RECENT DEVELOPMENT

MAIN DISH WITH A SIDE OF VOLUNTARY COMMITMENTS: DISH NETWORK–DIRECTV REVISITED

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INTRODUCTION

A lot can happen in a decade. It seems like just yesterday, but over eight years have passed since the attempted merger between EchoStar Communications Corporation, then owner of Dish Network, and Hughes Electronics Corporation, then owner of DIRECTV.[1] Although the Federal Communications Commission (FCC) denied their merger attempt in 2002,[2] the many changes that have occurred in the multichannel video programming distribution (MVPD) market[3] and our country's economy since then[4]—not to mention the FCC's recent approval of the relatively similar XM–Sirius Satellite Radio merger[5]—suggest the need to reconsider the merger. In light of these changes and the increasing importance of video media in our society, Dish Network and DIRECTV would be justified in moving forward with preliminary talks and reapplying to merge.[6] Not only will the merger benefit both companies, but if the applicants make certain voluntary commitments[7]—much like XM and Sirius did in their merger application[8]—then the merger will likely be in the public interest and thus gain the FCC's approval this time around.

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1. *See* EchoStar Communications Corp., General Motors Corp. & Hughes Electronics Corp., Consolidated Application for Authority to Transfer Control, FCC CS Docket No. 01-348 (Dec. 3, 2001) [hereinafter EchoStar–DIRECTV Application], *available at* http:www.fcc.gov/transaction/echostar-directv/echostarappli.pdf.

2. *See* EchoStar Commc'ns Corp., 17 F.C.C.R. 20,559, 20,562 (2002) (hearing designation order) [hereinafter EchoStar–DIRECTV Order] (claiming that the merger was not in the public interest).

3. *See* Video: Swanni's 2008 Predictions: DIRECTV & EchoStar Will Merge (2007), http://www.tvpredictions.com/swanniseven121707.htm [hereinafter Swanni's 2008 Predictions] (noting that "competition has expanded since 2002").

4. *See EchoStar Announces Price Freeze*, L.A. TIMES, Jan. 8, 2008, at C2 (citing the poor economy as a reason for increased competition in the MVPD market).

5. *See* XM Satellite Radio Holdings Inc., 23 F.C.C.R. 12,348, 12,352–53 (2008) [hereinafter XM–Sirius Order] (finding that the applicants' voluntary commitments and other conditions warranted approval of the merger).

6. *See* Mike Masnick, *Dish and DirecTV Figure If XM and Sirius Can Merge . . .*, TECHDIRT, Aug. 6, 2008, http://techdirt.com/articles/20080806/1743471914.shtml (stating that there are "rumors" that the companies attempt another merger); Andy Pasztor & Vishesh Kumar, *Dish Network Again Casts Its Deal Gaze at DirecTV*, WALL ST. J., Aug. 5, 2008, at B1 (stating that Dish Network CEO Charles Ergen may be "positioning Dish for a major strategic shift that may involve reviving attempts to combine Dish and DirecTV"). *But see* Linda Moss, *Dish Loss Fuels Rumors: But DirecTV's CEO Dismisses Idea of a Satellite-TV Merger*, MULTICHANNEL NEWS, Aug. 9, 2008, http://www.multichannel.com/article/CA6585953.html (reporting that DIRECTV's CEO Chase Carey publicly dismissed the idea of a merger).

7. Making voluntary commitments is a common practice in applications for license transfer. Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 201 (stating that these voluntary commitments are generally the result of a negotiation process between the merging parties and the Federal Communications Commission (FCC)).

8. *See* XM–Sirius Order, *supra* note 5, at 12,433–36 (outlining the various commitments that XM–Sirius made in order to make the merger in the public interest).

I. BACKGROUND

A. The Original EchoStar–DIRECTV Decision

Dish Network and DIRECTV are currently the two largest digital broadcast satellite (DBS) providers in the MVPD market.[9] In 2001, the owners of the two satellite providers applied to the Justice Department and the FCC for approval of their merger application.[10] The companies felt that the union would allow the merged DBS provider (New DIRECTV) to compete more effectively with cable systems in the MVPD market.[11] This was in part because the merger would have allowed the providers to eliminate their inefficient use of the DBS spectrum by consolidating the numerous duplicative channels that they distributed.[12] Finally, the applicants claimed that the merger, due to economic savings, would allow New DIRECTV to provide broadband Internet access to all parts of the country for the first time.[13]

However, the FCC denied the application on the basis that the public-interest harms outweighed the benefits.[14] The Commission ruled, among other things, that the merger would be against the public interest by reducing the number of competitors in the relevant product market, thus undermining the FCC's goals of increased and fair competition in the DBS market.[15] Further, the FCC feared the merger would result in harms caused by the concentration of ownership in a single license of the key DBS spectrum,[16] thereby increasing the likelihood of collusion between video service providers.[17]

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9. *See* Stephen Super, *Congress Gives Satellite Viewers Local Station Option*, 6 B.U. J. SCI. & TECH. L. 14 (2000) (noting that Echostar and DIRECTV were the two largest satellite carriers at the time).

10. *See generally* EchoStar–DIRECTV Application, *supra* note 1.

11. *See* EchoStar–DIRECTV Order, *supra* note 2, at 20,573 (2002) (citing the companies' claim that they would be able to offer new and expanded programming choices to consumers postmerger).

12. *Id.*

13. *Id.* at 20,573–74; *see also* Benton Foundation, New OECD Numbers: Broadband Around the World, http://benton.org/node/25492 (last visited Aug. 21, 2009) (noting the United States' poor broadband deployment).

14. *See* EchoStar–DIRECTV Order, *supra* note 2, at 20,562–63 (finding that the applicants have not met their burden of demonstrating the public interest that would be served by the merger).

15. *Id.* at 20,562.

16. *See id.* (claiming that such concentration would not result in more-effective competition).

17. *See id.* at 20,625 (citing "basic economic principles and the characteristics of the market" as factors that point to increased likelihood of collusion).

B. The XM–Sirius Decision

At the time, the FCC's reasons for rejecting the merger application seemed convincing. A lot has changed, however, in the past seven years, not least of which is the Commission's recent approval of the XM–Sirius merger. The FCC approved the XM–Sirius merger in part because of the merged company's voluntary commitments, which mitigated the impact of any harmful, anticompetitive effects.[18] Among other things, those commitments included an offering of á la carte programming, a commitment to set aside channels for noncommercial, educational, and informational programming, and a three-year price cap.[19] At the time of the merger, XM and Sirius were the two largest providers of satellite digital audio radio service in the United States. Despite the differences between the successful XM–Sirius merger and the EchoStar–Dish Network merger proposed in 2001,[20] there are also many similarities between them that warrant reconsideration of the merger.[21]

C. The Changing Landscape of the MVPD Market

In addition to the FCC's laissez-faire approach in the XM–Sirius decision, competition in the MVPD market has increased dramatically in the past few years and is currently at an all-time high. This is mainly the result of factors such as increased cable penetration and new entrants to the market.[22]

II. THE FCC'S MERGER STANDARD OF REVIEW[23]

When faced with a merger application,[24] the FCC must determine

18. *See* XM–Sirius Order, *supra* note 5, at 12,352 (making clear that absent the voluntary commitments, the merger would "increase the likelihood of harms to competition and diversity").

19. *See id.* at 12,433–36 (listing and expounding upon the voluntary commitments).

20. *See* Ryan Saghir, *XM/Sirius Merger Is Not Like EchoStar/DirecTV and Here's Why*, ORBITCAST, Feb. 26, 2007, http://www.orbitcast.com/archives/xmsirius-merger-3.html (explaining that, at the time of the EchoStar–DIRECTV proposed merger, the MVPD market was markedly different than it is today and much less competitive than the radio market).

21. *See* Joel D. Corriero, Comment, *Satellite Radio Monopoly*, 33 DEL. J. CORP. L. 423, 446 n.173 (2008) (noting such similarities include combining two satellite licenses into one, claiming as a benefit the ability to eliminate duplicated channels, and increasing competition against the rest of the relevant market); Pasztor & Kumar, *supra* note 6 (arguing that the DBS providers, much like XM and Sirius, face competition from a variety of media).

22. *See infra* Part IV for a discussion on these factors.

23. In telecommunications mergers, the U.S. Department of Justice conducts its own, separate investigation into the antitrust considerations of the proposed merger. That investigation is beyond the scope of this Recent Development.

24. Specifically, in the case of a Dish Network–DIRECTV merger, the parties would be applying to the FCC for consent to transfer control of various Commission authorizations

whether the proposed transfer of licenses will serve the "public interest, convenience, and necessity."[25] The applicants bear the burden of proving, by a preponderance of the evidence, that the proposed merger will serve the public interest.[26] In making this determination, the FCC considers whether the merger is in compliance with the Communications Act of 1934 and the FCC's rules.[27] In general, the FCC's public-interest evaluations consider the following factors: competition in relevant markets, the acceleration of private-sector deployment of advanced services, the diversity of information sources and services to the public, and the general management of the public-interest spectrum.[28] In the end, the FCC makes its decision based on a balancing test that weighs "any potential public interest harms of the proposed transaction against any potential public interest benefits" in terms of the above-mentioned factors.[29] Specifically, "As the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest."[30]

III. A DISH NETWORK–DIRECTV MERGER IS IN THE PUBLIC INTEREST

A. Competition and the Relevant Product Market

Although it is true that in 2001, the relevant market for DBS service consisted of only DBS service providers, the relevant market has expanded over the last few years. The FCC uses the Justice Department's guidelines for determining the relevant product market, which define the market as "the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a small

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and licenses, including DBS and fixed-satellite space-station authorizations. *See* EchoStar–DIRECTV Order, *supra* note 2, at 20,561 (outlining the considerations passed upon in the case of the EchoStar–DIRECTV Order).

25. 47 U.S.C. § 310(d) (2006).

26. XM–Sirius Order, *supra* note 5, at 12,364.

27. *Id.* at 12,363–64.

28. *Id.* at 12,364–65.

29. *Id.* at 12,364.

30. Ameritech Corp., 14 F.C.C.R. 14,712, 14,825 (1999) (memorandum opinion and order). It should also be noted that the Commission takes the public's comments into account when making a public-interest determination, and there is never a shortage of lobbying in such proceedings. This is important because while Rupert Murdoch, one of the industry's most influential lobbyists, was opposed to the original EchoStar–DIRECTV merger, he now owns a controlling interest in DIRECTV and would clearly be in favor of a merger this time around. *See* Phillip Swann, *DirecTV–EchoStar Merger: 5 Reasons Why It Will Happen*, TVPREDICTIONS.COM, Aug. 4, 2006, http://www.tvpredictions.com/mergeryes080406.htm (predicting that having Murdoch on their side this time around could alone make the difference).

but significant and non-transitory increase in price . . . ."[31] This means that if one product is a close-enough substitute for the other, the FCC considers them to be in the same market.[32] Based on this definition, at the very least, the relevant product market for DBS services today should include cable television service, video service provided by telephone companies (telcos) such as Verizon and AT&T, and television on the Internet.[33] This is a significant expansion from the relevant product market for DBS services in 2001, but as one expert television analyst put it, "things are different now."[34] In addition, the Justice Department itself ruled in 1997 that DBS providers compete in a "broad market" comprising both cable and DBS providers.[35] Due to what has become such a broad relevant product market, competition is now at an all-time high for DBS service providers.[36]

1. Cable

In the original EchoStar–DIRECTV Order, then-Commissioner Kevin Martin criticized the majority's view that DBS's relevant market did not include cable, stating that "such an approach is not reflective of the actual competitive landscape . . . ."[37] Today, there is no question that the current Chairman would feel the same way, as increased cable buildout[38] and cable providers' ability to bundle video, telephone, and high-speed Internet services have increased cable's stronghold on the MVPD market and encroached onto DBS providers' territory.[39] Charles Ergen, CEO of Dish Network, stated that cable's "triple play" offerings of video, telephone, and

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31. XM–Sirius Order, *supra* note 5, at 12,367 (internal quotation marks omitted).

32. *See* Bert Foer, *Panel Discussion I: Development of Bank Merger Law*, 13 FORDHAM J. CORP. & FIN. L. 511, 525 (2008) (using an example from the Federal Trade Commission to illustrate the application of this standard).

33. The relevant market could also be expanded to include video media such as video iPods, YouTube, Slingbox, and video via mobile phones.

34. Swanni's 2008 Predictions, *supra* note 3.

35. *See* Thomas P. Walsh, III, *Defining the Relevant Market: Impacts of the Abolition of the Presumption of Market Power in Patent Tying Cases*, 84 DENV. U. L. REV. 267, 288 (2006) (quoting Andy Pasztor & Yochi J. Dreasen, *EchoStar's Past Argument May Foil Its Bid for Hughes*, WALL ST. J., Nov. 12, 2001, at B8) (explaining the conflicting definitions of markets for satellite-broadcasting suppliers).

36. *See EchoStar Announces Price Freeze*, *supra* note 4 (citing growing concerns over a recession as a reason for EchoStar's price freeze). In addition, many competitors of DBS providers recently made plans to increase prices for their services, making it even more important that DBS providers be able to effectively compete. *See id.* (stating that Comcast, Cablevision, and Verizon all have made plans to increase prices).

37. EchoStar–DIRECTV Order, *supra* note 2, at 20,689.

38. *See* Swann, *supra* note 30 ("[C]able TV service is now available in more markets [than it was in 2002].").

39. *See* Julia Angwin & Andy Pasztor, *Weaker Reception: Satellite TV Growth Is Losing Altitude as Cable Takes Off*, WALL ST. J., Aug. 5, 2006, at A1 ("A decade-long growth spurt for U.S. satellite-television broadcasters is sputtering amid a resurgent cable industry and changes in what consumers want from their TV providers.").

Internet are "stealing good customers" away from his company.[40] In fact, even before the triple play became a factor in customers' decisions on MVPD providers, economist Robert Willig conducted a study finding that "former DIRECTV subscribers who cited cost as the reason for canceling [DIRECTV service] were three times as likely to become cable subscribers as to become EchoStar subscribers."[41] The combination of cable's pervasiveness and the conversion of customers from DBS services serves as proof that DBS providers are in competition with cable providers. The products are substitutes for each other and should be classified in the same product market.

A related issue with regard to defining the relevant market is the competition between Dish Network and DIRECTV. In 2000, EchoStar, then Dish Network's parent company, filed an antitrust suit against DIRECTV claiming as part of the suit that they were each other's biggest competitors and that their relevant product market should be limited to just DBS services.[42] However, both Dish Network and DIRECTV are now owned by different companies than they were when the suit was initially filed. Furthermore, from as early as 2001, Peter Standish, a lawyer for Hughes and Echostar, has stated that the market is very different now than it was when the suit was first filed.[43] More importantly, although it is true up to a certain point that Dish Network and DIRECTV compete against each other, the reality is that DBS providers are primarily competing together against cable providers and other video service providers such as telcos.[44]

2. Telcos

On top of increased competition from cable, DBS providers are also feeling competition from telcos, specifically Verizon's FiOS and AT&T's U-verse, which are new entrants in the MVPD market. Importantly, both Verizon and AT&T have entered as legitimate video providers since the

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40. *Id.*

41. *See* Joseph Larson et al., *The Role of Economics and Economists in Antitrust Law*, 2004 COLUM. BUS. L. REV. 380, 456 (using the study to show that satellite-TV demand is driven by cable services and not alternative satellite pricing).

42. *See* EchoStar–DIRECTV Order, *supra* note 2, at 20,609, 20,623 (discussing EchoStar's arguments in their Amended Complaint in the antitrust action).

43. *See* Andy Pasztor & Yochi J. Dreazen, *EchoStar's Past Arguments May Foil Its Bid for Hughes: Reverberating Antitrust Charges May Block Satellite-Broadcasting Ambitions*, WALL ST. J., Nov. 12, 2001, at B8 (asserting that arguments made by EchoStar in its antitrust suit may come back to hurt it in its new merger application).

44. *Cf.* Corriero, *supra* note 21, at 433–34 (analyzing the Justice Department's decision in the XM–Sirius merger and determining that, although those companies once competed against each other to attract new customers, there was never "significant competition between them for customers who had already subscribed to one or the other service").

FCC's original EchoStar–DIRECTV decision and its determination on DBS providers' product market.[45] These services now provide two more competitors to the DBS providers in the market areas where Verizon and AT&T have deployed their fiber. As early as 2006, analysts said that because of these new entrants and their increasing market presence, a DBS merger could pass FCC scrutiny.[46] Although the telcos' video services are by no means ubiquitous, their deployment continues to expand,[47] and "both time and expectation" are taken into consideration when determining market definition.[48]

3. Internet

Another new entrant in the MVPD market is the Internet. Although we do not yet have universal Internet service, we are getting closer to universal access and it seems as though President Barack Obama will do everything he can to make that goal a reality.[49] Even if universal access is not achieved within the next few years, broadband is pervasive enough now to be considered in the same product market as DBS. "Wifi is everywhere now . . . even in the most remote areas," says one MVPD market expert.[50] A variety of public places such as libraries, McDonald's, and Starbucks all provide Americans access to the Internet. Furthermore, computers are significantly more affordable now than they were a decade ago, giving more and more Americans access to the Internet. Not only is the Internet more pervasive today, but people are using the Internet for purposes that

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45. *See* Swann, *supra* note 30 (stating that the launch of TV services from Verizon and AT&T have increased competition in the MVPD market since the original EchoStar–DIRECTV merger application).

46. *See* Linda Moss, *Wall Street Sizes Up a Satellite Merger*, MULTICHANNEL NEWS, July 24, 2006, http://www.multichannel.com/article/CA6355545.html (citing a lawmaker and analysts who believe the media landscape has changed enough to validate a merger).

47. *See* Benton Foundation, Proposal for the Creation of a Rural Fiber Fund, http://www.benton.org/node/20091 (last visited Aug. 21, 2009) (proposing the government approve funding needed to wire all of rural America with full fiber networks).

48. *See* Walsh, *supra* note 35, at 287 (using the satellite-television industry as an example).

49. *See* Lynnette Luna, *How Does Obama's Broadband New Deal Come to Fruition?*, FIERCEBROADBAND WIRELESS, Dec. 11, 2008, http://www.fiercebroadbandwireless.com/story/how-does-obamas-new-new-deal-come-fruition/2008-12-11 (examining Obama's proclamation that Internet access in America must be universal).

50. *See* Video: Interview by Sumi Das with Sam Diaz, Senior Editor, ZDNet, http://news.zdnet.com/2422-13568_22-213440.html (last visited Dec. 16, 2008) [hereinafter Das Interview] (describing the current satellite-television landscape and why the XM–Sirius merger was possible). Even Congressman Rick Boucher (D-Va.) who represents part of rural America would be on board for a potential Dish Network–DIRECTV merger. *See* Moss, *supra* note 46 (stating that Rep. Boucher has been active on satellite issues since the 1980s and that he favored the DBS providers' last attempt to merge).

directly compete with DBS. Today, more Americans than ever get their television fix via the Internet; the percentage of Americans that go online for news on a typical day increased by fifty percent from 2000 to 2004.[51] According to a 2007 study, nearly eighty million Americans watch their favorite television shows on the Internet.[52] That is forty-three percent of the online population, a figure that has almost doubled in the last year.[53] One college student even goes as far as saying, "the [I]nternet is becoming much more of a television community than actual television is."[54] The pervasiveness of the Internet combined with Americans' increasing use of broadband to watch television make it clear that the Internet competes with DBS providers and is part of the relevant MVPD market.

Thus, although opponents of a Dish Network–DIRECTV merger will point to the presumption that a merger that reduces the number of competitors in a product market to one or two is against the public interest,[55] that presumption simply does not apply here because there are significantly more competitors in the relevant product market now than ever before.

B. Advanced Services

As noted already, one of the reasons why the relevant product market for DBS services is larger today is because of the ability of cable providers and telcos to provide a triple play offering of video, telephone, and broadband Internet to consumers.[56] However, for economic reasons,[57] DBS providers are currently not able to provide certain advanced services,[58] specifically

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51. *See* PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, MEDIA CONSUMPTION AND BELIEVABILITY STUDY 5 (2004), *available at* http://people-press.org/reports/pdf/215.pdf (reporting that twenty-four percent of Americans had gone online for news on the day before the survey).

52. *See* Press Release, Solutions Research Group, Primetime Is Anytime: Americans Are Turning to Broadband for Their Favorite TV Shows (Feb. 4, 2008), http://www.srgnet.com/pdf/Prime%20Time%20is%20%20Anytime%20-%20February%204%202008.pdf (listing results from a survey of over one thousand Americans in November 2007).

53. *Id.*

54. Ali Rothschild, *Narrowcasting Changes How Americans Watch TV, Did Internet Kill the TV Star?*, DAILY CARDINAL, Oct. 15, 2008, http://www.dailycardinal.com/article/20867 (noting the same student also remarked that he "had more instances of friends gathered around a laptop than around a television set").

55. *See* EchoStar–DIRECTV Order, *supra* note 2, at 20,603 (stating the long-standing public policy view that diversity of service serves the common good).

56. *See supra* notes 39–40 and accompanying text.

57. *See* Calvin S. Goldman et al., *The Role of Efficiencies in Telecommunications Merger Review*, 56 FED. COMM. L.J. 87, 122 (2003) (stating that economic factors play an "integral role" in antitrust analysis).

58. Other advanced services include more high-definition TV channels, interactive digital video recorders, and broadband-enabled set-tops. *See* Swann, *supra* note 30 (arguing

broadband, to consumers.[59] This does not appear likely to change anytime soon, as both companies are seeing a slowdown in the number of new subscribers,[60] and earlier this year, Dish Network actually posted the first quarterly subscriber loss in the history of U.S. satellite television.[61] If the DBS providers could not afford to provide broadband before, they surely will not be able to do so now in the present context of subscription losses, increased competition, and our nation's struggling economy.

A merger between the two DBS providers would provide a solution to this competitive imbalance. Analysts estimate that a Dish Network–DIRECTV merger would save as much as $3 billion a year[62] for New DIRECTV through "economies of scale," "eliminated redundancies," and increased "leverage in programming deals."[63] This extra revenue would give New DIRECTV enough revenue to roll out a potent wireless-broadband offering to consumers and keep pace with major cable and telco operators.[64]

C. Diversity of Programming

Another advantage of this increased postmerger revenue would be New DIRECTV's ability to set aside capacity in order to address and fulfill the FCC's goal of increased program diversity. The elimination of the many currently duplicated channels between Dish Network and DIRECTV[65] will free up capacity that can be leased to diverse programmers. In the XM–Sirius Order, the FCC evaluated the merger's impact on diversity and found that a simple commitment by the parties to lease capacity to qualified programmers[66] would account for and satisfy diversity concerns.[67] There is

that the merged companies could pool their resources to better provide advanced services); *see also* Goldman et al., *supra* note 57, at 90 (stating that new technologies stimulate merger and acquisition activity).

59. *See* Pasztor & Kumar, *supra* note 6 (positing that neither DBS provider has such ability due to the lack of financial resources that a merger could muster).

60. *See* Angwin & Pasztor, *supra* note 39 (reporting that in 2006 both companies' gains decreased to half of what they had been in previous years).

61. *See* Moss, *supra* note 6 (asserting that Dish Network lost 25,000 subscribers in the second quarter of 2008).

62. *See* Angwin & Pasztor, *supra* note 39 (noting that these savings would be more than enough to cover broadband expansion); *see also* Pasztor & Kumar, *supra* note 6 (estimating potential savings of $2 billion per year).

63. *See* Moss, *supra* note 46 (reporting that analysts believe the savings realized from a merger would allow the merged companies to pursue "an aggressive wireless-broadband strategy").

64. *See* Swann, *supra* note 30 (concluding that with the money saved, the companies could make the large investment necessary to compete in the MVPD market).

65. *See infra* Part IV.D.

66. "A 'Qualified Entity' includes any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics." XM–Sirius Order, *supra* note 5, at 12,409 n.437.

no reason why a similar commitment from New DIRECTV would not similarly fulfill the FCC's goal of diverse programming.

D. Efficient Use of Spectrum

Going hand in hand with the increased capacity for new channels resulting from a merger is the amount of spectrum that the FCC could save if the two DBS operators stopped providing so many of the same channels. Although not determinative, the FCC considers efficiencies of this nature,[68] or more specifically, the efficient use of spectrum, to be one of its main policy goals.[69] With the current state of the DBS market, this goal is simply not being achieved. Prior to the XM–Sirius merger, the FCC had noted, in favor of the applicants, that XM and Sirius offered 87 duplicative channels.[70] Dish Network and DIRECTV currently offer over 500 duplicative channels.[71] A merger would allow New DIRECTV to eliminate these duplications and use the resulting saved spectrum and revenue to provide advanced services, diverse and noncommercial educational and informational programming, and lower prices.[72]

67. *See id.* at 12,380–81 ("[T]his voluntary commitment mitigates the potential harm from a decrease in diversity.").

68. *See* Goldman et al., *supra* note 57, at 110 (noting that the FCC historically prefers to condemn some transactions that would result in "high concentration levels even in the face of likely significant efficiencies"). Though recognizing the FCC's concerns, some commentators have cautioned against premature judgment:

> Although we agree there are transactions that should be viewed as "unthinkable," even though they may create some efficiencies, it is in the closer calls that care must be taken not to prematurely judge a transaction as "good" or "bad" due to the disparity between the burdens imposed on the government and on the transaction parties. In those transactions killed by such insurmountable presumptions, there will never be an opportunity for society to potentially benefit from the associated efficiency gains.

Id.

69. *See* EchoStar–DIRECTV Order, *supra* note 2, at 20,586 (stating that the nature of the application requires consideration of "long standing federal spectrum policies," including spectrum efficiency and competition).

70. XM–Sirius Order, *supra* note 5, at 12,381.

71. EchoStar–DIRECTV Order, *supra* note 2, at 20,586.

72. *See* Goldman et al., *supra* note 57, at 93, 96 (arguing that mergers in the telecommunications sector can allow companies to "offer a less expensive, more efficient, and broader range of services to consumers through joint production").

IV. VOLUNTARY COMMITMENTS[73]

Due to the similarities between this merger and the XM–Sirius merger, Dish Network and DIRECTV would likely need to adopt a series of voluntary commitments in order for the FCC to approve the merger. These commitments would mitigate some of the uncertainties that are commonly associated with mergers.[74] One, as noted, *supra*, will be a commitment to lease a certain amount of capacity to qualified programmers in order to maintain program diversity.[75] Another, in terms of pricing, should be a commitment to cap monthly charges in rural areas to the lowest fees paid by subscribers anywhere across the country.[76] Although rural America's lack-of-access argument will not stand up much longer,[77] a voluntary price cap for a few years would go a long way in quelling current fears of inflated prices, much like the price cap that XM and Sirius committed to in their merger.[78]

CONCLUSION

Simply put, "To impose a rigid merger specificity test to transactions has the potential of hampering a firm from obtaining, as expeditiously as possible, efficiencies that may be critical to the firm's ability to compete . . . and that may promote competition in the industry."[79] Although some may argue that many of the benefits of the merger could theoretically be accomplished through other means, such as interconnection or a joint venture, such actions come with high transaction costs that the struggling industry will not want or even be able to afford.[80]

Notwithstanding the benefits of a merger, it is possible that, absent a merger, the MVPD market may still lose a competitor. Analysts have claimed for years that without a merger there would be an extremely tough

73. Applications where the FCC informally identifies significant competitive concerns will generally be approved after the applicants "voluntarily amend their application to include conditions or commitments sufficient to ameliorate the FCC's concerns." Donald J. Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and Federal Communications Commission*, 11 GEO. MASON L. REV. 143, 149 (2002).

74. *See id.* at 151 (implying that the defining characteristics of a merger review are the inherent uncertainties associated with the merger).

75. *See supra* Part IV.C.

76. *See* Pasztor & Kumar, *supra* note 6 (believing that such a price cap would be enough to alleviate fears of reduced competition).

77. *See* Das Interview, *supra* note 50 (stating such an argument); *see also supra* Part IV.A.

78. *See* XM–Sirius Order, *supra* note 5, at 12,435 (agreeing that XM–Sirius will cap all retail prices for three years after consummation of the merger).

79. Goldman et al., *supra* note 57, at 123.

80. *See id.* at 123–24 (discussing reasons why firms elect not to pursue efficiencies internally, such as cost and contracting difficulties).

road ahead for DBS providers.[81] In fact, six years ago, an analyst proclaimed that due to increased competition in the market, DBS providers most likely will not "be able to sustain the increasing capital costs required to keep up with cable"[82] and may "be *forced* to merge."[83] The bottom line is that today, "video is coming from all kinds of sources."[84] Thus, a merger between Dish Network and DIRECTV, with certain voluntary commitments, would not be against the public interest and would benefit the industry and Americans alike.

81. *See* Angwin & Pasztor, *supra* note 39 (reporting that while both major DBS providers are still profitable, they are spending more than ever to gain new customers); *see also* Swann, *supra* note 30 (affirming that Dish Network's "back is up against the wall").

82. Pasztor & Dreazen, *supra* note 43.

83. Walsh, *supra* note 35, at 288 (emphasis added).

84. *See* Swanni's 2008 Predictions, *supra* note 3 (observing the expansion of sources of audiovisual media).