

Before the  
Federal Communications Commission  
Washington, D.C.

In re Application of )  
 )  
 MCI TELECOMMUNICATIONS )  
 CORPORATION, Assignor )  
 )  
 and ) File No. SAT-ASG-19981202-0093  
 ) Call Sign S2232  
 ECHOSTAR 110 CORPORATION, Assignee )  
 )  
 For Consent to Assignment of Authorization to )  
 Construct, Launch, and Operate a Direct )  
 Broadcast Satellite System Using 28 )  
 Frequency Channels at the 110° W.L. Orbital )  
 Location. )  
 )  
 )  
 )  
 )  
 In re Application of )  
 )  
 AMERICAN SKY BROADCASTING, LLC, )  
 Assignor )  
 )  
 and ) File No. SES-ASG-19981204-01829(4)  
 ) Call Signs E980180, E980174, E980178,  
 ECHOSTAR NORTH AMERICA ) E970394  
 CORPORATION, Assignee )  
 )  
 For Consent to Assignment of Transmit- )  
 Receive Earth Station Authorizations. )  
 )

**ORDER AND AUTHORIZATION**

**Adopted: May 19, 1999**

**Released: May 19, 1999**

By the Commission: Commissioner Ness issuing a separate statement.

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**I. INTRODUCTION**

1. In this Order we grant the application of MCI Telecommunications Corporation ( MCI ) and EchoStar 110 Corporation ( EchoStar ) for consent to the assignment from MCI to EchoStar of MCI s authorization to construct, launch and operate a Direct Broadcast Satellite ( DBS ) system using 28 frequency channels at the 110° W.L. orbital location. We also grant the related application of EchoStar s affiliate EchoStar North America Corporation ( ENA ) and American Sky Broadcasting, L.L.C. ( ASkyB ) for consent to the assignment from ASkyB to ENA of ASkyB's authorizations associated with earth station facilities constructed by ASkyB in Gilbert, Arizona.<sup>1</sup> Grant of these applications will serve the public interest because they will allow

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<sup>1</sup> We will refer to the applications collectively as the Joint Application and individually as "EchoStar/MCI Application" and "ENA/ASkyB Application." On November 30, EchoStar signed agreements to acquire certain assets from News Corp. and MCI Worldcom Inc. EchoStar proposes to acquire the MCI/News Corp license to operate high-powered DBS service on 28 frequency channels at 110°. EchoStar would acquire from ASkyB a satellite uplink center in Gilbert, Arizona, and contracts related to two Loral-built satellites. News Corp. will pay costs of building, launching and insuring these satellites, scheduled for launch in 1999. EchoStar also would receive a worldwide license agreement to manufacture and distribute set-top boxes internationally and a three-year retransmission consent agreement for EchoStar's DISH Network to rebroadcast Fox Network local station signals to their respective markets. In addition, EchoStar would carry the Fox News Channel on the DISH Network, and MCI would receive the non-exclusive right to bundle EchoStar's DBS service with MCI Worldcom's telephone service. EchoStar and News Corp. agree, upon consummation of the transaction, to withdraw any pending lawsuits regarding their prior attempt at merger.

the 28 channels of DBS spectrum at the 110° W.L. orbital location to be used in a timely manner and will likely allow EchoStar to provide consumers with a more competitive alternative to cable offerings and thereby increase competition in the Multi-Channel Video Programming Distribution ( MVPD ) market, which should lead to additional service offerings and/or lower prices.

## **II.      BACKGROUND**

2.      Since its introduction in 1994, DBS has emerged as one of the fastest growing major consumer video programming services in the United States.<sup>2</sup> Today there are only three orbital locations from which DBS operators can provide service to customers across the entire United States.<sup>3</sup> They are 101° W.L., 110° W.L., and 119° W.L., each consisting of 32 channels. The 110° W.L. location is the only one that remains completely unused. MCI acquired its authorization to use 28 channels at 110° W.L. by bidding \$682.5 million at a spectrum auction conducted by the Commission on January 24 and 25, 1996.<sup>4</sup> MCI planned to develop its DBS business in a joint venture with ASkyB, a wholly-owned subsidiary of The News Corporation Limited ( News Corp. ).<sup>5</sup> In pursuit of this plan, MCI has proceeded in constructing its authorized system, and ASkyB constructed an earth station in Gilbert, Arizona for communications with that system. MCI, however, has since concluded that it is not feasible for it to proceed with the launch of a stand-alone DBS system, and has instead entered into a purchase agreement with EchoStar.<sup>6</sup>

3.      EchoStar's parent, EchoStar Communications Corporation ( ECC ) has been authorized to provide DBS service since 1989.<sup>7</sup> ECC, through subsidiaries, is currently authorized to provide service from the 119° W.L., 148° W.L., 61.5° W.L., and 175° W.L.<sup>8</sup>

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<sup>2</sup> Counting Primestar, as of June 1998, there were just under nine million DBS subscribers. Currently, two out of every three new multichannel subscribers chooses to subscribe to DBS. February 1999 *DBS Investor*.

<sup>3</sup> The northern portion of Alaska is the only part of the Nation where service is not technically feasible from these orbital locations.

<sup>4</sup> *MCI Telecommunications Corp.*, 11 FCC Rcd. 16275 (Int'l Bur. 1996) ( *MCI Authorization Order* ), *aff'd*, Memorandum Opinion and Order, FCC 99-110 (released contemporaneously with this Order).

<sup>5</sup> *MCI Authorization Order*, 11 FCC Rcd. at 16277.

<sup>6</sup> EchoStar/MCI Application at 2-3.

<sup>7</sup> *Continental Satellite Corp.*, 4 FCC Rcd. 6292 (1989).

<sup>8</sup> *EchoStar Satellite Corp.*, 7 FCC Rcd. 1765, 1770 (1992); *Direcstsat Corp.*, 8 FCC Rcd. 7962, 7964 (1993).

ECC, MCI and ASkyB have executed a Purchase Agreement whereby, subject to certain approvals, MCI will assign to EchoStar its authorization for a DBS system at 110° W.L. and ASkyB will assign to EchoStar its Gilbert earth station complex and associated authorizations. Among other assets, EchoStar will also acquire MCI's two, partially constructed satellites that MCI had intended to use in its DBS system.<sup>9</sup> In return, MCI and a News Corp. subsidiary will receive non-controlling, equity holdings in ECC of approximately eight percent and thirty-two percent respectively.<sup>10</sup> Both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) did not object to the proposed transaction and granted early termination of their antitrust review process.<sup>11</sup>

4. Applicants assert that this transaction will provide consumers several far-reaching benefits. They first assert that it will give EchoStar the capacity to offer consumers national programming, local programming, high definition television ( HDTV ), data-enriched video entertainment, high-speed access to the Internet and other broadband services through the use of a single, customer provided, earth satellite antenna, thereby promoting effective competition in the MVPD market.<sup>12</sup> Applicants claim that, in order to truly compete with dominant cable operators in the MVPD market, they must be able to offer local signals (including HDTV) to a substantial percentage of American households as well as to offer other HDTV programming, data-enriched video entertainment, high-speed Internet access<sup>13</sup> and various other data services.<sup>14</sup> Applicants also submit that EchoStar's acquisition of 110° W.L. would allow EchoStar to provide seamless offerings to consumers through a single earth station antenna. They assert that because the 110° W.L. slot is located in the middle of the three U.S. high-power DBS slots, it can be used to send signals to DBS receiving antennas already pointed to satellites in either the 101° W.L. or 119° W.L. orbital location.<sup>15</sup> As a result, they claim, all current DBS subscribers in the country could

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<sup>9</sup> EchoStar/MCI Application at 3-5; ENA/ASkyB Application at Exhibit 3 p. 1.

<sup>10</sup> EchoStar/MCI Application at 4-5.

<sup>11</sup> See <<http://www.ftc.gov/bc/earlyterm/1998/9812/et981216.htm>> (early termination of review granted Dec. 16, 1998).

<sup>12</sup> EchoStar/MCI Application at 5-6. The parties assert that recent technological developments will allow a consumer to receive two DBS signals from a single earth station antenna, thus allowing EchoStar to transmit DBS signals from both its existing authorizations at 101° W.L. and its proposed authorizations at 110° W.L. to its existing customers.

<sup>13</sup> As to prospective Internet services, the parties also note, however, that because of the one-way nature of DBS transmission, it will be necessary to have an alternative return channel to achieve inter-activity, which will require additional capacity. EchoStar/MCI Application at 16, n.35.

<sup>14</sup> EchoStar/MCI Application at 16-17.

<sup>15</sup> EchoStar/MCI Application at 17 and n.37 citing *United States v. Primestar, Inc., et al.*, Complaint in

receive signals from a satellite in the 110° W.L. slot without having to purchase and install a second separate earth station receive antenna.<sup>16</sup> Applicants cite additional benefits, including allowing EchoStar to expedite DBS service to customers in Alaska, Hawaii and Puerto Rico, and enabling EchoStar to put promptly to use the one-channel assignment of its affiliate Directsat Corporation at 110° W.L.<sup>17</sup>

5. Several parties filed petitions to deny, comments in support, or requested imposition of conditions. The Small Cable Business Association (SCBA), the United Church of Christ *et al.* (UCC), and PrimeTime 24 Joint Venture (PrimeTime 24) contend, for separate reasons, that the Joint Application should be denied. SCBA opposes the applications on several grounds, alleging that grant of the applications would harm cable operators and local broadcast stations.<sup>18</sup> UCC contends that Applicants have failed to satisfy the Commission's qualification requirements.<sup>19</sup> PrimeTime 24 urges denial of the Joint Application on the grounds that EchoStar is contractually barred from providing certain of the services it proposes.<sup>20</sup> Finally, while not directly addressing the merits of the Joint Application, Time Warner Cable (Time Warner) asserts that the Joint Application contains unfounded attacks on the cable industry.<sup>21</sup>

6. In contrast, the DOJ urges expeditious grant of the Joint Application, asserting that grant would increase competition in the MVPD market.<sup>22</sup> In addition, while not opposing the Joint Application, the State of Hawaii (Hawaii) and CoreComm Limited (CoreComm) ask that a grant be conditional. Hawaii requests assurances that consumers in Hawaii will be able to use small, 18-24 inch receiving dishes and that EchoStar continue to be obligated to serve Hawaii from its authorization at 148° W.L., even if it serves Hawaii from the 110° W.L. orbital location. CoreComm seeks assurances that EchoStar and News Corp. will not enter into any exclusive programming arrangements, and that other MVPDs continue to have access to News Corp.'s programming. For the reasons discussed below, we conclude that it is in the public interest to grant the Joint Application without conditions and do so today.

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Civil File No. 1:98CV01193 (JLG) at 83 (D.D.C. May 12, 1998).

<sup>16</sup> *Id.*

<sup>17</sup> *See Directsat Corp.* 10 FCC Rcd. 88 (1995) (granting application for transfer of control of Directsat Corporation from SSE Telecom, Inc. to EchoStar Communications Corp.).

<sup>18</sup> SCBA Petition at 3.

<sup>19</sup> UCC Petition at 2-3.

<sup>20</sup> PrimeTime 24 Petition at 2-3.

<sup>21</sup> TimeWarner Comments at 2.

<sup>22</sup> DOJ Comments at 1.

### **III. DISCUSSION**

#### **A. Legal Standard**

7. Under Section 310(d) of the Communications Act, we must find that the proposed assignment serves the public interest, convenience, and necessity before we can approve the assignment of authorizations or licenses.<sup>23</sup> To make this finding, we must weigh any potential public interest harms against any potential public interest benefits, considering competitive effects and other public interest factors such as rapid delivery of service to the public.<sup>24</sup> As we explained earlier this year in the TCI/AT&T case:

"[O]ur public interest analysis is not, however, limited by traditional antitrust principles. . . . It also encompasses the broad aims of the Communications Act. . . . To apply our public interest test, then, we must determine whether the merger violates our rules, or would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy. That policy is, of course, shaped by Congress and deeply rooted in a preference for competitive processes and outcomes."<sup>25</sup>

8. Consistent with this precedent, we begin our analysis by identifying the relevant product markets that are affected by the proposed transaction.<sup>26</sup> Then we consider the competitive effects of the proposed transaction in these markets. Finally, we consider a number of other issues raised by parties that factor into a public interest determination.

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<sup>23</sup> 47 U.S.C. 310(d).

<sup>24</sup> *Southern New England Telecommunications Corp., Inc.* 13 FCC Rcd. 21292, 21298 (1998) (granting application for transfer control of Southern New England Telecommunications Corp. to SBC Communications, Inc.); *MCI Communications Corp.*, 13 FCC Rcd. 18025, 18030 (1998) (granting application for transfer control of MCI Communications Corp. to WorldCom Inc.).

<sup>25</sup> *Tele-Communications, Inc.*, Memorandum Opinion and Order, CS Docket No. 98-178, FCC 99-24 at 14 (released February 18, 1999) (granting application for transfer of control of Tele-Communications, Inc. to AT&T Corp.). See also *United States Satellite Broadcasting Co., Inc.* Order and Authorization, DA 98-225 (released April 1, 1999).

<sup>26</sup> See, e.g., *NYNEX Corp.*, 12 FCC Rcd. 19985, 20008 (1997) (granting application for transfer of control of NYNEX Corp. to Bell Atlantic Corp.); *Teleport Communications Group, Inc.*, 13 FCC Rcd. 15236, 15245 (1998) (granting application for transfer of control of Teleport Communications Group, Inc. to AT&T Corp.). Each product market is defined by a geographic component.

**B.      Effects on competition**

*1. Relevant Product Markets*

9.      In our annual assessment of the video marketplace, we have found that DBS operators compete in two product markets.<sup>27</sup> First, DBS operators compete with each other and other distributors of video programming for the acquisition of programming.<sup>28</sup> We shall call this market the "programming market". Second, DBS operators compete with each other and other distributors in the distribution of multiple channels of video programming to consumers. We shall call this market the multichannel video program distribution or "MVPD" market.<sup>29</sup>

10.     We have found the "programming market" to be national or regional in geographic scope, depending upon whom the programmer wishes to reach and to whom the distributor plans to transmit the programming.<sup>30</sup> We have also found that the relevant geographic market for assessing MVPD competition is a local area. The extent of the local area is defined by the overlap of the "footprints" of the various service providers in that area.<sup>31</sup>

11.     EchoStar currently distributes by satellite multiple channels of video programming directly to consumers across the United States.<sup>32</sup> Thus, EchoStar competes in the MVPD market as a DBS distributor. Because EchoStar distributes programming directly to consumers across the United States, it competes in many local MVPD markets. Because EchoStar serves

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<sup>27</sup> *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034 at Section III (1998) (*1997 Cable Competition Report*).

<sup>28</sup> *In the Matter Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Report*, 13 FCC Rcd. 24284, 24362 (1998) (*1998 Cable Competition Report*).

<sup>29</sup> *1998 Cable Competition Report*, 13 FCC Rcd. at 24287. DOJ concurs with the Commission's analysis that the relevant product market is the provision of MVPD services. DOJ comments at 3.

<sup>30</sup> *1998 Cable Competition Report*, 13 FCC Rcd. at 24362. Most programmers produce video programming with the intent of distributing it to a national audience. However, there is some video programming, such as regional sports programming, that is intended for distribution to a regional audience only and so is sold to distributors for that purpose.

<sup>31</sup> The "footprint" of a service provider is determined by the geographic reach of the provider. For example, the geographic footprint of a cable franchise operator is determined by the location of the homes within a franchise that an operator passes with its cable and thus can serve. *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 12 FCC 4358 at 115 (1997) (*1996 Cable Competition Report*).

<sup>32</sup> *See* <http://www.dishnetwork.com/> for a description of EchoStar's current offerings and coverage.

consumers across the United States, it has an incentive to acquire programming primarily intended for national distribution. Consequently, EchoStar primarily competes with other companies for the acquisition of programming in the national programming market.<sup>33</sup>

12. In the present transaction, EchoStar proposes to acquire the assets of a joint venture of MCI and ASkyB, which was poised to enter the DBS industry. MCI had purchased the authorization to construct, launch, and operate a DBS system using 28 frequency channels at the 110° W.L orbital location. ASkyB has a license for a earth station to serve MCI's orbital location. Thus EchoStar, a current DBS distributor, proposes to acquire the assets of a potential DBS distributor, ASkyB, by acquiring the DBS related assets of both the joint venture and its participants. Consequently, this transaction potentially affects the programming market and the MVPD market.<sup>34</sup>

*2. Competition in the Affected Product Markets*

13. We focus first on aspects of the current state of competition in these markets that are relevant to our evaluation of the proposed transaction's effect on competition in these markets.<sup>35</sup> This discussion reaches conclusions that are relevant to our analysis of various issues raised by comments on this transaction.

14. The programming market. DBS operators compete with other distributors of video programming, including terrestrial broadcast television networks, to obtain programming to distribute. While we do not have data on the individual purchases of video programming by each of these competitors, we can draw inferences from the following information. As of June 1998, there were approximately 98 million households with a television set ("TV households") in the United States. Of these TV households, approximately 76.6 million subscribed to the services of

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<sup>33</sup> However, as we discuss further below, EchoStar has indicated that it plans to use some of the additional channels at 110° W.L. to obtain and retransmit the signals of local terrestrial TV stations to better compete with cable TV systems. If EchoStar chooses to retransmit such programming, it may improve its ability to acquire subscribers and thereby acquire programming, but these changes are unlikely to confer on it any market power in the acquisition of programming, as they would be simply matching the competitive offerings of cable operators.

<sup>34</sup> We recognize that as a result of this transaction, News Corp will have an equity interest in EchoStar. We further recognize that one cable operator (AT&T) has an indirect interest in News Corp. While there are no attribution rules for DBS service, under either broadcast or cable attribution rules, no cable operator would have an attributable interest in EchoStar. Consequently, we do not believe this transaction will lessen EchoStar's efforts to compete with cable operators for subscribers.

<sup>35</sup> *See 1998 Cable Competition Report*, 13 FCC Rcd. 24284, for a recent and more complete assessment of the status of competition in the markets for the delivery of video programming.



some MVPD, and approximately 7.2 million subscribed to some DBS service.<sup>36</sup> As of June 1998, EchoStar had approximately 1.4 million subscribers.<sup>37</sup> These data strongly suggest that DBS operators generally, and EchoStar particularly, do not have enough subscribers to give them market power in the acquisition of video programming.<sup>38</sup> Such a conclusion is consistent with the fact that many, if not all, of the program access complaints discussed in the recent *1998 Cable Competition Report* concerned DBS distributors trying to obtain access to programming available to cable distributors at competitive terms or prices.<sup>39</sup>

15. The MVPD market. DBS distributors compete with a number of other MVPDs using different transmission media.<sup>40</sup> As of June 1998, of the roughly 76.6 million TV households that purchased the services of some MVPD, cable distributors had 65.4 million subscribers (or 85.3% of the MVPD total), while DBS distributors had 7.2 million subscribers (or 9.40% of the MVPD total).<sup>41</sup> Consequently cable distributors, rather than DBS distributors, dominate the

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<sup>36</sup> These estimates are from the *1998 Cable Competition Report*, 13 FCC Rcd. 24284 at C-1.

<sup>37</sup> This estimate is from SkyTrend, "DTH Subscribers: December 1997 - December 1998," [http://www.skyreport.com/skyreport/dth\\_us.htm](http://www.skyreport.com/skyreport/dth_us.htm).

<sup>38</sup> This analysis is consistent with the Commission's emphasis in its annual assessments of the video marketplace on whether or not distributors of video programming possess sufficient market power in the distribution market so as to confer on them the ability to exercise market power in the programming market. *See, e.g. 1997 Cable Competition Report*, 13 FCC Rcd. at 1108. *See also Tele-Communications, Inc.*, FCC 99-24 at 31-42 (similar analysis in the context of an acquisition of a MVPD).

<sup>39</sup> *See 1998 Cable Competition Report*, 13 FCC Rcd. 24284, Appendix E. The Commission's program access rules, 47 C.F.R. 76.1000-.1003, derive from Section 628 of the Communications Act, 47 U.S.C. 548, which prohibits unfair or discriminatory practices in the sale of programming intended for cable and satellite broadcasting. Section 628 is intended to increase competition in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by making it "unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." *Id.* 548(b). Section 628(d) provides parties aggrieved by conduct alleged to violate the program access provisions the right to commence an adjudicatory proceeding before the Commission. *Id.* 548(d).

<sup>40</sup> Competitors in the MVPD market include cable operators, DBS operators, wireless cable operators (Multichannel Multipoint Distribution Services, Local Multipoint Distribution Services, etc.), Satellite Master Antenna Television Systems, and Local Exchange Carriers. *See 1998 Cable Competition Report*, 13 FCC Rcd. 24284 at Section II for a fuller description and evaluation of the different competitors in the MVPD market.

<sup>41</sup> *See 1998 Cable Competition Report*, 13 FCC Rcd. 24284, Table C-1. As of November, 1998, there were approximately 65.81 million TV households that subscribed to cable TV and 8.34 million TV households that subscribed to DBS (DIRECTV, Primestar, EchoStar). Thus cable operators had approximately 8

national MVPD market.

16. The degree to which cable distributors dominate local MVPD markets varies across different regions of the United States. There are consumers, such as those living in sparsely populated rural areas, who may only be able to purchase the offerings of DBS distributors because their homes are not served by any other MVPD. We do not have available more geographically delineated data to ascertain the market position of DBS operators in different local MVPD markets. Nevertheless, we note that 96.6% of U.S. TV households are passed by a cable system.<sup>42</sup> This estimate suggests that most U.S. TV households have a choice between at least one cable operator and two DBS competitors. Further, based on the national MVPD market estimates, cable operators have far more subscribers on average than do DBS operators, as a group. Thus we conclude, as does the *1998 Cable Competition Report*, that cable operators continue to be the dominant distributors in most local MVPD markets.<sup>43</sup>

### *3. The 1995 DBS Auction Rule*

17. Although the above assessment of the current state of competition in the programming and MVPD markets concludes that EchoStar does not currently dominate these markets, the question remains whether or not the proposed transaction, if approved, would enable EchoStar to reduce future competition in the affected markets. After considering the issues raised by petitioners and commenters, we conclude below that on balance the proposed transaction, if approved, would benefit competition in the affected markets more than harm it.

18. In the *1995 Auction Order*, in which we established rules for the first (and to date only) DBS auction, we sought to encourage the emergence of new DBS entrants by limiting the capacity that an incumbent could acquire in the auction.<sup>44</sup> To this end, we adopted one-time spectrum limitations applicable only to that auction. Those rules required that any entity with an attributable interest in DBS channels at one full-CONUS location divest this interest within 12

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times as many subscribers as did DBS operators. Sources: [http://www.ncta.com/dir\\_current.html](http://www.ncta.com/dir_current.html), [http://www.skyreport.com/skyreport/dth\\_us.htm](http://www.skyreport.com/skyreport/dth_us.htm).

<sup>42</sup> The National Cable Television Association reports in its *Cable Television Developments: Fall 1998/Winter 1999* at 1, that of a total of 98,920,000 television households, 95,520,000 or 96.6% of these households are passed by a cable system. These estimates were taken from Paul Kagan Associates, Inc., *Marketing New Media* (November 16, 1998). A household is "passed" if cable service is sufficiently available to it that it might subscribe to cable service if it chooses.

<sup>43</sup> *1998 Cable Competition Report*, 13 FCC Rcd. at 24362-63.

<sup>44</sup> *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd. 9712, 9733 (1995) (*1995 Auction Order*).

months of acquiring an attributable interest in the other full-CONUS channels then available at auction.<sup>45</sup> The proposed transaction will allow EchoStar, an entity with an attributable interest in DBS channels at one full-CONUS location, to acquire an attributable interest in another full-CONUS location.

19. DOJ, in its comments supporting this current transaction, argues that market conditions have changed since the Commission issued its 1995 Auction Order and thus the concerns that motivated its spectrum limitation no longer apply. DOJ states that DBS and cable offerings have become closer substitutes for each other and, as a result, these operators engage in increasingly rivalrous behavior.<sup>46</sup> In support of this contention, DOJ makes two points. First, cable operators are spending an increasing amount of money monitoring and countering DBS operators' marketing plans.<sup>47</sup> Second, cable operators are spending an increasing amount of money upgrading their systems to provide more programming and better picture quality.<sup>48</sup> DOJ argues that we should approve this transaction as it will improve EchoStar's ability to match cable offerings and thus compete with cable operators.<sup>49</sup> We agree with DOJ that DBS operators and cable operators have engaged in increasingly rivalrous behavior, and that grant of these applications will likely increase the degree of that competition.

20. Further, DBS operators must obtain Commission approval for their acquisition of additional capacity to increase their product offerings because such acquisitions require assignment of spectrum and orbital locations. Cable operators, in contrast, can invest in either new (*e.g.*, fiber optic) or additional cable to add the capacity necessary to increase their product offerings without Commission approval. Thus, it is important for the Commission to take cognizance of the investment plans of EchoStar's competitors when judging whether or not EchoStar should be allowed to acquire more DBS capacity because these plans will likely effect EchoStar's ability to compete with cable operators in the future. In this regard, we note that EchoStar's competitors are also acquiring additional capacity in order to expand their product

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<sup>45</sup> *1995 Auction Order*, 11 FCC Rcd. at 9736, 9810. Full-CONUS refers to fact that DBS satellites at 101° W.L., 110° W.L. and 119° W.L., have footprints that cover the continental United States.

<sup>46</sup> DOJ Comments at 9. See F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, 3rd edition (1990), at 16, for a discussion of the importance of *rivalrous* behavior amongst firms that do not offer perfect substitutes for each others' product.

<sup>47</sup> DOJ Comments at 5.

<sup>48</sup> DOJ Comments at 5.

<sup>49</sup> DOJ states that "the deconcentration of the MVPD market and promotion of price competition between DBS and cable -- will best be served by allowing EchoStar to acquire the 28 channels at 110° slot while retaining its current 21 channels at 119°." DOJ Comments at 9.

offerings.<sup>50</sup> As the *1998 Cable Competition Report* notes, cable operators generally are investing in fiber optical cabling, converting to digital transmission of programming, and entering new markets by providing Internet access and Internet Protocol ("IP") telephony.<sup>51</sup> As a consequence, we find that EchoStar's acquisition of the additional DBS capacity at issue is not likely to confer on it the ability to dominate the markets in which it competes.

21. We recognize that if we allow EchoStar to acquire MCI's authorization to operate 28 DBS channels at the 110° W.L. orbital location, another firm with the intent of competing with cable operators is unlikely to enter the U.S. DBS industry.<sup>52</sup> This likelihood arises from the fact that there will be few unused full-CONUS DBS channels left after this transaction, and those that are left, represent an amount of capacity that is likely to be insufficient to offer a competitive substitute to cable offerings.<sup>53</sup> Nevertheless, we view the potential competitive benefits of allowing EchoStar to become a stronger competitor in MVPD markets as outweighing the potential competitive costs of reduced entry into the DBS industry. These potential competitive costs are mitigated by other entry possibilities. DBS operators compete in a number of MVPD markets where there are a number of alternative transmission media new entrants might use.<sup>54</sup> For example, the *1998 Cable Competition Report* noted the potential that utilities (*e.g.*, electric service companies) have to become major competitors in different local MVPD markets.<sup>55</sup> As a result of these changed circumstances, we do not believe that the reasoning behind the 1995 DBS channel limitation rule should be applied to the particular transactions.<sup>56</sup> Further, we agree with

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<sup>50</sup> *Tele-Communications, Inc.*, FCC 99-24 at 9.

<sup>51</sup> *1998 Cable Competition Report*, 13 FCC Rcd. at 24360.

<sup>52</sup> However, we also note that in order to facilitate the opening of international DBS markets, the United States has reached agreement with Mexico to permit DBS satellites licensed by either country to provide service into each other's territory. Thus, at some time in the future, a company licensed in Mexico may be able to provide DBS service to U.S. consumers. *See* Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 28, 1996.

<sup>53</sup> Eleven DBS channels at 119° W.L., which are currently licensed to TEMPO Satellite, Inc. (TEMPO) are not yet operational. On January 27, 1999, an application to assign TEMPO's license to DIRECTV was filed with the Commission. *See*, Public Notice, Report No. SPB-147 (February 1, 1999).

<sup>54</sup> For example, new entrants can enter through wireline transmission systems (*e.g.*, cable overbuilds, open video systems), wireless transmission systems (*e.g.*, Multichannel Multipoint Distribution Service, etc.), or combinations of these systems (*e.g.*, Satellite Master Antenna Television Systems).

<sup>55</sup> *1998 Cable Competition Report*, 13 FCC Rcd. at 24360.

<sup>56</sup> Our NPRM to revise Part 100 of our rules requests comment on whether the reasoning behind the one-time rule limiting DBS operators to one CONUS location would lead us to deny subsequent transfer

DOJ's conclusion that approval of the proposed transaction "could play a critical role in expanding consumers' choices in MVPD services, leading to better service, quality and lower prices for both DBS and cable."<sup>57</sup>

*4. Program Access Issues*

22. CoreComm and, to a limited extent, SCBA raise concerns about the effect of the proposed assignments on the availability of News Corp. programming. CoreComm points out that News Corp. controls access to Fox network, cable entertainment programming networks, and a large share of national and local sports programming in the United States.<sup>58</sup> It submits that News Corp. has a record of affording favorable treatment to cable multiple system operators (MSOs) in which it holds interests.<sup>59</sup> CoreComm, therefore, concludes that, if left unchecked, there is a substantial threat that News Corp. would also favorably treat EchoStar as well as News Corp.'s MSO partners.<sup>60</sup> Consequently, CoreComm requests that the Commission condition its approval of the proposed transaction upon: (1) News Corp.'s and EchoStar's commitments to refrain from any exclusive contracts that would preclude terrestrial MVPDs from obtaining News Corp. programming; and (2) News Corp.'s obligation to make its programming available to terrestrial MVPDs on nondiscriminatory terms and conditions no less favorable than those afforded to EchoStar or the Fox/Liberty cable partners.<sup>61</sup> SCBA concurs with imposing the second obligation by urging that we condition the grant on the continued availability of Fox broadcast programming to other MVPDs.<sup>62</sup>

23. In support of its request for conditions, CoreComm refers to the experience of its British affiliate, NTL, Inc. (NTL), in dealing with News Corp.'s British affiliate, British Sky

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applications. *See Policies and Rules for the Direct Broadcast Satellite Service*, IB Docket No. 98-21, Notice of Proposed Rulemaking, 13 FCC Rcd. 6907, 6937-47 54-65 (1998). There we stated at 62, that "[i]f DBS is considered part of a broader MVPD market, ... is there a reason to be additionally concerned if any one DBS system control more than a certain aggregate number of channel or more than a single DBS orbital position, especially a full-CONUS orbital position?" Although that Rulemaking is still outstanding, we do not believe it necessary to impose the one full-CONUS restriction in this case.

<sup>57</sup> DOJ Comments at 10.

<sup>58</sup> CoreComm Request at 14.

<sup>59</sup> CoreComm Request at 14-15.

<sup>60</sup> CoreComm Request at 17-19.

<sup>61</sup> CoreComm Request at 21.

<sup>62</sup> SCBA Reply at 21-22.

Broadcasting ( BSkyB ), in the United Kingdom. CoreComm alleges that BSkyB has systematically prevented NTL and other providers of multichannel video services from gaining access to certain programming in the United Kingdom.<sup>63</sup> CoreComm is concerned that News Corp.'s entry into the DBS market via EchoStar could have similar anti-competitive consequences for MVPDs in the U.S.<sup>64</sup>

24. In reply, News Corp. questions the relevancy of what it views as a series of commercial disputes between CoreComm's U.K. affiliate and BSkyB, a publicly held company in which News Corp. holds a minority interest. News Corp. notes that the Commission historically does not become involved in private contractual disputes, especially those governed by the law of another country.<sup>65</sup> News Corp. also takes issue with CoreComm's characterization of OFT's findings. In addition, News Corp. argues that even if CoreComm's allegations about BSkyB's actions were true, they are irrelevant.<sup>66</sup> News Corp. points out that it lacks control of BSkyB and that BSkyB, rather than News Corp., holds all the programming rights at issue. Thus, BSkyB's actions cannot be attributed to News Corp.<sup>67</sup> EchoStar also questions the relevancy of CoreComm's concern because it has not entered into any exclusive contracts with News Corp. and asserts that it does not have the market power to force News Corp. into such arrangements.<sup>68</sup>

25. We are unpersuaded by CoreComm and SCBA's arguments for several reasons. First, the statutory provisions for program access conditions were enacted by Congress after extensive hearings and findings that horizontal concentration in the cable industry combined with extensive integration (i.e., combined ownership of cable systems and programming suppliers), created an imbalance of power, both between cable operators and programming vendors and between cable operators and their MVPD competitors.<sup>69</sup> The current record does not reflect a

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<sup>63</sup> CoreComm Request at 11-12 (citing Director General's Review of BSkyB's Position in the Wholesale Pay TV Market (December 1996)).

<sup>64</sup> In support of its factual allegations, CoreComm cites portions of a 1996 report issued by the Director General of the Office of Fair Trading ( OFT ), an U.K. antitrust authority. In its reply comments, CoreComm also attaches a more recent decision in which the U.K.'s Independent Television Commission ( ITC ) announced a general prohibition on minimum carriage requirements or tiering for subscription television channels. CoreComm Reply at 12-13.

<sup>65</sup> News Corp. Opposition at 11-12.

<sup>66</sup> News Corp. Opposition at 12-13.

<sup>67</sup> News Corp. Opposition at 12.

<sup>68</sup> EchoStar Opposition at 20.

<sup>69</sup> See, e.g., *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 3359, 3366 (1993).

similar imbalance of power here: between EchoStar and programming vendors or between EchoStar and its MVPD competitors.

26. Second, CoreComm has mentioned that News Corp. holds attributable interests in a number of satellite-delivered programming services. As such, CoreComm is concerned that the proposed assignment might result in News Corp. giving EchoStar exclusivity to News Corp.'s attributable programming services or, at a minimum, giving EchoStar preferable treatment with regard to such programming. However, according to News Corp.'s unchallenged assertion, nearly all of its attributable programming services are covered by the Commission's program access rules,<sup>70</sup> which prohibits unfair or discriminatory practices in the sale of programming by, among others, a satellite cable programming vendor in which a cable operator has an attributable interest.<sup>71</sup> Therefore, as News Corp. correctly notes, the Commission's rules provide MVPDs an avenue for redress if they believe a New Corp. programming arrangement involves price discrimination or unfair practices.<sup>72</sup> Consequently, we will not impose the conditions that CoreComm requests. Although a few programming services may not be covered by the program access rules, we will not apply program access conditions in the instant proceeding to address these few services.

27. Finally, in addition to subscription programming, News Corp. also has an interest in the broadcast programming distributed by the Fox television network. SCBA surmises that Fox owned and affiliated television stations might withhold retransmission consent from other MVPDs competing with EchoStar.<sup>73</sup> We find no basis for SCBA's concern. The Commission's

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<sup>70</sup> In Exhibit B of its Opposition, News Corp. lists cable programming entities in which it has attributable ownership. These are the following: Fox/Liberty Networks cable entities, Fox Sports Net, Rainbow Media Holdings, Home Team Sports, Sunshine Network, FiT TV, Fox Sports International, and FX, in addition to The Golf Channel and Fox Kids Worldwide, including The Family Channel. According to News Corp., all of these entities are deemed to be "vertically integrated" for purposes of the Commission's program access rules. Also listed in Exhibit B are Fox News Channel and "fXM: Movies from Fox," cable programming services that New Corp. also has attributable interest, but according to News Corp., are not deemed to be vertically integrated and thus not subject to the program access rules. Following the merger of TCI with AT&T, AT&T will own all the common stock of Liberty Media Corporation and all the equity interest of New Liberty Media Group. *See* AT&T proxy to its shareholders, [http://www.att.com/ir/ep/tci\\_merger/pr\\_proposed\\_transactions.html](http://www.att.com/ir/ep/tci_merger/pr_proposed_transactions.html). As a result of the proposed transaction, Liberty Media Corporation will acquired 8% of News Corp.'s diluted outstanding shares. Consequently News Corp. submits that the two programming services that are not currently vertically integrated - Fox News Channel and fXM: Movies from Fox - will become vertically integrated and thus subject to our program access rules. *See* News Corp. *Ex Parte* Filing (April 22, 1999).

<sup>71</sup> *See supra* note 39.

<sup>72</sup> 47 C.F.R. 76.1000-.1003.

<sup>73</sup> SCBA Reply at 21-22.

rules prohibit exclusive retransmission consent agreements between a television station and *any* MVPD.<sup>74</sup> Therefore, should a situation arise whereby it appears that News Corp. has violated the Commission's exclusive retransmission prohibition, interested parties are always free to bring their concerns to our attention via the Commission's complaint process.

*5. Pending Litigation*

28. PrimeTime 24 opposes the Joint Application, alleging that EchoStar has breached its exclusive network programming contract to offer only PrimeTime 24's retransmitted broadcast television programming to EchoStar's subscribers. PrimeTime 24 claims that EchoStar, in breach of this contract, substituted its own retransmitted broadcast network programming. PrimeTime 24 further claims that EchoStar has also refused to pay PrimeTime 24 programming fees that were accrued prior to the breach. PrimeTime 24 contends that it will prevail in a suit it has filed against EchoStar, seeking both damages and specific performance of the contract. Thus, according to PrimeTime 24, it would be futile for the Commission to approve the Assignment of the 110° W.L. orbital slot as EchoStar 110 requests; EchoStar 110 ultimately will not be able to use the slot as it now asserts it plans to use it.<sup>75</sup> Notwithstanding its pending suit, PrimeTime 24 argues that until its litigation is concluded, granting the Joint Application will enable EchoStar to greatly expand its network capacity, albeit temporarily, and thus increase EchoStar's injury to PrimeTime 24 as result of EchoStar's breach of contract.<sup>76</sup> Because of this increased risk, PrimeTime 24 argues that it has standing to petition the Commission to deny the EchoStar/MCI Application.<sup>77</sup>

29. Applicants respond that PrimeTime 24 lacks standing in this proceeding because it is not a party in interest under Section 309(d)(1) of the Communications Act,<sup>78</sup> and cite our longstanding policy of refusing to adjudicate private contract issues of the kind raised by PrimeTime 24.<sup>79</sup> We find both arguments advanced by Applicants persuasive.

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<sup>74</sup> 47 C.F.R. 76.64(m).

<sup>75</sup> PrimeTime 24 Petition at 2-3.

<sup>76</sup> PrimeTime 24 Reply at 2-3.

<sup>77</sup> PrimeTime 24 Reply at 2-3.

<sup>78</sup> The Communications Act provides that [a]ny party in interest may file with the Commission a petition to deny an application . . . . The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest . . . . 47 U.S.C. 309(d)(1).

<sup>79</sup> *Listeners Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987); *see also Stockholders of Renaissance Communications Corporation*, 12 FCC Rcd. 11866, 11869 (1997); *Northwest Broadcasting, Inc.*, 12 FCC Rcd. 3289, 3293 (1997); *WFOA-TV, Inc.*, 11 FCC Rcd. 20041, 20042 (1996).



30. PrimeTime 24 fails to meet the threshold requirements for standing. It does not allege personal injury that is "fairly traceable" to our granting the applications and that there is a substantial likelihood that our denial of the applications will redress the injury claimed.<sup>80</sup> PrimeTime 24 has failed to specify how it believes it would be harmed by the proposed assignment. It has simply alleged that denial of the applications would inhibit EchoStar from engaging in certain conduct alleged to breach a programming contract.<sup>81</sup> Nor has PrimeTime 24 submitted any documented proof that its success in the pending litigation would, aside from possibly curbing to some degree local-into-local service, prohibit EchoStar from using additional spectrum for purposes PrimeTime 24 does not challenge, such as providing EchoStar's subscribers the many other services EchoStar proposes, such as HDTV programming and high-speed Internet access. In any event, even if PrimeTime 24 had standing, we would find that its assertions, if proven true, would not raise public interest concerns sufficient to deny the application. PrimeTime 24 raises a private contractual dispute that is currently pending before a federal court, and we will not adjudicate private contractual matters where an alternative forum exists to resolve the matter and the contractual dispute does not bear on the public interest.<sup>82</sup> Nor do we consider such matters a persuasive reason to deny the Joint Application.

*6. Potential harm to Terrestrial Broadcasters and Small Cable Operators*

31. SCBA, in its petition to deny, contends that the proposed acquisition threatens the financial viability of the nation's 1,150 local broadcasters. Further, it states that because the primary source of small cable operators' service offerings is programming produced by local

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<sup>80</sup> *MCI Telecommunications Corp.*, 12 FCC Rcd. 7790, 7793 (1997).

<sup>81</sup> PrimeTime 24 Response at 3. Not being a member of the consuming public, PrimeTime 24 cannot avail itself of the expansion of standing to the consuming public under *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1002-1006 (D.C. Cir. 1966), *see, e.g., FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *FCC v. National Broadcasting Co.*, 319 U.S. 239 (1943) (progenitors of the Communications Act's standing rules); *see also The Evening Star Broadcasting Co.*, 68 FCC 2d 129, 136 (1978), *vacated on other grounds*, 67 FCC 2d 1503 (1978) (no standing where party met neither consuming public status under *United Church of Christ* nor the established grounds of electrical interference or economic injury).

<sup>82</sup> *Listeners Guild*, 813 F.2d at 469. Both cases cited by PrimeTime 24 in its Response, *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42 (D.C. Cir. 1994), and *Granik v. FCC*, 234 F.2d 682 (D.C. Cir. 1956), are inapposite. In those cases, third parties with contractual interests in licensees were found to have standing. Here, PrimeTime 24 has no interest in EchoStar, but merely has an unrelated contractual dispute with EchoStar. Moreover, unlike the claims raised in *Telephone and Data Systems, Inc.* and *Granik*, the contractual dispute raised by PrimeTime 24 is not relevant to the Commission's determination whether the public interest, convenience and necessity would be served by grant of the application and the alleged injury is not traceable to the Commission's action here.

broadcasters, any reduction in programming resulting from a diminution in local broadcasters' revenues will harm SCBA's members.<sup>83</sup> SCBA claims that the harm will result in two ways: through the selective carriage of broadcast stations and through the illegal importation of television signals.<sup>84</sup>

32. SCBA argues that local broadcasters in larger markets will suffer from the fact that EchoStar's acquisition of an additional 28 frequency channels will enable it to retransmit only the signals of affiliates of the nation's four most popular networks, ABC, CBS, NBC, and Fox, in the top 100 markets. Consequently, SCBA reasons that this capacity limitation threatens the financial viability of broadcasters in these markets that are not carried by EchoStar, namely emerging networks, local PBS, and independent stations, which tend to offer programming oriented toward unique local community needs.<sup>85</sup>

33. SCBA also contends that granting the Joint Application will cause harm to local broadcasters serving smaller markets. SCBA contends that satellite carriers, including EchoStar, have demonstrated a pervasive disregard for the distant signal importation limit of the Satellite Home Viewer Act (SHVA), which restricts delivery of network television programming to "unserved households."<sup>86</sup> According to SCBA, these violations cause nominal harm to broadcasters in small markets because their viewers have little interest in local programming retransmitted from distant major markets. In other words, signals from cities in other parts of the nation are not good substitutes for programming produced locally. However, adds SCBA, EchoStar's additional capacity will enable it to carry the signals of many more major markets. Consequently, says SCBA, there will be a large number of instances in which consumers will be able to receive signals from a major market that is close to their homes. In those cases, asserts SCBA, DBS would be sufficiently appealing to persuade viewers to look to DBS, rather than their local broadcasters, for local programming.<sup>87</sup> SCBA also asserts that EchoStar already has demonstrated readiness to violate SHVA, and allowing EchoStar to acquire an additional 28 channels will provide it with the capacity to commit even more violations. Moreover, SCBA asserts that economic necessity will compel EchoStar to resort to widespread local-into-local dissemination of selected broadcast signals in order to recover the \$1.25 billion that it will need to

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<sup>83</sup> SCBA Petition at 3.

<sup>84</sup> SCBA Petition at 6.

<sup>85</sup> SCBA Petition at 7.

<sup>86</sup> The term "unserved household" is defined by SHVA as a household that cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity of a primary network station affiliated with that network. 17 U.S.C. 119(d)(10)(A).

<sup>87</sup> SCBA Petition at 8.

spend in order to utilize the 28 channels. This activity, they argue, will surely result in numerous SHVA violations.<sup>88</sup>

34. We find that SCBA's petition to deny fails to meet the criteria of Section 309(d)(1) of the Communications Act.<sup>89</sup> That provision of the Act states that when a petition to deny is filed it must contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest.<sup>90</sup> SCBA fails to meet this obligation for several reasons.

35. First, SCBA has failed to establish a link between the perceived harms of selective local-into-local carriage and the public interest. Cable operators and DBS operators compete in the same markets and at present, cable operators rather than DBS operators tend to dominate those markets.<sup>91</sup> Thus, if our grant of EchoStar's request allows it to offer a closer substitute to cable operator's offerings, then, by implication, some cable operators may suffer adverse economic impacts because of the increased competition. The public interest, however, is in insuring robust competition and not in protecting the financial interests of particular firms. In this particular instance, consumers will benefit from the increased competition.

36. Second, terrestrial broadcasters supply programming that is sufficiently important to consumers that DBS operators seek to retransmit their programming in order to better compete with cable operators. Recent data suggest that the prime time viewing share of broadcast television is on average 64 percent.<sup>92</sup> Consequently, terrestrial broadcasters are supplying programming that consumers like enough that DBS operators would find it advantageous to retransmit terrestrial broadcast television signals. In fact, surveys show that a significant number of consumers would subscribe to the services of a DBS operator rather than a cable operator if the DBS operator carried local broadcast television signals.<sup>93</sup> Consequently, DBS operators have a strong incentive to carry local broadcast television signals in order to compete with cable operators. A major constraint on DBS operators from supplying such programming is the capacity limitations of existing DBS assignments. Grant of EchoStar's application for 28

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<sup>88</sup> SCBA Petition at 15.

<sup>89</sup> 47 U.S.C. 309(d)(1).

<sup>90</sup> 47 U.S.C. 309(d)(1).

<sup>91</sup> See earlier discussion on the current status of competition in the affected markets.

<sup>92</sup> This figure represents the season to date (March 15-21, 1999) average of network prime time viewing share, and is taken from figures reported in *Broadcasting & Cable* magazine (March 29, 1999) on page 40.

<sup>93</sup> EchoStar/MCI Application at 12, and *1997 Cable Competition Report*, 13 FCC Rcd. at 1041.

additional DBS channels will ease this constraint for EchoStar and permit it to provide such service to consumers.

37. Third, SCBA's allegations concerning its perceived harm to broadcasters in smaller markets are based on the supposition that EchoStar has violated SHVA and will continue to do so. EchoStar denies it has violated or that it has any intention of violating SHVA. Moreover, Applicants submit that this Commission is not the proper forum for determining whether or not an entity is in compliance with SHVA.<sup>94</sup> We agree. We are, nonetheless, aware of the fact that EchoStar is involved in pending litigation concerning its compliance with SHVA.<sup>95</sup> We do not, however, consider these lawsuits to be sufficient basis for us to conclude that EchoStar will intentionally violate SHVA to the detriment of local broadcasters. In any event, speculation about future violations of SHVA does not provide a basis for denying the Joint Application.

38. Finally, we note that no broadcaster sought to deny the Joint Application at issue because of the harms SCBA alleges will accrue to them by our grant of the Joint Application. While SCBA asserts that this is because FOX, a party with interest in the proposed transaction, is a member of the National Association of Broadcasters (NAB), this argument is not persuasive. As evidenced by many proceedings, broadcasters will comment on proceedings of interest with a wide variety of views even when NAB has commented on the same proceeding. Thus, if some broadcasters were to be harmed by the proposed Joint Application as asserted by SCBA, then we would expect that they would have commented in the proceeding to that effect. Consequently, broadcasters' apparent lack of interest in this proceeding undermines SCBA's allegation of harms to them from our granting the Joint Application.

### **C. Other Issues**

#### *1. Service to Hawaii*

39. The State of Hawaii supports the proposed assignment provided two conditions are met. First, Hawaii asks that Applicants assure that reliable, small, 18-24 inches, customer furnished, earth station receiving antenna ("dish") DBS service will be provided to its consumers.<sup>96</sup> The State is concerned that MCI's design for the satellites may not have sufficient power to adequately serve all of its citizens. Hawaii explains that a high number of its citizens live

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<sup>94</sup> EchoStar/MCI Joint Opposition at 8.

<sup>95</sup> See, e.g., *CBS Broadcasting, Inc. et. al. v. EchoStar Communications Corp.*, Civil Action No. 98-2651-CIV-MIDDLEBROOKS (S.D. Fla., Dec. 2, 1998).

<sup>96</sup> Hawaii Comments at 3.

in multi-family housing units that can only accommodate small receiving dishes.<sup>97</sup> Hawaii also points out that without DBS, there is no alternative to cable service in the State.<sup>98</sup> Second, Hawaii requests that the Commission affirm that granting the applications does not obviate EchoStar's separate, previously incurred, obligation to provide DBS service to Hawaii from EchoStar's channel assignments at 148° W.L. Hawaii asserts that if EchoStar is permitted to combine its regulatory obligations and only offer service from the 110° W.L. orbital location, it is likely that Hawaiians will not be provided the same level of DBS programming that is available in the continental United States.<sup>99</sup>

40. Applicants oppose Hawaii's request for conditions, arguing that the State's demand for assurance of service through 18-24 inch receive dishes is untimely, and that this is not the proper proceeding for a determination concerning EchoStar's service obligations from its 148° orbital location.<sup>100</sup> Applicants point out that when MCI applied for the authorization it now seeks to assign to EchoStar, Hawaii was well aware of what the Commission's service requirements to Hawaii and Alaska were because Hawaii had participated in the rulemaking proceeding that established these requirements. Nevertheless, Applicants point out that Hawaii did not object to MCI's service proposal, request any conditions, or seek reconsideration of the authorization. Based on that authorization, Applicants point out that hundreds of millions of dollars have now been spent constructing MCI's satellite system in accordance with the proposed specifications.<sup>101</sup> In view of Hawaii's prior acquiescence, Applicants submit that it is estopped from requesting the modification of an authorization that has long been finalized. As for EchoStar's obligations at the 148° W.L. orbital location, Applicants point out that EchoStar previously filed an application to modify its authorization for the 148° W.L. location, and that Hawaii should raise any concerns in relation to that application.

41. In the 1995 DBS auction Report and Order, which modified the DBS rules, the Commission revised geographic service obligations for DBS licensees.<sup>102</sup> The Commission recognized that due to various technical limitations not all DBS orbital positions necessarily will

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<sup>97</sup> Hawaii Comments at 4. Hawaii seeks detailed technical disclosure of MCI and EchoStar's satellites capabilities, including the quality of service that will be offered, the rate of service interruptions, and the diameter of dishes that will be used by Hawaiian subscribers. *Id.*

<sup>98</sup> Hawaii Comments at 1-2.

<sup>99</sup> Hawaii Comments at 3.

<sup>100</sup> EchoStar/MCI Joint Opposition at 10-12.

<sup>101</sup> EchoStar/MCI Joint Opposition at 11.

<sup>102</sup> *1995 Auction Order*, 11 FCC Rcd. 9712.

be capable of serving all areas of the United States with the same size receive antenna dishes.<sup>103</sup> Accordingly, the Commission explained that DBS service must be provided to Alaska and Hawaii where "technically feasible," recognizing that it was unclear whether it is possible to provide service from some orbital locations.<sup>104</sup> It was pursuant to these obligations that the Commission granted MCI's application for the subject authorization. Our grant of the Joint Application does not change the terms and conditions of this authorization. In other words, EchoStar will be in the same shoes as MCI -- nothing more or less. Therefore, EchoStar's authorization for the 28 channels at 110° W.L. will be subject to the same terms and conditions as MCI's authorization for these same channels.

42. Despite our concern that Hawaii, as well as Alaska, be provided DBS service, it would be inappropriate to require that the MCI satellites be re-designed at this late stage of development. Applicants expect the first satellite to be placed into orbit shortly after grant.<sup>105</sup> Any change in design at this time would surely foreclose the launch and cause further delay of service from 110° W.L. to not only Hawaii, but the entire continental United States, as well as Alaska and Puerto Rico. In addition, modifying the nearly completed satellites and rescheduling their launch would impose a substantial financial burden upon Applicants, amounting to millions of dollars, which would ultimately be passed on to EchoStar's subscribers. As such, it would not be appropriate or fair to condition the assignment of MCI's DBS license on the requirement of a maximum dish size for service to Hawaii. The appropriate time for Hawaii to have objected to MCI's DBS service proposal was when MCI's original application for the 110° W.L. authorization was under consideration or by filing a timely petition for reconsideration after grant of that authorization. Hawaii did neither. Therefore, the assignment of MCI's DBS license will not be conditioned on providing a specific antenna size for Hawaiian consumers.

43. In addition, we will not condition the proposed transfer upon EchoStar's performance of its obligations at 148° W.L.<sup>106</sup> The separate DBS license conditions on EchoStar's 148° W.L. license will continue without regard to the action taken in this proceeding. EchoStar has not requested modification of its other DBS licenses in this proceeding and, as Hawaii notes in its reply comments, EchoStar does not challenge Hawaii's assertion of EchoStar's obligation.<sup>107</sup>

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<sup>103</sup> *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd. 19276, 19295 (1996).

<sup>104</sup> *1995 Auction Order*, 11 FCC Rcd at 9762.

<sup>105</sup> Echostar/MCI Application at 6.

<sup>106</sup> Hawaii Comments at 3. EchoStar is also assigned channels at the 61.5° W.L., 119° W.L., 148° W.L., and 175° W.L. orbital locations. The Commission has not determined whether DBS service can be provided to Hawaii from the 61.5° W.L. location.

<sup>107</sup> Hawaii Comments at 4.

2. *Qualification Requirements*

44. In its petition to deny, UCC contends that the Applicants have not established their character or citizenship as required by the Communications Act and the Commission's rules.<sup>108</sup> According to UCC, Applicants seek to avoid these obligations on the mistaken assumption that because the applications are for authorizations to provide subscription service, they should be held to lesser standard than other broadcast applicants. UCC argues that the International Bureau misinterpreted the Commission's *Subscription Video* decision<sup>109</sup> in granting MCI the authorization it now seeks to assign to EchoStar.<sup>110</sup> UCC asserts that the mere fact that the applications concern subscription DBS service, rather than terrestrial television service, does not relieve Applicants from demonstrating that they are in compliance with all of the requirements imposed on broadcasters by the Communications Act. UCC argues that to provide subscription DBS service, an entity must first obtain a broadcast license, which necessarily entails complying with a full panoply of requirements, including those concerning citizenship and character. UCC contends that once a license is obtained, the newly created licensee may then self-elect to provide service on a subscription basis and, if it so elects, at that time, it would no longer be subject to broadcast content-related obligations.<sup>111</sup> UCC claims that if DBS applicants were allowed to avoid these broadcast application qualification requirements, there would be no way to prevent licenses from being granted to international terrorists or convicted felons.<sup>112</sup> In addition, UCC contends this precedent could be applied to terrestrial broadcast licenses and further compound the problem. UCC notes that it has sought Commission review of the International Bureau's holding in the *MCI DBS Order*, which it asserts will confirm the correctness of UCC's assertion that applicants for DBS licenses must comply with the obligation set forth in Section 310(b) of the Act. UCC contends that as long an Application for Review is pending, MCI has no authorizations to assign, and EchoStar has no basis for its failure to comply with the mandates of Section 310(b) of the Act, which restricts foreign ownership of broadcast licensees.<sup>113</sup>

45. This issue is being addressed by us in another proceeding. Consequently, we will

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<sup>108</sup> UCC Petition at 3.

<sup>109</sup> *Subscription Video Services*, 2 FCC Rcd. 1001 (1987), *aff'd sub nom.*, *NABB v. FCC*, 84 F.2d 665 (D.C. Cir. 1988).

<sup>110</sup> UCC Petition at 3-4 (citing *MCI Authorization Order*, 11 FCC Rcd. 16275).

<sup>111</sup> UCC Petition at 3-5.

<sup>112</sup> UCC Petition at 5 n.5.

<sup>113</sup> UCC Petition at 6.

not address it here.<sup>114</sup>

#### **IV. CONCLUSION**

46. In view of the forgoing, we find that granting the applications will serve the public interest, convenience, and necessity by increasing competition in the MVPD markets to the benefit of U.S. consumers. For this reason and the reasons described in the *Order and Authorization*, we grant the application of MCI Telecommunications Corporation ( MCI ) and EchoStar 110 Corporation ( EchoStar ) for consent to the assignment from MCI to EchoStar of MCI s authorization to construct, launch and operate a Direct Broadcast Satellite ( DBS ) system using 28 frequency channels at the 110° W.L. orbital location. We also grant the related application of EchoStar s affiliate EchoStar North America Corporation ( ENA ) and American Sky Broadcasting, L.L.C. ( ASkyB ) for consent to the assignment from ASkyB to ENA of ASkyB's authorizations associated with earth station facilities constructed by ASkyB in Gilbert, Arizona.

#### **V. ORDERING CLAUSES**

47. Accordingly, IT IS ORDERED that the Application of MCI Telecommunications Corporation and EchoStar 100 Corporation for Assignment of Authorization to Construct, Launch, and Operate a Direct Broadcast Satellite System Using 28 Frequency Channels at the 110° W.L. Orbital Location, File No. SAT-ASG-19981202-0093, from MCI Telecommunications Corporation to EchoStar 110 Corporation IS GRANTED.

48. IT IS FURTHER ORDERED that the Application of American Sky Broadcasting, LLC and EchoStar North America Corporation for Assignment of Transmit-Receive Earth Station Authorizations, File No. SES-ASG-19981204-01829(4), from American Sky Broadcasting, LLC to EchoStar North America Corporation IS GRANTED.

49. IT IS FURTHER ORDERED that the petitions to deny filed by Small Cable Business Association, PrimeTime 24 Joint Venture, and the request for imposition of conditions filed by CoreComm Limited ARE DENIED.

50. IT IS FURTHER ORDERED that the assignments shall be completed within 60 days from the release of this order and that the Commission shall be notified by letter within 30 days of consummation.

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<sup>114</sup> MCI Telecommunications Corp., FCC 99-110 (released May 19, 1999).



51. This Order is effective upon release. Petitions for reconsideration under Section 1.106 of the Commission's rules, 47 C.F.R. 1.106, may be filed within thirty days of the public notice of this Order (*see* 47 C.F.R. 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

May 19, 1999

**Separate Statement  
of  
Commissioner Susan Ness**

*Re: Application of MCI Telecommunications Corporation and EchoStar 110 Corporation for Consent to Assignment of Authorization to Construct, Launch, and Operate a Direct Broadcast Satellite System Using 28 Frequency Channels at the 110 W.L. Orbital Location*

DBS provides a valuable service to the American public, and its benefits should extend to all geographic areas of our country.

When the Commission licensed EchoStar in 1996, it required EchoStar to provide service to Hawaii and Alaska from 148 W.L. As the Commission stated then, "[W]e will expect Echostar to provide DBS service to Hawaii and Alaska in accordance with Commission rules and policies."

Although EchoStar's original plans to serve Hawaii and Alaska have been somewhat delayed due to technical problems with its satellite, Echostar has made interim arrangements, and is now providing alternate service to both states. Nothing in the order we adopt today will relieve Echostar of this continuing geographic service requirement.

In addition, in 1996, when we authorized MCI to provide service at 110 W.L., the Commission also required MCI to comply with our geographic service rules. In acquiring MCI's DBS license, EchoStar assumes this obligation for this additional orbital location and is subject to the Commission's rules. I expect EchoStar to fulfill its commitment to serve these non-contiguous areas.

Thus, I reiterate my commitment to making DBS service available to all geographic areas throughout the United States, including Hawaii and Alaska.