCHER. Thank you, Mr. Ergen.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman.

As I mentioned in my opening statement, my concern was not necessarily the macro, but the micro. The micro competition factors are in those areas that cable does not serve. Satellite becomes 100 percent of their access to the television.

So focusing on those rural areas, the two companies combine, and you are now more efficient in eliminating the redundancies that Mr. Hartenstein had mentioned in his statement, and in the macro you are able to compete. You can go into the big cities, the New York Cities, the Chicagos, the Detroits, and the Omahas, and maybe even the Kalamazoos and compete in there against cable.

So here is what my fear is, and I am going to ask Mr. Ergen this question. My fear is you become so competitive in those areas that you have to reduce your prices, have a subsidized price, in essence, in the urban areas to compete against cable that will then be transferred to the rural areas that have no remedy available to them, no other satellite competitors to go to to get a better price.

Obviously as a consumer we focus on three things: you know, service. How often do you go off line? How often does the TV go off channels? Do you have what I want to watch? And price?

So those outside the city limits, are they going to get stuck then paying a higher price for the quality of service and channels that you will provide in trying to compete in the urban areas? How do you insure those consumers that they will not get stuck with a bigger bill?

Mr. ERGEN. I think you have asked a great question, and I think the way that we have tried to be sensitive to that issue is to say that we would go to nationwide pricing. We will commit to nationwide pricing so that those people in rural America get exactly the same price that we charge in the most competitive city, for a Boston where you have an RCN as an over builder. You have the Cablevision cable company there, and of course, you would have DIRECTV there. That would be a very competitive market.

Somebody in Nebraska would get that exact same price, but in addition to that, and here is where they are going to be better off, particularly when you go home over Christmas and talk to them, they are going to have the ability to get HDTV. Without this merger, they are not going to get a lot of HDTV.

They are going to have the ability to get video on demand from satellite. Probably not going to have that without this merger. And they are going to have the ability to get broadband at a low price, always on connection without using a phone line some day.

So those are things they are going to get with this merger, and we will give them the benefit of committing to nationwide pricing. There may be other remedies that people have. We are open to suggestion if the committee or regulatory agencies have a different mechanism for doing that.

But I would point out that after 6 years in business on the EchoStar side and, I think, 8 years now, almost 7 years for a DIRECTV, we have always done that. Our prices are the same no matter where you go, just like America On Line has the same price across the Nation.

Mr. TERRY. Well, I do think your nationwide pricing plan does answer that question. Though how do I assure my constituents in Valley Nebraska in my district or go outside of Douglas County to any small community in Nebraska? How do I assure them that their community will be part of your nationwide pricing plan? And how do I assure them that 2 years after the merger is approved that competition does not force you to a different plan?

Mr. ERGEN. Yes, I am not the legal expert here, but my understanding is that the regulatory agencies have entered into consent decrees to protect consumers. So you are not just taking my word for it or Eddy's word for it, and we would certainly consider a consent decree that would be long term in nature, binding, and protect that very piece of America that is so important to you.

Mr. TERRY. Do you feel that the nationwide plan resolves any of the antitrust issues that some of us may have concerns about?

Mr. ERGEN. Well, again, I am not a lawyer, but I believe you have to look at the merger in the context of the marketplace. We are in high technology business. We are not certainly in the baby food business. We are in a very high technology business. Our competition owns 80 percent of the markets moving 90 miles an hour. We have to catch up. We have to invest capital.

And I think when we look at the broad context and the benefits and the efficiencies, I believe the antitrust law takes that into consideration when they review a merger. And I am certainly not an expert, but I believe the people at Department of Justice are, and I think when they go through and look at the facts that they will some to the conclusion that this does pass all antitrust muster.

Mr. TERRY. Mr. Chairman, I know my time is up. If I can ask just one quick follow-up question, when we talk about nationwide pricing, earlier I said as a consumer you look at service, startup costs, channels, all of those type of things. So when we talk about nationwide pricing, what do you mean by that?

Does that mean, you know, the up front cost to the consumer? Does it include equipment, installation, those type of things as well?

Mr. ERGEN. Yes, I think it needs to cover not only the cost of your service, which in our case perhaps we have our top 50 channels for $21 nationwide, but it would include the price of our set top box, which today we sell. If you lease it from us, it is $49 up front first month. It would include free installation, which we do on a nationwide basis, and again, we do that today. This is not a departure because we have huge fixed costs in our space. We have very low marginal costs. It costs is very little to get the next subscriber. So we have to go get subscribers from the incumbent cable company. We have to have low cost across the Nation from our billing systems and so forth, and so this also then protects customers and includes a wide range of services.

Mr. TERRY. Thank you.

Mr. UPTON. Mr. Shimkus.

Mr. SHIMKUS. So many questions, so little time.

It is great to have you all here. You bring up a lot of compelling arguments and counterpoints that I am finding very interesting.

I would just say, to begin with, I find it difficult when people in other industries try to preach to another industry how to run their business. I know it is very difficult to you to operate in competitive markets, whether that is cable or that is free over-the-air broadcasting or whether that is direct satellite.

And those who put up capital to try to do it should be admired and thanked, and those who have not put up the capital to do what they are doing and may be doing something else ought to be admired, but that is what makes this world and this country great.

And then we have the conflict of when the paths cross and we get into the competitive market, but we want a lot of things that the promises that are being made by this proposed merger. You know, we do want broadband access. We do want, I think, nationwide pricing if it accomplishes what you are entailing to my colleague from Nebraska. It would be beneficial.

Who could argue that if there is no competition currently in rural America and there is no cable that they have the same competitive price as if they were in the St. Louis metropolitan market?

High definition TV, which we are all supporting and offers great benefits.

Let me ask to Mr. Hartenstein and Mr. Ergen: why can't the competition that you are now fighting against each other, why can that not bring the services that you are promising with the merger?

Mr. HARTENSTEIN. If you look at how we started in the business, it was really sort of upside down from how our competition did. The first thing we did when we launched our first satellite is put up the first hundred or so services that we could deliver, and those are nationwide services, the likes of ESPN, the Disney channel and some of the others, HBO and a few more.

It wasn't until only 2 years ago when certain members of this committee helped author the SHVIA Act that allowed us to really compete and bring the most watched product and most watched channels in anyone's home, namely, the local stations, the network affiliates and the independent television stations.

So we had to then add on with a fixed amount of capacity that we have, we at DIRECTV and separately Charlie at EchoStar, the local channels into as many markets as we could.

The best that we're doing today, notwithstanding theoretical expert postulations as to what might happen, the best we can do in Hughes and DIRECTV comes from a long heritage, as Congressman Harman indicated, developing the first satellites; the best we could do is deliver a few local channels into a few markets, and obviously from an economic perspective, we picked the most populated ones first.

Mr. SHIMKUS. Well, let me, and I understand. I only have 5 minutes.

Mr. HARTENSTEIN. Okay.

Mr. SHIMKUS. And I want to keep the responses relatively short.

And I understand that. And there is going to be a convergence of the ability to do this and more capital or the ability to get capital to get this new technology, but we would hope the competitive market would bring these services.

And actually, aren't you providing broadband direct satellite in the West right now?

Mr. ERGEN. We do provide some experimental broadband service today. It has not been economical. We have to charge about $1,000 for the equipment with installation, and we have to charge about $70 a month, and we lose a lot of money on it. We believe that we have got to get the cost of that system to the consumers down to a couple hundred dollars, about the prices of a satellite system, and we have got to get the service down to the national average of about $50 a month.

To do that we have got to put the companies together and invest several billion dollars, and both to Hughes' credit and EchoStar's credit, we're both willing to do that going forward with this merger.

It is a risky proposition. I am not sure our shareholders are particularly happy about it, but we feel strongly about it.

Mr. SHIMKUS. Okay. Let me follow up on the discussion on local into local, and I think you probably have consensus here that there are services that need to be broadcast and there are some that may not be as arguable.

You know, I will talk for the local broadcasters, and I represent currently about 19 counties in the State of Illinois and possibly in the next cycle over 30. So I have communities of Quincy, Springfield, Decatur, Harrisburg, Evansville, Indiana, Terra Haute, Indiana, Paducah, Kentucky. They probably do not make the cut.

Mr. HARTENSTEIN. Actually I think some of them do. Some of them do not. We have to look at the best possible engineering solution we can give with the combined spectrum as quickly as we can roll that out and consolidate it, taking into account all of the real world technologies.

But, yes, we are going to do as many as we can, and if we do get some relief on must carry, then there is just that many more that we could deliver.

Mr. SHIMKUS. Who is from the broadcast? Do we have someone on the table?

Address the high definition TV and the proposals that could occur to help offset the cost and the sharing spectrums. No one has really addressed the transition to high definition TV. And does this help or hinder that?

Mr. FIORILE. Well, I find it interesting to hear one of the things a merger will do will advance high definition television. There are currently over 225 stations on the air covering about 75 percent of America. To the best of my knowledge, none of them are carried by either EchoStar or DIRECTV.

The fact the merger will double the amount of local markets or almost triple the amount of local markets, up to 60 markets or up to 100 markets and not service the other 110 markets, I am confused as to how it is also going to deliver high definition television because there is not even enough room to cover the other half of the United States.

You know, again, the record shows there are no, to the best of my knowledge, no high definition stations. We have two that have been on the air more than a year that are currently carried on DBS.

Mr. ERGEN. Yes, I would just like to state for the record that EchoStar does carry CBS, an owned and operated station out of New York and Los Angeles. We do carry it in the owned and operated station. CBS has worked very closely with us to get high definition television going forward.

I might also mention that local broadcasters, while accusing us of being a monopoly, we have asked them when they do not broadcast the CBS station; we have asked them to let us bring it in via satellite, and we have been turned down by all of the affiliate groups, stations, across the country. Only the CBS corporate owned and operated stations in about 15 markets allow us to do that.

And we are very appreciative of that, that they have taken the lead in advancing the technology.

Mr. SHIMKUS. And I have consumed much more than my time. I will just yield back.

We understand the turf wars. We have dealt with them over many, many years, and I yield back, Mr. Chairman.

Mr. UPTON. Actually, we were hoping to broadcast some of the Cub games down there. There are some St. Louis fans down there.

Mr. SHIMKUS. No one would watch. We do not watch minor league ball. We just watch major league ball.

Mr. UPTON. The gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. Ergen, I was interested to hear what EchoStar is doing with HDTV, and is CBS, the national affiliate in New York and L.A., the only two that you are providing?

Mr. ERGEN. No, we also provide a full-time channel of HBO and a full-time channel of Showtime. Occasionally when Hollywood will release a movie in HDTV and DIRECTV—I will let Eddy mention what you broadcast.

Mr. HARTENSTEIN. We have an HBO feed of high definition and an HDNet.

We are looking at this as members of also the Consumer Electronics Association to try to jump start and get through the chicken and egg process, to make about a dozen nationwide high definition channels available. The content is out there. No, it is not the local affiliates, but we think this would be a tremendous boon for the industry and the economy and the broadcasters to help bring a dozen channels of high definition content to every home in America.

Mr. GREEN. Mr. Ergen, let me follow up. I have read in your testimony that your company is planning to make a major push in the carriage of local into local broadcast if the proposed merger is approved; is that correct?

Mr. ERGEN. That is correct.

Mr. GREEN. I would like to know what hurdles your company has been experiencing that currently limits you to only offering limited local-into-local service. In particular, I am interested to know if you are currently utilizing all of your Ka-Band satellite slots that are not Y.

In addition, I would like to know how long you have owned those unused Ka-Band slots and what your future plans are for them.

Mr. ERGEN. Okay. The limitations and the barriers to doing more local cities today is the absence of a spectrum. Our satellites are full. So we do not have spectrum to do it.

Second, those satellites were designed before technologies, such as spot beaming, were available to increase our capacity.

And, third, the burdensome must carry law requires us to carry every channel in a market no matter how many times it is redundant, such as Home Shopping.

So those are the factors. We have spent $500 million to build and launch two new generation satellites to comply with must carry. It does not necessarily give us particularly more markets. We are hopeful we will get a few more beyond the 36 we carry today.

As far as our Ka-Band slot, we have had that slot for several years. We have a satellite under construction with the Loral Space Corporation that is a Ka-Band satellite to launch. I believe in October of next year is when they are telling us it will be finished. It is an experimental Ka-Band satellite because the technology is relatively new, and we believe that it will take some work to make that economical.

And so we started to sell out a couple of years ago and just took about 3 years to build it. So every slot that we have gotten as a company we have built or intend to build. We have not let any slots lay fallow as other companies have done.

Mr. SCHNOG. Excuse me, Mr. Green.

Mr. HARTENSTEIN. Well, excuse me 1 second. Hughes Electronics also has a couple of Ka-Band slots for which satellites at the expense, including ground equipment, of over a billion dollars has under construction and will be launched in early 2003 for the so-called Spaceway Project.

Mr. SCHNOG. Excuse me, Congressman Green. You know, I keep hearing about this must carry and how they have all of these 37 Home Shopping networks, but my question as a local guy is what about Chemeketa College, which is out of Salem, Oregon, which provides local educational programming off premises to students who can't get into college or get in to the site?

What about the college programming tat we send down to a casino in Grand Ronde, Oregon so that people can go in there and learn because they cannot make the trip to Portland?

I mean, those kinds of things, the local broadcaster in Salem who is not in that Portland market, you know, these guys, they want to cherry pick off the ABC, the NBC, the CBS in Portland, but they do not want to bring the local programming that is important to our communities.

You know, we are talking about are we going to bring these in and how come they do not want to put them on. Mr. Upton asked before why do they not do that. Well, Chairman, I will tell you why they do not want to do it. It does not make them any money. It is all about the dollars.

You know, I keep hearing this there are 36 channels of Home Shopping. Well, there might be that out there, but what about Chemeketa College? What happens to them? They just get lost?

Mr. ERGEN. Well, I might add that we do carry it. If it complies with the must carry law, we will be carrying it January 1st, No. 1.

And second, we are a national service. There is a difference between a local broadcaster who sends a signal out for 30 miles and a national broadcaster from a satellite that goes to every square inch. We carry about 30 channels of public service, which include almost all of them are educational channels, universities, high schools, public education, Head Start on a national basis for people for education.

We do a great job of that, and we do that. Our company did that voluntarily. The SHVIA law did require us to do 4 percent, but we did a lot of that voluntarily, and we do not make money on that, but we are happy to do that as a public service.

Mr. GREEN. Let me ask a follow-up though for the broadcasters. Mr. Fiorile, if you can answer the question, do you think that the proposed merger between EchoStar and DIRECTV, if it did not go through, could each company still comply with the must carry requirements under the Satellite Home Viewer Act?

And more specifically, do you believe that each currently possess sufficient spectrum to comply when taking their Ka-Band into account, as well as the ability to use spot band technology?

Mr. FIORILE. In answer to your first question, yes, I do believe there is enough capacity.

And the second question, in particular, I am not an engineer. I cannot. To get into all of the particulars of that piece of the spectrum, I would be happy to get you that answer, but currently I believe there is room.

Furthermore, you know, the comment that other CBS affiliates would not allow them to carry the signal, as Mr. Ergen suggested, they are a national program service. The interest of local broadcasters is in providing the local news and information that come with the local network affiliation: emergency weather, emergency broadcast systems. That is what we miss by providing service only to New York and Los Angeles.

Mr. GREEN. Mr. Chairman, I know I am out of time, and I agree. I have a station in Houston that I would much rather have than the New York or the L.A. affiliate.

Thank you, Mr. Chairman.

The Cubs play well down in Texas as well.

Mr. UPTON. Mr. Ergen and Mr. Hartenstein, if this merger goes through, you have got millions of Americans that have one system and not the other. As you convert to one system, who is going to cover the cost of that conversion? And which one is it going to be or is it going to be a combined of the two? Will everyone get a new system?

I mean, you have got encryption. You have got a whole number of things that have to be evaluated.

Mr. HARTENSTEIN. In the interest of time, we have not yet decided which platform and which aspects of which platform we will combine, but we made a pledge when we made this merger as part of the contractual agreement that no existing consumer would be disadvantaged or inconvenienced or incur any cost to get to a combined system. That is a cost that we would cover as combined, and I believe Chairman Dingell asked that and I am glad to answer that in the affirmative.

Mr. UPTON. Mr. Phillips, you indicate in your testimony, in regard to the nationwide pricing proposal that is on the table that there was no price guarantee, no enforcement, and no service quality type of issue.

Let me just ask a quick question on service quality. You know, when we did the Cable Act a number of years ago, it was prompted in large part because of service problems which I have to say is a credit to the cable industry. They have addressed and addressed it well a number of complaints, the time that it takes for a consumer to get to a cable company to make sure that that complaint is registered and, in fact, make sure that that's fixed.

What does your system have? If someone has got a problem, if they want to watch HBO, if they want to watch ESPN and there is some problem, how quickly are you able to address that in terms of service quality? What are your standards that you impose on yourself?

Mr. ERGEN. Well, first of all, I am going to point out that both DISH Network and DIRECTV are normally rates No. 1 and two in all the surveys for customer service, and I agree with you. Cable has made vast improvements, and they are a very tough competitor on customer services where they were not, you know, 3 or 4 years ago.

But one of the advantages of putting the companies together is that we both have service technicians in rural America that has to respond to you when you have a service call, that's awfully expensive for us obviously with one service technician we will now be able to respond to the platform.

So we are committed to customer service. We will go out of business if we do not have it. The cable companies have made great progress there, but we are still rated at the high end of the scale on that, and we want to continue to do that.

Mr. UPTON. Mr. Hartenstein, that same answer?

Mr. HARTENSTEIN. Yes.

Mr. UPTON. Mr. Phillips, how do you judge the guarantee in terms of nationwide pricing?

Mr. PHILLIPS. I would like to respond to that, and I appreciate the opportunity.

As a competitor today to EchoStar, who knows them in the marketplace, respects them for their competition and someone who helped DIRECTV by putting money up to launch the service, I would suggest to you that the inquiry you have had so far is not sufficient to really nail that point down.

EchoStar and DIRECTV each have somewhat like 50 packages and a la carte services that they offer. So there are multiple offerings here that are made available to consumers, first of all.

Second, the way that price varies is by coupons, by rebates, by products which are offered with the service to consumers.

There are differences in service cost. He just indicated that today there are two sets of technicians. They each hire competing people in the field so that they can race to your home to get service.

Their answer on everything today that you have heard is by getting more efficient having one is better. I would suggest to you that is not the case. By having one technician out there and one provider, you have got one place to go to get service, one place to go to get support.

Now, to your point, when EchoStar goes to compete with Charter Communications, what they do is they offer a $100 coupon or rebate, and the relevant question is: is that going to be available to rural customers?

And I would suggest to you, no, there is no need to anymore because they do not have any other choice but to take EchoStar once the company merges with DIRECTV.

What I have sat here and listened to today I am alarmed by because as a competitor in the marketplace the way the satellite industry developed where it is today is through competition. Mr. Ergen and Mr. EchoStar—excuse me. When we launched the business with DIRECTV, satellite equipment cost $700 to $800. That price did not come down until Mr. Ergen launched his service. Suddenly we all started subsidizing the cost of the equipment to make it cheaper.

There was no local in the local service initially because DIRECTV chose not to offer it. It was only when Mr. Ergen offered local into local that DIRECTV responded and offered it. I am suggesting to you that if you remove the competition, the intense competition that exists in our satellite market today that you will leave one provider, and Mr. Ergen will get to choose what he provides, when he provides it, and who is going to service and take care of that system.

So I think there is a lot of exploration here that needs to be done that we have not talked about today.

Mr. UPTON. Mr. Pagon.

Mr. PAGON. Mr. Chairman, if I could just add or elaborate a little bit on the point that Mr. Phillips was making, one of the concerns that I would have, Mr. Ergen and Mr. Hartenstein have talked about the virtues of standardizing equipment as a recommendation for the merger going through, and that if that were to happen perhaps other providers in the future, NRTC, Pegasus or others might take the cost of putting up additional services like local-to-local that they are not doing and provide it over standard equipment.

The defect with that, I think, is that to do that we would, of course, be dependent upon securing an agreement from the merged company to allow us to do that, and I would say from my personal experience I would have concern that that would happen on terms that would be attractive to consumers, and I can just give you one specific anecdotal experience that relates to local-to-local.

Fifteen months ago I proposed to Mr. Hartenstein that if DIRECTV would allow us a license to combine programming from least Ku transponders with the program that they offered over their 101 satellites, we would undertake the cost and the expense of leasing transponders and to negotiate agreements with broadcasters to provide local-to-local in smaller markets beginning with markets like Burlington, which is the 92nd market, and Jackson, Mississippi, which I believe is the 85th market, and perhaps as many as ten or 20 more at no cost to DIRECTV and no risk to DIRECTV.

And we have an exclusive right to provide DIRECTV in our territories. We do not unfortunately have a right to combine programming offered from other facilities with that programming. We need DIRECTV's agreement to allow us to do that. They declined to allow us to do that.

So my point is very simple. There may be virtues in standardizing equipment, but if one company is the party that is the gatekeeper for delivery through standard equipment, you have the issue of competition versus monopoly and will that one company allow services to be offered and on what terms?

Mr. UPTON. Mr. Hartenstein, do you want to respond? Then I am going to yield to Mr. Boucher.

Mr. HARTENSTEIN. Sure. I guess it was about 18 months ago that the proposal that Mr. Pagon referred to was part of a larger context of issues that time probably does not permit here, but there is not a single service on the DIRECTV platforms across all of the satellites that DIRECTV has today that we have not made provision for the NRTC and its members and affiliates, which include Pegasus, to offer to their consumers, and we certainly would be willing to entertain that as part of an overall solution to this, to provide that continued competition going forward.

Mr. UPTON. Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

Mr. Ergen, I was pleased to note the several comments that you have made during the course of our hearing today in which you have committed to have national pricing so that the price that is charged to all of your subscribers is the same on a nationwide basis, and that price would be the price that is set in the competitive market, where you are competing directly with cable, and so it is a market based rate.

I would assume that extends not only to your basic package structure, but also to any special responses you might have to make to cable on a market-by-market basis as cable offers particular attractive packages within that market. You would then agree to match that offer or respond to it in some way and then carry the benefits of that response you've made into your entire national subscriber basis; is that correct?

Mr. ERGEN. Yes. We typically do that today, and I think that part of anything that we might talk about with the regulatory agencies would be to look at those kinds of things to make sure that you do, in fact, get the benefits in rural America of the most intense competition.

In just relation to Mr. Pagon's comment, I think it is a great idea if somebody wants to put up the local channels in Jackson, Mississippi and we could not do it. You know, I think those are the kind of things that if you want to bring true competition, you have to get people to work together. You have to make some compromises, and I think that those are the kind of things that as a satellite industry we have to do to compete against the entrenched cable companies.

Because, you know, a lot of people that have gone up against cable are not around today, and we don't want to be one of those companies.

Mr. BOUCHER. Let me ask you about the non-price elements of the service that is provided to your customers and just get your response to these particular matters. I would assume that the same national programming would be available through your service everywhere in the United States, urban areas and rural areas alike.

I would also assume that in response to the question raised by the chairman, every subscriber to EchoStar's service would have access to your 800 number through which technical support or other customer service could be provided.

And I would also assume that the on premises installation of equipment to initial subscribers, which is competitively provided today by the retailers who are in competition with each other locally, would continue to be competitively provided and there would be no change in that.

Could you simply respond to those three non-price elements of your service?

Mr. ERGEN. Well, I think all three of those would be true, and again, the reason is because you have a nationwide system, but, again, I have mentioned we have high fixed costs of several billion dollars. The only way we can grow as a business, the only way we can pay for the satellites is to continue to get new subscribers. We have to get them from cable because they have them.

So that is why you are going to do all of those things on a nationwide basis.

Mr. BOUCHER. And so I have correctly stated your intention with regard to those non-price elements of service?

Mr. ERGEN. Yes, you have I think more succinctly put, it is beyond just the price of your service or a la carte channels, which of course is easy to do.

Mr. BOUCHER. Let me ask you, Mr. Ergen, and also Mr. Hartenstein about what might happen if this merger is not consummated. Your companies have been very successful. You have acquired on the order of 17 million customers. You have about 17 percent of the national multi-channel video market, and that is a commendable performance for the period of time that both companies have been in business.

But I also understand that at the present time neither company is profitable, and in the absence of profits, it is hard to be a viable competitor to cable over the long term.

And so my question to you is in the absence of this merger, what is the basic outlook for both companies? And what would the effect of the merger not being approved be upon your ability to continue to offer new services, such as local-into-local, HDTV, and that high speed Internet access?

Mr. HARTENSTEIN. I guess it's a compound question. You are right. Well, I cannot speak for Charlie's numbers, but we're yet to be profitable, notwithstanding the fact that we are serving with DIRECTV some 10 million homes.

Clearly we would not be able to stay competitive, as I indicated in my oral and written testimony. The world has changed. Digital cable has come. We have a lot more things that we have to be competitive with today. We are truly competitive in only about 60 percent of the country today even with the new spot beam satellite we launched.

We are not going to be able to offer more than the couple of high definition channels. Expanded capacity for other interactive services would not be possible.

The subscriber acquisition costs have gone up from where they began in the business where we started in 1994. It's a different world. It's not as good an outlook. We would obviously have to, after a long time coming to this conclusion, you know, look at another path, but this is the best path that we saw given the capital markets that were in today and where we feel we need to go with the market power there as defined by, you know, the business that we are in, namely, the cable industry.

Mr. BOUCHER. Excuse me, Mr. Hartenstein. Let me ask just one follow-up question before I turn to Mr. Ergen. Would you agree that the ability of DIRECTV to offer enhanced services, to continue to be a strong and viable competitor to cable is better if you combine with EchoStar than if DIRECTV's business were sold to someone else, such as Murdoch or some other individual or party?

Mr. HARTENSTEIN. We looked at all of the possibilities there, and the answer to your question is, yes, this is the merger that made the most sense for us, our shareholders and, we believe, for consumers.

Mr. BOUCHER. Thank you.

Mr. Ergen.

Mr. ERGEN. Yeah, I think that General Motors has made the decision to sell the company. If not EchoStar, it would ultimately be, you know, somebody else. It clearly would not have the synergies because they would not be in the satellite business. They would probably be in the programming business where you would have vertical integration issues and costs going up to consumers.

Mr. ABBRUZZESE. Excuse me, Congressman.

Mr. ERGEN. I would hope that we would, as a company, be able to survive and go it alone, but I think that might be difficult, and I think that ultimately a broadcaster might buy us or a cable company might buy us. I mean, because I think that ultimately we might have a longer row to hoe.

But if we could go it alone, we certainly would try to do that. That would be my goal, but I hope we didn't come to that.

Mr. ABBRUZZESE. If I could interject for one quick second, please, I just want to point out that traditionally in cable TV, the business of cable TV, very few of the largest cable companies have ever been profitable. They've operated on a cash-flow basis. That is not unique in this industry. They go decades without being profitable.

TCI went decades without being profitable. It is not unique that EchoStar and DIRECTV operate on an unprofitable basis, and I would submit that we pose that they have grown by 400 percent in the last 5 years. That is astounding growth, and that has occurred at a time when there are two providers.

You have here at least three entities that are in the satellite business today who would like to compete going forward and just do not have the space because through the merger of these two entities, there is not going to be any space left for anybody to operate on.

You have people willing to provide that second entity in the marketplace to insure that there is competitive pricing without relying on promises of national pricing policies. We will have the ultimate in pricing policy, which is a competitor, if we are provided access to some limited assets out of this merger in order to operate going forward. That is good policy. That is good business, I would submit.

And I do not think there is anything unique about them operating on a nonprofitable basis at this point in time. It is standard business in this industry.

Mr. BOUCHER. Well, I would only note, Mr. Chairman, in closing that the companies against which they are competing are profitable today. The large cable MSOs are doing quite well. They have deep cash reserves. They have the ability to attract capital. These are all problems that both EchoStar and DIRECTV have pointed to in order to roll out new services, such as high speed Internet access. They're having trouble attracting the capital because of the narrowness of the subscriber base of the individual companies and the high cost of providing that service for each company. By merging they can spread that cost out over a larger subscriber base. It becomes economical. They are then in a position to attract capital. They can be a much more viable competitor against the very profitable multi-channel video operators.

Mr. Chairman, time has expired.

Mr. ABBRUZZESE. But, Mr. Chairman, can I just answer one quick thing on that? They are mature companies, the other capital operators, at this point in time. They are profitable because they have experienced their highest growth period.

When you are in a growing mode in cable, you are always losing money no matter whether it is NMDS, cable TV or a satellite. That is just a fact of life in the business. They are growing so fast; they are doing such a good job; they are losing money.

Mr. PAGON. Mr. Chairman, if I could just make one comment. The implication would be that the companies have fared poorly in the capital markets. I think if you look at the record of appreciation for shareholders of all of the pay TV companies, satellite and cable, you will find that the No. 1 performing stock over the past 6 years is EchoStar, and that with respect to Hughes, I think Hughes has created in DIRECTV almost $20 billion of value in a company that did not exist 7 years ago.

Mr. BOUCHER. Mr. Chairman, if I can indulge you just for a moment.

Mr. Pagon, the problem that has been presented is that in order to deploy the infrastructure that is necessary for new series, which themselves are necessary to compete with cable, including the high speed Internet access service that EchoStar is determined to make more robust and more affordable to consumers, in order to attract the capital to do that, a merger is really necessary because the capital markets have simply said to the companies, "You have got too few subscribers to make a $2 billion per company investment in this infrastructure. Bring your infrastructure costs down by merging to 2.5 billion, and then the money will be available in order to finance the deployment of these facilities."

And that would enable the company to offer high speed Internet access and be a more viable competitor with cable.

Now, I acknowledge the accuracy of many of the things that you have said about this market, but this fact remains, and there are needs to have a larger subscriber base under a merged company if capital is going to be attracted for additional services and those additional services are absolutely necessary to be a viable competitor.

Mr. Chairman, I am going to yield back.

Mr. UPTON. The gentleman's time has expired some time ago.

Mr. BOUCHER. I have taken up too much time.

Mr. UPTON. Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Mr. Sachs, you have been sitting at the end very patiently, and I know in the opening statement you did not come out in support or in opposition to a merger, but based upon your position, do you feel that the merger would create a larger competition to the industry you represent than the two competing elements presently?

Mr. SACHS. Let me go back to what I tried to say. We regard both EchoStar and DIRECTV as very formidable competitors today, and the prospect of a 17 million subscriber satellite company will probably look more like a 19 or 20 million subscriber satellite company at the time this merger would close is no less daunting.

This company, both companies have excellent track records, and if their energies are combined and if they achieve certain efficiencies, they will certainly be as competitive as they are today, and they have given you reasons why they believe they will be more competitive.

Mr. SHIMKUS. Thank you.

Mr. Ergen, based upon the announcement today that Comcast and AT&T could merge, and based upon the arguments for your efficiencies based upon your merger, could I assume that you would be supportive of that?

Mr. ERGEN. We certainly will compete against anybody that we can in a level playing field, and we certainly think that from a regulatory point of view that would be a hard merger to stop.

The ownership cap limits which would have stopped perhaps that kind of merger was 30 percent. Those were thrown out by the courts. The Supreme Court, I believe, just announced they are not going to hear an appeal of that. So there is no ownership cap today against, I guess, cable companies becoming really one company.

So it is a scary thought, but we are up to the challenge to compete as long as we can on a level playing field. I think our concern would be program access there where Time Warner owns, I mean, or AT&T or Comcast own programming. Comcast, for example, does not sell its sports channel today in Philadelphia. Therefore, it cannot compete in Philadelphia. That would be our big concern.

Mr. SHIMKUS. Let me go to one more question, and I am not an attorney. I do not even pretend to be one, but for those who are, tell me how viable consent decrees are and if they are worth the paper they are written on.

Does anyone have an opinion on that?

Mr. ERGEN. Well, I am certainly not an attorney either, but they certainly have been done many, many times in mergers and so forth. And the Justice Department obviously is proficient at that.

We can get some information to you in the committee. AOL Time Warner is the most recent one where I think there were similar concerns with AOL Time Warner.

Mr. SHIMKUS. Does anyone have a dissenting view?

Mr. SCHNOG. You know, the consent decrees are great and wonderful, but I think that you also have to think about kind of the reality in the marketplace of what is going to go on if this merger is approved.

Kind of the reality is this as I see it. You are going to create this 900 pound gorilla with 1,200 channels, or God knows what it is, that they control, that no one else will ever be able to touch.

They are going to be able to compete with cable. For folks who say they are not competing with cable now, look at Classic Cable who is in bankruptcy because they cannot compete with the satellite dish competition as it is today. That is 350,000 customers in this country.

There are lots of other small cable companies like my own who are in trouble because of this, and I think what you are going to see happen is if this 900 pound gorilla comes out of the closet, all of the small cable companies or a great number of them are going to disappear. You are not going to have 9 million homes or 3 million without cable. You are going to have maybe close to 18 million. That is the 8 million customers that we have.

And in those markets where they are used to paying $2 for a hamburger, and you guys here in Washington, I bought one yesterday for $9; they will be paying that same $9 for their cable TV or their satellite dish, and it is the same price as the big cities.

And the big cities, do you know what? They will still have the cable competition because those major operators who have those economies of scale will be able to compete and put on 1,200 digital channels.

What you will end up having is this huge, huge digital divide. You know, I see Congressman Boucher has gone out, and I hate to disagree with the Congressman, and I appreciate him wanting to get services into his market for high speed Internet and what have you, but I might suggest that he has kind of thrown the baby out with the bath water, you know, saying, "Let's get them in here."

But remember when you get them in here, you are creating a 900 pound gorilla, and these guys, these big companies, they are after the dollars. They are after making money, and that is what they are going to do.

If you think any different, I mean, you look at Charlie Ergen's testimony to the courts when somebody else was going to buy DIRECTV and when they were going to merger Primestar, and as soon as it suits his way it changes when he gets before you here.

I mean, Id o not blame him. He is a tough businessman. He knows what he is doing. He is trying to make money for his investors. No problem.

But if you are really thinking about the consumer, think about what a 900 pound gorilla will do.

Mr. PHILLIPS. Mr. Shimkus, could I respond to your question?

Mr. SHIMKUS. My time is out, if the chairman would be so diligent.

Thanks.

Mr. PHILLIPS. I do have a law degree. I do not practice anymore, and I am not an antitrust expert, but I am advised by some good attorneys, and they indicate to me that the Department of Justice's preference is to have competition and not to eliminate it. If there is to be a consent decree, I think the department generally favors a scenario where they can create competition with a provider that has some staying power.

For example, facilities. You will remember the United Air case where essentially Robert Johnson's company was set up to be facilities based, to compete in certain routes so that there was two providers. It ultimately failed, but I think that is the way the Department of Justice would tend to go.

They do not like to accept promises. There is no regulatory scheme really that has been set up to enforce Mr. Ergen's promises about national pricing. As I tried to point out, it is very complicated because it involves more than just 50 packages and what you charge. It invites rebates and other things that are shoved through the distribution channel that affect consumer price.

And so those are generally not the kind of remedies that the Department of Justice favors.

I would suggest, as a participant in the industry having experience with these people, that if there are to be these kinds of consent decrees based on promises, they are going to have to be very thorough. They are going to have to be very clear. They are going to have to be very enforceable and swiftly, not through the courts or any other, you know, delayed mechanism if we are really going to protect consumers.

Mr. FIORILE. Mr. Chairman, I think it would be foolish to suggest that the combination of these companies would not help the profitability. Of course it would.

This industry, because of the competition, has grown by close to 20 percent in the last year, which I would submit there is probably not a whole lot of businesses that have grown close to 20 percent in the last 12 months.

So let's look at what has caused it to grow by 19 percent, which is exactly, I think, the number. Some of cable's nonresponsiveness to service, and this industry has done a marvelous job with service. They have an excellent reputation. So what kind of promises are we hearing that are going to happen with the combined companies?

We are going to be able to reduce our service departments and save a lot of money. No question. Who is it going to impact? It is going to impact consumers. Where there were two service people in an area, there is going to be one, and, yes, it will be more profitable.

What else has driven the growth of DBS recently is the competitiveness between pricing and programming, and there is no question that that has helped this industry. And what we have heard a little bit about today is we are a national program service, and some of these services are redundant, and I would suggest the redundant is another way of saying competitive.

And last, what has driven largely the growth of DBS in the past year has been local-into-local. People no longer have to go out and buy a local television antenna in addition to their satellite dish.

Now they can get both, and where we are today is local-into-local is being challenged in the courts.

And last but not least certainly is we have also heard not even a promise with regards to the other 110 markets in this country.

So it will be profitable? Yes, it will be more profitable, but let's face it. The consumers are the ones that are going to pay for it.

Mr. UPTON. Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

First I want to say to Mr. Shimkus and to the audience I am a lawyer.

And I just wanted full disclosure.

Actually I ran into Gregory Peck about 20 years ago, and I said to him, "Mr. Peck, I just wanted to let you know that I saw 'To Kill a Mockingbird' when I was 15 years old, and I have wanted to be a lawyer from that moment on."

And he looked at me and he said, "Young man, you are the 100,000th lawyer to tell me that."

"And I do not want the responsibility."

So I appreciate, you know, the conditions under which I am about to begin my questioning.

When you look at any merger, especially from an antitrust perspective, the key decision always is to define what market we are talking about. Are we talking about solely the DBS marketplace or are we assessing the impact on the entire multi-channel video market including cable? Define the market.

In this case, I am not sure it makes a difference because in the former we would go from two current competitors, DBS and EchoStar, down to one, and in the latter, that is, including cable, we would go from three competitors, including cable plus DBS or, I mean, plus both of the companies that are here, down to two, moving to a duopoly.

It is hard to see how either scenario would be in the consumer's interest in the long term.

In addition, fewer distribution platforms may have a negative effect on programmers, especially programmers who are neither owned by cable operators nor major broadcast networks. Obviously those players would bring some leverage to the negotiation at that point with either the cable industry or the remaining satellite company.

Fewer competitors may also have negative consequences for manufacturers and retailers. We are still waiting on this committee to see the fulfillment of the Telecom. Act mandate that the FCC assure that consumers can purchase their own set top boxes and modems and other equipment not of the cable industry's choosing, but of the consumer's choice. We still do not have that from the FCC. The cable industry continues to lobby that they decide what cable boxes each American gets, and that is wrong.

The leading argument for approving the merger is that although quantitatively we would have fewer competitors, the merged satellite company would represent qualitatively better competition in the marketplace.

This notion is supported by the assertion that the merged company would do local to local into more markets. So on that I have a question that I would like Mr. Ergen and others to answer.

Why shouldn't we believe that instead of merging the spectrum between these two companies, that instead, with digital compression and with new spot beam technologies that would be driven by the paranoic competition between your two companies, that we would not wring much more efficiency out of the existing spectrum rather than having the spectrum of both companies put together, but having a dramatic reduction then in the intensity of the investment in new technologies that would insure that we would wring more efficiencies out of that spectrum which we do have?

Mr. Ergen.

Mr. ERGEN. Well, as a business person, I have to make those decisions every day, and I wish I could wave my magic wand, snap my fingers and suddenly double the amount of capacity or spectrum.

But one thing. I am not an expert in law, but I am an expert in the satellite side of the business, and just the spectrum, the technology does not exist to do that today. Something like MPEG-4 that was mentioned, the chip sets are not available, the thousands of dollars in tests today. MPEG-4s for steel frames is not there yet, and by the time 5 or 10 years from now we get advances, and I think we will get advances, it is going to require we replace the equipment that is out there just like digital cable has upgraded their plant to digital.

But we cannot snap our fingers and turn our signal off for 3 years while we are building these satellites and this technology. We have to continue to do an ongoing business.

So just from a practical point of view it is not possible, but believe me, as a business guy, for my shareholders if I could spend $250 million, as Mr. Pagon suggested, and put up a satellite that broadcast to every local city, 210 markets, I would be crazy not to do it.

But I spent my $250 million on a satellite that was state-of-the-art that we believe can do 40 markets.

Mr. MARKEY. All right. Let's go to Mr. Pagon then. What do you have to say, sir, quickly?

Mr. PAGON. Well, I recall 10 years ago going to Fleet Bank, and I was then in the cable business, and asking them to lend me money to get in the DBS business, and they said, "Well, it will not work. Everybody knows that." And 7 years later we have 17 million customers who are served by technology which was unproven then. I think MPEG-4 is here. It is not generally deployed, but over the next, I think, 5 or 6 years, you will see it deployed commercially, and MPEG-4 will allow compression rates, a standard definition digital channel to be delivered in a third of the current bandwidth that MPEG-2 does.

So it will be here. Spot beam satellites are here. Mr. Hartenstein referred to the launch of their 4-S satellite, which went up 2 or 3 weeks ago. Spot beam technology is something that would allow potentially a four to sixfold increase in the intensity of use of the current spectrum, which is not very useful for national channels, but very, very useful for delivery of channels like local TV stations which you do not have a legal right to offer outside of their home markets.

So I think it is here.

Mr. MARKEY. Now, let me move on now. The way I see all of these hearings is that it is kind of like the segment in "Who Wants to Be a Millionaire" where the key part of all of these and, I think, the most fun for everyone is ask the audience.

For Congress that segment is really ask the consumer. You know, ask your constituents what would they want So they are being told that cable rates are rising. DBS rates rise, but it is because of these programming costs that are just out of their control. And so the question would be here if this merger goes through, would this give you any more leverage over the programmers so that you could extract lower rates from the programmers and as a result see the consumer pay less for the service overall?

Mr. ERGEN. Well, two things would happen. One is you probably from a practical point of view would get some leverage, and certainly the NAB has testified that they are worried about us having leverage on the retrans. side where they pay for their channels, but I think the consumer benefits from that.

But mostly what you have is contracts where you have something called a most favored nation clause, and so let's say, for example, AT&T pays 20 cents for a channel because they have 14 million subscribers, and because we have 6 million subscribers we pay 30 cents. By combining the companies, we would go to the bottom of the rate card as AT&T and Time Warner are, and most of these contracts are up in those numbers where we just do not get to and probably will not get to in our lifetime without the merger.

So that is how you get the lower costs. Those are then passed on to the consumers.

Mr. MARKEY. Would you then commit here today that if those prices to you lowered that you would lower rates for consumers?

Mr. ERGEN. I will commit that I will pass on a substantial portion of programming rates that we save on to consumers. And the reason we do that is because then we become a——

Mr. MARKEY. Is a substantial portion more than 50 percent, more than 75 percent?

Mr. ERGEN. Yes, more than 50 percent. Substantial, more than 50 percent.

And the reason we would do that is because as we lower our costs to consumers for programming, we get more subscribers to pay our fixed cost of satellites. So there is an economic one on one analysis here that says whether we guaranteed you we would do that or not, we would do it because it makes practical business sense and improves our bottom line.

Mr. MARKEY. I have read reports that the synergies that are created through this merger will save $5 billion between the two companies. Now, will you pass that $5 billion on to the consumer in the form of lower rates?

Mr. ERGEN. We would pass some of that on. Some of it would go——

Mr. MARKEY. How much would you pass on to the consumer?

Mr. ERGEN. I do not know exactly. It would not be——

Mr. MARKEY. Because here is the problem from our perspective.

Mr. ERGEN. Whatever it is, it is more than it is today.

Mr. MARKEY. Well, from the perspective of Congress, from the consumer looking at these industries, the multi-channel video marketplace seems to be the only place where prices always go up and they never go down.

So since September 11th, automobiles, they are like giving them away. You go into the stores, and they are like giving you the suit. Please, take it, you know. Thirty percent is not enough? I will give you 50 percent of, and they are giving away everything in our society.

And yet AT&T is announcing they are increasing cable rates by 8 percent, and there is no reduction in DIRECTV or EchoStar rates to consumers. It is the only product area that is completely immune to everything else that is going on within the economy.

So here we have a moment in time where a merger promises so much savings, $5 billion a year, that you would want the consumer to see a dramatic lowering of his rates maybe in a way that actually allows you to be price competitive with the cable industry.

And so it is important for us to hear the actual kind of percentage reduction in your rates that you might promise. Is it a 5-percent reduction, a 10-percent reduction, a 20 percent reduction in your rates for consumers that kind of brings it more in line with a product that the cable industry might have to fear in price competition?

Mr. SCHNOG. Congressman Markey.

Mr. MARKEY. Just wait a second.

Mr. SCHNOG. Oh, I am sorry.

Mr. ERGEN. Well, I can only tell you that we have been 6 years in the business. We have raised our rates of our basic channel one time without these efficiencies. Nobody has fought harder against cable than our company in terms of trying to be the most competitive we possibly can.

You certainly balance that with investing in new technologies and so forth as a business person. You have to balance your shareholder needs, but because this merger brings $5 billion in savings a year, as you say, a large part of that will be passed on to consumers to go from a practical point of view, because of our high fixed costs, but I have not done the analysis, and I am certainly there. I do not know what interest rate we pay on our debt today to finance the acquisition. I do not know a lot of different things. We have to finance the box switchout, which will be a couple billion dollars, I think about $2 billion. So it will be a large part of it, but it probably will not be all of it. It will not be all of it. That is for sure.

And certainly as we get farther into this, we will have more detail for you on that, but as we sit here today, I certainly do not have an exact answer for you.

Mr. MARKEY. See, this committee is——

Mr. ERGEN. Oh, by the way, the $5 billion synergy is, I think, 4 years after the merger is completed. It is not $5 billion the first year. It is $5 billion the fourth year.

Mr. MARKEY. How much is it the first year?

Mr. ERGEN. In 2005, it would be about $5 billion a year.

Mr. MARKEY. How much is it the first year?

Mr. ERGEN. I think it is about a billion.

Mr. MARKEY. A billion? And that keeps rising to the point where it is $5 billion?

Mr. ERGEN. Yes, yes.

Mr. MARKEY. Does it get bigger as each year goes on?

Mr. ERGEN. No, it stops at about $5 billion unfortunately.

Mr. MARKEY. Five billion. That is still a lot of money after you make the initial, you know, investment in trying to help on the converter boxes and everything.

Mr. ERGEN. It is a lot of money, and I am very excited about passing those costs or some of those savings on to consumers and keeping our prices lower than cable so we can go get their customers.

Mr. MARKEY. Right. So would you commit? In other words, I need a commitment from you that it would be a minimum of 10 percent. That is a lot of money.

Mr. SCHNOG. I will give you ten.

Mr. MARKEY. In the total universe of revenues here, in the entire multi-channel video industry, that is a lot of money, $5 billion.

Mr. ERGEN. No, we would definitely be more than 10 percent. We would definitely be more than 10 percent of the savings. That would be a low number in my opinion. I believe it would be in our best interest to do materially more than 10 percent.

Mr. MARKEY. What would be a median number?

If 10 percent is low, what do you think is a median number?

Mr. ERGEN. I think 100 percent would be high.

Mr. UPTON. Is that your final answer?

Mr. ERGEN. So somewhere between 10 percent and 100 percent. I am not trying to be evasive here, but you are asking me a very technical question without me knowing the circumstances a year from now when the merger is completed.

Mr. MARKEY. Okay. We have got a Mr. Schnog on the line.

Mr. SCHNOG. Yes.

Mr. MARKEY. Mr. Schnog, I would like to ask you what do you think about what we have here with prices?

Mr. SCHNOG. I am glad you asked, Congressman Markey. I have looked at your face in many trade magazines, and all the time I think in the cable TV business, "Boy, oh, boy, what does this guy know?"

And what you do not know and what I need to tell you is that I do not——

Mr. MARKEY. All you think of is what I do not know.

That is why we have you on the line.

Mr. SCHNOG. That is right. That is right. I have got to let you know.

Everybody complains about the high rates and what you do not know is honest to goodness, it is not my fault, and it is not Mr. Ergen's fault. You see, in this country people think there are only two things that are certain, death and taxes. It is death, taxes, and paying Disney $5 a month per consumer.

Something you do not know. Right now I have Disney on one of my systems. It is a pay channel. If people want it, they can pay for it. If they do not, they do not have to.

Disney came to me 6 months ago, actually about a year ago and said, "We want you to put it on your basic service, and you are going to pay us about a buck for every single one of your customers now."

And I said, “I cannot do that. I cannot afford it. I do not have any way to pay for this.”

They said, “No problem. Raise your rates.”

I said, “I cannot raise my rates. I have got competition from satellite.”

Mr. MARKEY. Let me frame the question for you.

Mr. SCHNOG. Okay.

Mr. MARKEY. What impact do you think the merger between DIRECTV and EchoStar will have on the programming costs to you, Mr. Schnog, a small cable operator?

Mr. SCHNOG. I think they are going to go much higher.

Mr. MARKEY. Much higher? Not lower?

Mr. SCHNOG. Much, much higher. Here is what is going to happen. They are going to be that giant gorilla out there with the other five gorillas, G.E., Disney, CBS and Fox, and when they go to make a deal, they are going to say, “We are a giant gorilla. We want you to charge the rural operators more,” and they will be because we are smaller. I have only got 8,300 customers, and charge us less because we have got this large area, and we will not go out and compete for the programming with you.

And they will have their nice, cozy, little I do not know what you would call it, but they will keep the monopoly there, and you will see a lot of these smaller operators. Their costs continue to rise, and we will not be able to do much but go out of business.

And for these guys, all of a sudden again that market will go from 9 million people who do not have cable TV now available as a competitor to maybe around 18 million.

The worst part of it is or the thing that is most important, if you would commit to me to say I will sit down and help you with this programmer problem, help me with the fact that ESPN raised it rates last year 20 percent just like that, and it had to get passed along someplace. I mean, my difference in what my cost for programming today and 10 years ago, in 1991 I was paying $3.85 for my programming for basic. Today I am paying about $10.

My rates have gone from $24 to $27. That is the truth.

So where are the rate increases coming from? A lot of that money is going straight on back to the programmers who now with two competitors?

Mr. MARKEY. Can I say this?

Mr. SCHNOG. Go ahead. I am sorry.

Mr. MARKEY. No, we are talking about selling the most precious asset that we have in New England, the Boston Red Sox.

We have this shrine, Fenway Park. We have all of these wonderful players. We have everything else that is attached to it. But do you know what the bottom line is in the business section? It is that everyone says it is a cable play.

Mr. SCHNOG. It is all about money.

Mr. MARKEY. It is a cable play, and it is all about how much higher you can raise these rates to consumers because no matter what you are going to pay for Nomar Garciaparra or for Pedro Martinez to make sure that they are not ultimately free agents that are purchased by the Yankees and you want to keep them in Boston, well, do you know what the key is? We are going to raise cable rates.

So we obviously are increasingly conscious on this committee, you know, as is the American consumer, that this is a spiral that seems to continue to go out of control. And so we would like out of this conversation, amongst other things, to figure out ways in which it starts to get under control.

Because if it does not, with all due respect, because I think that, you know, Mr. Ergen is a technological and business genius, but I think there are certain other inevitable inexorable forces that are built into this process that run counter to any and all promises which you might try to make here, and they may be well intentioned promises, but ultimately illusory promises made to the committee because of the essentially uncontrollable nature.

And my own feeling is that—and it is why I think it is important to study this issue—is that if there is no real competition in the marketplace because that is a proxy; competition is a proxy for regulation to within an inch of your life government intervention into the marketplace. It is the only thing you can substitute, is real competition, and it is the only way in which you get the conversation with all players, including programmers.

I am just a little bit apprehensive about what could happen if it gets reduced down to two from three because it is already so bad at three, and I am not sure that this kind of provides us with a road map to the consumer not putting aside 10 percent of their monthly budget just to watch programming, not a 10-percent savings, but an ever increasing share of the limited discretionary income average families have in our country.

Mr. Sachs, I appreciate it.

Mr. SACHS. If I can just speak to your observation about cable rates and automobiles, if I might for a second, I think the anomaly in part is that cable is not a static product, and that with most rate adjustments cable operators are offering if it is part of the basic package new services that are coming on the market.

I mean, in the last year National Geographic launched. Oxygen for Women launched, and so if you look at it simply in absolute terms about if the product had not changed, then the rate increases look a lot more substantial.

If you look at it as the Bureau of Labor Statistics does and look at it for the period since cable rates were deregulated, which is mid-1999, cable rates have gone up approximately 1 percent over inflation, if you take account of the fact that the product itself has expanded, and I think that is the anomaly.

Mr. MARKEY. Well, if I may just for a second, you know, one of the things that I think we have to take note of is that DIRECTV is owned by General Motors.

Mr. SACHS. They should sell Charlie the car division, not the satellite company.

Mr. MARKEY. The question here is: what is the market cap today for DIRECTV? What would you say it would be worth?

Mr. HARTENSTEIN. The market cap for Hughes is on the order of about $20-some billion.

Mr. MARKEY. And what is the market cap for General Motors minus Hughes?

Mr. HARTENSTEIN. It is a little bit difficult because General Motors owns 100 percent of the asset, but it is a tracking stock.

Mr. MARKEY. No, now I am only talking about General Motors, the automotive branch. What is that market cap worth?

Mr. HARTENSTEIN. I am not sure I can do where the stock price is today, but it is probably about 25, 30 percent above that of what the market cap is of Hughes. I would have to confirm that form you.

Mr. MARKEY. The point is that the automotive industry is static. We know that they have not really improved fuel economy standards for 16 years.

But at the same time this is not static. The asset which General Motors owns is really quite dynamic. It is growing exponentially year after year after year. It is now worth $20 or $25 billion, and the entire automotive division of General Motors might only be worth $30 or $35 billion. Think about that in our society.

Now, if we were having a hearing on whether or not General Motors should be allowed to purchase Chrysler, it would almost be understandable at this point. Look at that market just shrinking.

Here, however, we are having a hearing on the largest growth sector of the American economy that are picking up 1.5, you know, 1.8 million customers per company per year. So that is why it causes us some concern, because obviously the consumer is a beneficiary of that robust competition.

And while the cable industry over the years has been a beneficiary of policies on this committee, the Cable Dereg. Act of 1984, and the broadcast industry has been a beneficiary of acts on this committee, the Spectrum Allocation Act of 1996. So, too, the satellite industry has been a beneficiary of the 1992 programming access provisions and the local-into-local provisions of 3 years ago.

So obviously each industry has been nurtured by this committee trying to create many more players that are more robust, and so what we are really trying to do here today is to find a route that insures that the consumer is the beneficiary of the wise decisions this committee has made in creating a blueprint that has allowed the geniuses of these industries to go out there and create, to innovate, and that we do not want to invoke the law of unintended consequences whereby we decrease the incentive to innovate, decrease the incentive for more technological breakthroughs.

We know that the satellite industry is driving the digital revolution in the cable industry. We know that, and the more successful you are is the more they are going to have to move because it is all about paranoia, and the broadcasting industry and every other industry that is represented here is all driven by the same phenomenon.

And I am looking forward to working with you because I do not come to this with any preconceived judgment as to what is the right route out, except that it has to at the end of the day benefit the consumer, the viewer at home with lower prices and more choices, which I believe is the promise of all of your industries.

I thank you, Mr. Chairman.

Mr. UPTON. Thank you.

I want to thank all of the panelists for being here. I know we asked a lot of good questions. We look forward to the decisions that are going to be made downtown.

Thank you.

[Whereupon, at 5:25 p.m., the subcommittee was adjourned.]
[Additional material submitted for the record follows:]

PREPARED STATEMENT OF SOPHIA COLLIER, PRESIDENT AND CEO, NORTHPOINT TECHNOLOGY, LTD.

Mr. Chairman, members of the Committee, I applaud you for holding today's hearing on the status of competition in the Multi-Channel Video Programming Distribution Marketplace.

THE NEED FOR FACILITIES-BASED COMPETITION

The fact of the matter is that the state of competition in this marketplace is dismal, and Echostar's acquisition of DirecTV can only make matters worse.

As disclosed in its most recent annual report on competition in video markets, the FCC has certified only one percent of all communities in the United States have effective competition.[1] EchoStar's acquisition will simply match today's local cable monopoly with tomorrow's national satellite monopoly.

When Congress passed the 1996 Telecommunications Act, many hoped that cable overbuilders would enter the marketplace and create new competition. That, unfortunately, has not come to pass. In fact, these overbuilders have failed to materialize. And if this merger occurs we will see the total elimination of facilities-based competition in satellite service.

DBS has never been a price competitor to cable. If it were, the entry of DBS service should have tempered the rise of cable rates. Yet for the last five years cable prices have *increased* at 2.2 times the rate of inflation. Remarkably, the cable rate increases appear to have increased at a faster pace after DBS service began in December 1994.[2] Clearly, a form of competitor to cable other than DBS is needed if consumers are ever going to enjoy the higher quality and lower prices that have been realized in other areas such as personal computers, long distance services, and consumer electronics.

For almost eight years now, our company has stood ready to offer consumers a new, facilities-based alternative to cable and DBS service. We can provide a uniform high quality of service in all 210 local markets in the country. We would offer your consumers access to 96 channels of video programming for $20/month and high speed access to the Internet for just another $20/month.

Some may recall that nearly three years ago I testified before this very subcommittee, then under the leadership of Chairman Tauzin. Let me repeat to you a commitment I made then, which still holds true today: "Once regulatory approval is achieved, our service can be deployed in the first markets in as little as six months, with nationwide coverage within two years."[3]

In the period of time since I last addressed this panel, we could have fully built out our entire network, offering all of your constituents the choice of a low-cost alternative to cable and satellite.

SATELLITE OPPOSITION TO NEW COMPETITION

The only reason that our service is not deployed today is because the satellite incumbents have used the regulatory process to slow our progress toward approval to a crawl. Initially they tried to turn our licensing process into a Catch 22—we can't be licensed until we can prove that we won't cause interference to DBS, but we shouldn't be given any experimental licenses to demonstrate our abilities. With strong support from Members of Congress, we have been able to successfully demonstrate our technology in Kingsville, TX, Austin, TX, and Washington, DC.

But rather than invest in the infrastructure of our system, we've invested millions in legal fees.

Few small companies with new technologies could sustain the kind of multi-year assault from entrenched incumbents that we've experienced. In the end, when incumbents are permitted to abuse the regulatory process to keep out new competition, its not the prospective entrepreneurs that suffer the greatest loss, its consumers who are denied the opportunity to select from alternative providers who can offer better service and lower prices.

Northpoint is not concerned about our ability to compete effectively against New EchoStar. What we do fear, however, is that the new satellite monopoly will lever-

[1] 7th Annual Report on Competition in Video Markets, Jan. 8, 2001, paragraph 138.
[2] Bureau of Labor Statistics, comparison of monthly cable prices and consumer product index.
[3] Statement of Sophia Collier before the House Commerce Subcommittee on Telecommunications, Trade and Consumer Protection, February 24, 1999.

age its power to ratchet up the satellite industry's eight-year campaign to keep us out of business.

EchoStar's continued opposition to our service—at a time in which EchoStar desperately needs to demonstrate to antitrust and FCC regulators that there will be sufficient competition in the MVPD marketplace after its merger—attests to the depth of its commitment to keep us out.

I hope members of the Committee share Northpoint's frustration at our slow progress towards the marketplace. As you consider the merits of the EchoStar consolidation of the satellite industry, I ask that you examine how that company has been treating this would-be competitor.

LOCAL CHANNELS

The proponents of the merger have asserted that they need to consolidate so that they can deliver local channels to more markets. This statement further confirms our long-standing assertion that satellites are ill-suited to carry local TV stations.

Even though a single company will control 100% of the spectrum allocated to DBS service, the proponents of the merger themselves concede they will still lack the capacity to serve even a *majority* of the 210 local television markets. But even assuming the merger goes through, the public must wonder if it can count on EchoStar to make good on its claim to serve 100 markets. EchoStar's record is one of seeking to avoid local carriage, not foster it.

Recall that EchoStar supported enactment of legislation to enable it to carry local channels, but later led an industry lawsuit seeking to over turn the must carry component of the law, a compromise that was critical to ensuring the legislation's passage.

Earlier this year the satellite industry ridiculed my prediction, published in *Broadcasting & Cable* magazine, that on January 1st—just in time for the college Bowl games—the DBS companies would likely drop local television stations in dozens of markets in order to comply with the must carry law.[4] Now comes word—from none other than EchoStar CEO Charlie Ergen himself—that EchoStar will be forced to take down local programming in several markets.[5]

Many fans of the hit show "Survivor" won't be able to see the next contestant to be eliminated because EchoStar will have eliminated their ability to watch the local CBS affiliate.

Which markets will be exiled in this EchoStar version of "Survivor"? Stay tuned for the answer on January 1st.

Nevertheless, if the public is still willing to assume that New EchoStar will try to serve 100 markets, this won't come about until it addresses the incompatibility between the existing DirecTV and EchoStar set top boxes. This lengthy process will slow the provision of local channels.

Finally, these 100 markets that New EchoStar claims it will serve with local channels leave behind the people who would benefit most from getting local channels via satellite. That is, the states with the highest penetration of DBS service (and usually the lowest penetration of cable service) are least likely to get local channels via New EchoStar.

SPECIOUS CLAIMS OF INTERFERENCE

The satellite industry says it has no problem with Northpoint's terrestrial service—so long as it operates in another spectrum band. The FCC has rejected this specious, self-serving excuse.[6]

DBS satellites today share the 12 GHz band with each other, enabling a tremendous amount of spectrum to be reused over and over again. DBS satellites in the

[4] See "Technology validated: Northpoint asks FCC to proceed with license—at last," Sophia Collier, *Broadcasting and Cable,* June 11, 2001; "Fears of interference: DBS 'fights tooth and nail' to protect customers, investment," Chuck Hewitt, *Broadcasting and Cable,* June 25, 2001.

[5] "ECHOSTAR SURPRISES WITH RECORD-BREAKING QUARTER," *Communications Daily,* October 24, 2001: "Ergen said EchoStar 'may be forced to take down' local TV programming in several markets to comply with must-carry rules because EchoStar 7 won't be launched in time to meet increased demand. He indicated eliminating service was last resort, but finances would be major determinant in decision. 'We have some markets where we offer 22 channels and there are only a couple of thousand' subscribers. [']We are going to make sure' where service is offered 'makes economic sense . . . We're going to have to make some tough choices.' "

[6] First Report and Order, ET Docket No. 98-206, paragraph 168 (November 29, 2000): "These [other] bands either do not offer the same amount of spectrum, are encumbered by existing operations, impose higher equipment costs, or have significant propagation constraints. The use of innovative spectrum sharing techniques will facilitate a high level of frequency reuse in this [12 GHz] band and provide a variety of broadband services to a vast number of consumers."

12 GHz Ka Band are stationed nine degrees apart over the equator; in the Ku Band, similar satellites are stationed just two degrees apart.

Northpoint's patented technology brings satellite spectrum sharing principles down to earth. We avoid interference by transmitting in a southerly direction, right into the back end of DBS subscribers' reception dishes, which serves as a shield to our transmissions.

The FCC has noted that in all of the tests of our system, not a single DBS subscriber has suffered an outage,[7] despite the satellite industry's dire predictions that interference was "unavoidable" for "tens of thousands" of subscribers.[8]

Based on these successful tests, the FCC established the Multichannel Video Distribution and Data Service (MVDDS). The FCC found that it would be in the public interest for the DBS industry to share the 12 GHz band with terrestrial services such as ours.[9]

Clearly, the FCC would not have established MVDDS unless it was confident that satellite-terrestrial spectrum sharing is indeed feasible. Congress sought and obtained further confirmation that terrestrial operations would not harm DBS customers when it directed the FCC to commission an independent test.[10] The FCC selected the MITRE Corporation, which unequivocally concluded, and I quote, "MITRE believes that with implementation of the licensing process and other policy recommendations outlined above, spectrum sharing between DBS and MVDDS services in the 12.2-12.7 GHS band is feasible."[11]

DBS: HOLD AUCTIONS, BUT NOT FOR SATELLITES

The satellite industry's latest line of attack is to subject us to a burdensome licensing process to which satellites are not required to endure. They say we should have to pay for the right to share the spectrum they were given for free.

Here are the facts:

The FCC awarded DBS operators in the 12 GHz Ku Band almost 6,000 MHz of spectrum without an auction.[12] In contrast, we are seeking just 500 MHz. True, EchoStar did buy some extra spectrum, but that was in addition to the 3,075 MHz of spectrum it had already obtained for free.[13] DirecTV has never participated in an auction for its spectrum.

While the FCC did auction two partial orbital slots[14], this must now be viewed as an anomaly. Just a few months ago, the FCC awarded 66,000 MHz of auction-free spectrum to 11 satellite companies—including EchoStar, DirecTV and Pegasus—who will provide DBS-type service in the Ka Band.[15]

We are in a proceeding at the FCC with eight non-geosynchronous orbiting satellites (NGSOs) who applied on the same day as us to use the same spectrum.[16] The FCC determined that we can all share the spectrum safely with one another and with DBS incumbents, but only our application is being contemplated for an auction.[17] To put this in perspective, the NGSOs seek 25,400 MHz of spectrum; we seek just 500 MHz—more than a 50:1 ratio!

How is this so? Why would the FCC discriminate against applications solely on the basis of technology? The answer is, with respect to the satellite applications, federal statute prevents the FCC from conducting an auction.[18] (While our applications were pending, the satellite industry sought and obtained an exemption from auc-

[7] FCC First Report and Order, paragraph 215.

[8] DirecTV *ex parte* filing urging the FCC to reject Northpoint's experimental testing in Washington, DC, June 23, 1999.

[9] First Report and Order, paragraph 167.

[10] Public Law 106-553, Title X, "Launching our Communities' Access to Local Television Act of 2000," Section 1012—"Prevention of Interference to Direct Broadcast Satellite Services."

[11] *Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band,* MITRE Corporation, page 6-8 (April 23, 2001).

[12] "DBS Orbital/Channel Assignments," http://wireless.fcc.gov/auctions/data/maps/dbs.pdf. (Based on FCC's assignment of 185 transponder channels without an auction. Each orbital slot allocates 1,000 MHz of spectrum to 32 transponder channels, i.e., 31.25 MHz/transponder channel times 185 = 5,781.25 MHz.)

[13] Northpoint *ex parte* letter to Chairman Powell, Appendix C (November 28, 2001).

[14] January 25-26, 1996, 24 channels at 148 degrees; 28 channels at 101 degrees.

[15] FCC Ka Band "Second Round" Order, DA 01-1693 (August 2, 2001).

[16] ET Docket No. 98-206.

[17] First Report and Order and Further Notice of Proposed Rulemaking, paragraphs 331-339.

[18] Public Law 106-180, Section 647—Satellite Auctions: "Notwithstanding any other provision of law, the Commission shall not have the authority to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services."

tions as a rider to the ORBIT Act, the legislation which privatized Intelsat and Inmarsat.)

We firmly believe that this statutory exemption should apply to the spectrum used by satellites and not just to the satellites themselves. Certainly a statutory clarification is needed to end the obvious competitive advantage it bestows upon satellites at the expense of terrestrial competitors that would use the same spectrum.

Putting aside the need for parity, the FCC still lacks the authority to hold a spectrum auction in our case because there are no mutually exclusive applicants before it. Northpoint Technology alone submitted technology for the independent MITRE test, a statutory requirement. Another company, MDS America, has advocated an auction, but apparently because of its foreign ownership, the company has not filed an application.

Northpoint's technology is patented and has been licensed only to its Broadwave affiliates. To wait for new and unknown innovators to come forward with a non-infringing technology, just for the purpose of holding a spectrum auction, cannot be considered good public policy. American consumers need new service now.

SET TOP BOX STANDARDIZATION

If the merger is approved, at a very minimum conditions must be imposed to ensure that customer set top boxes are open to competitive services.

These conditions would replicate the "open access" and "interoperability" regulations now required of cable operators and cable boxes. They would allow new terrestrial providers to offer competitive services to EchoStar customers to either complement (e.g., local channels and high speed Internet) or completely replace EchoStar service. Consumers should be free to choose to switch providers without losing their investment in equipment.

The FCC reached a similar conclusion with respect to the new satellite radio service, for which it has ruled that all Digital Audio Radio Service (DARS) operators must design their receiver for interoperability with all other DARS operators.[19]

In practical terms the new regulations should be implemented at the same time that EchoStar standardizes its set top boxes. Instead of providing a closed set top box that can only receive its service, EchoStar should be required to provide all of its customers a box that is open to competition. All future set top boxes should be required to be designed according to these regulations.

In order for this to be effective the following three principles should be observed.

- All DBS boxes must conform to an open (non-proprietary) standard such as the DVB protocol or other open-standards based (freely available) transmission protocol so that these boxes can be connected to new terrestrial providers.
- All DBS boxes must have separate conditional access, as the rules require for cable boxes.
- Add on or proprietary features should be allowed but must be designed as removable modules (similar to PC cards, for example) such that the basic functionality of the set top box is not disturbed by adding or removing proprietary features.

PROGRAM ACCESS

Before concluding, I would like to comment on an important matter on which I believe we share common views with the DBS industry and that is program access.

Section 628 of the Communications Act prohibits exclusive contracts between vertically integrated programming vendors and cable operators. Congress recognized that cable operators enjoyed a monopoly in program distribution at the local level and concluded that exclusive contracts would further inhibit competition and diversity. This provision will sunset on October 5, 2002, unless the Commission determines it continues to be necessary.

The Commission has noted that the purpose of the restrictions on exclusive contracts for this ten year period were intended to foster development of emerging competitors to cable, allowing a transition to a competitive market for the distribution of programming.

Regrettably the transition to the competitive market envisioned by Congress in 1992 has not occurred, as cable still maintains its 80% monopoly in the MVPD marketplace.

Instead of seeing greater diversity of programming, industry consolidation threatens to limit consumer choice. Through its TCI and Media One mergers, AT&T became the largest cable operator. AOL, which already dominated the ISP landscape, acquired Time Warner, becoming the second largest cable operator. Now, number

[19] 47 CFR § 25.144 (a)(3)(ii)

3 Comcast, poised to merge with AT&T Broadband, would overtake AOL/Time Warner and become the largest vertically integrated cable operator. Nearly a decade after Congress insightfully prohibited exclusive contracts, programming content and distribution is even more firmly entrenched in the hands of a few powerful cable companies.

Content is crucial in order for competitors to attract and retain viewers. Given the recent and substantial industry consolidation, it's even more critical today to maintain the prohibition on exclusive contracts. If incumbent cable providers are permitted to use their market dominance to inhibit competitors' access to programming, competitors will not survive. The ultimate loser will be the American people who will be denied the benefits of competition and diversity.

CONCLUSION

Northpoint has been seeking approval for almost eight years. It has invented and proven a new technology that can provide low cost services to consumers who currently lack service and/or competition. Although entrenched incumbents such as the DBS industry have opposed Northpoint, we have continued to seek licenses and strongly believe our services are now needed more than ever.

I would like to conclude by reiterating my offer, made nearly three years ago, to fully deploy our system throughout all 210 television markets within two years.

THE COMMONWEALTH OF MASSACHUSETTS
STATE HOUSE, BOSTON
December 4, 2001

The Subcommittee on Telecommunications and the Internet
2125 Rayburn House Office Building
Washington D.C. 20515

DEAR CHAIRMAN UPTON, RANKING MEMBER MARKEY AND MEMBERS OF THE SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET:

I apologize that my schedule does not permit me to attend the Committee's public hearing today on the status of competition in the multi-channel video programming distribution marketplace. However, my absence does not in anyway indicate less than full support for mandating satellite and cable providers operating across the country to provide local news channels to all of their subscribers.

As you know, since the events of September 11, 2001 it is more important than ever for people across the country to be informed as to what decisions are being made, and what actions are being taken by government officials regarding public safety and public health on both the state and federal level. It is essential for people to have immediate access to not only national news but also a local news source that can provide up to the minute accounts of the events of the day.

With that said, I represent the Second Berkshire District in the Massachusetts House of Representatives. It is a large, rural district, encompassing parts of Berkshire and Franklin Counties. I write to inform you that most of my constituents are unable to receive local news coverage from Massachusetts' network stations. As much of my district is rural, cable service is not available in all areas and consequently most of my constituents rely on satellite providers to receive television signals. Additionally, due to the rural nature and mountainous terrain of the area, a standard roof top antenna will not service homes with local channels almost without exception. I can without hesitation make the assertion that this is a problem in other parts of the country as well.

The problem of not having access to the local Boston channels in Western Massachusetts stems from the Satellite Home Viewer Improvement Act of 1999 (SHVIA). This legislation permitted satellite providers to offer local broadcast TV to subscribers, however, SHVIA also gave satellite companies the authority to decide whether or not to provide local coverage to subscribers. Currently, none of the satellite companies are providing local coverage in western Massachusetts. Nevertheless, even if the satellite providers decided to provide local TV coverage, Berkshire County is considered to be in the Albany, NY local market, and Franklin County is in the Springfield, MA market. Western Massachusetts still would not receive news from Boston, our state's political and economic capital.

At a time when public safety and public health are of major concern across the country, it is imperative that people know of government decisions that are being made that affect them. Everyone across the country deserves to know immediately breaking news on public health and safety, regardless of where they live. On October 2, 2001, Massachusetts Governor Jane Swift addressed the citizens of Massachusetts on the issue of public safety, which was carried on all three local network news stations in Boston; however, most of my constituents did not have the means to watch this address.

This problem is not endemic to Massachusetts. Across the United States our own government is not allowing access to local news channels; channels that will provide people with the best source information at a time when news and information is crucial. The recent events in our country illustrate the great need for people to have immediate access to news and information. By not mandating that satellite and cable providers offer access to local network stations, the Government is limiting the public's ability to make timely decisions regarding public safety and health in the event of a crisis.

People need access to local TV news stations and they need it now. As this information needs to be provided without delay, I respectfully request that you seek to mandate satellite and cable providers operating across the country to provide at least one local news channel from the political capital of all of their subscribers' respective states. On a matter as important as this, politics should not be able to trump the dissemination of vital information to citizens.

Thank you for your time and attention on this matter. If you have any questions or require additional information that would assist you in the consideration of this issue, I would be more than willing to discuss this matter at your convenience. I can easily be reached at 617-722-2240 or 413-684-5133.

Sincerely,

SHAUN P. KELLY
State Representative