

DBS slots, not even satellites only. The comparison drawn by the NAB from the DARS licensing proceeding is inapposite for a similar reason. The DARS licensees were then, and are now, the only providers of unbundled nationwide subscription radio. DBS providers, by contrast, have to compete against much larger, entrenched incumbents that do not use the “high-power Ku-band spectrum” at all. Finally, the Commission has, in fact, sanctioned the use of the spectrum allocated to a particular service by one licensee.⁶⁹

II. THE MERGER WILL HAVE PRO-COMPETITIVE EFFECTS, AND NO ANTI-COMPETITIVE EFFECTS, IN THE MVPD MARKET

A. EchoStar and DIRECTV Compete Primarily Against Cable Operators in the MVPD Market

EchoStar and DIRECTV compete in the market for Multichannel Video Program Distribution (“MVPD”). This market (and not a DBS-specific one) has been identified by both the Department of Justice⁷⁰ and the FCC⁷¹ as the relevant market for

⁶⁹ When the Commission first established the Mobile Satellite Service (“MSS”) in the L-band, it received competing Applications from 12 companies, invited all the Applicants to form one consortium, American Mobile Satellite Corporation, and gave one license to that entity. The Commission purposefully elected to license one large consortium as opposed to multiple smaller entities because, among other things: a larger amount of bandwidth would permit a greater variety of services to be provided by an MSS system, and a larger customer base to be served; the high cost of an MSS system and the amount of spectrum available for MSS warranted the licensing of one initial MSS system using the entire allocated spectrum; and joint ownership of an MSS system would best permit a variety of competitive mobile satellite services to be made expeditiously available to the public. These same considerations would justify to a much greater extent here the creation of New EchoStar even if there were not ample other spectrum in the same band available for other competing providers.

⁷⁰ In 1998, the Department of Justice (“DOJ”) sued to enjoin Primestar, a joint venture of large cable companies, from acquiring rights to an orbital slot for nationwide DBS service that were held jointly by News Corp. and MCI Telecommunications Corp. In the suit, DOJ alleged that allowing cable operators through Primestar to control those DBS assets would eliminate the possibility that those assets could be used to compete

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purposes of evaluating transactions such as the EchoStar-Hughes merger.⁷² Although the MVPD market encompasses a number of different distribution technologies, there can be no doubt that this market continues to be dominated by incumbent cable operators, which continue to hold an approximately 78% share according to the most recent FCC analysis.⁷³

The principal merger opponents and their economists do not take serious issue with the notion that the relevant product market is MVPD, but they quibble around its edges and attempt to distort a number of facts and marketplace developments in order to construct a case that the merger will lessen rather than promote MVPD competition. Specifically, these parties have adopted a four-pronged strategy that seeks to: (i) minimize the degree to which cable operators dominate the MVPD marketplace; (ii) overstate dramatically the degree to which DIRECTV and EchoStar are competitively

against cable. DOJ also alleged that the MVPD market was the relevant product market for the purpose of evaluating Primestar's proposed purchase of the DBS assets. *See United States v. Primestar, Inc.*, Civ. No. 1:98CV01193 (JLG) (D.D.C. May 12, 1998).

⁷¹ *In re Application of MCI Telecommunications Corp.*, 15 Communications Reg. (P&F) 1038 (1999), at para. 9 & n.29 (finding that the MVPD market was the relevant market for purposes of analyzing this DBS transfer of control application, and moreover, that "DOJ concurs with the Commission's analysis that the relevant product market is the provision of MVPD services.")

⁷² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd. 7442, 7474 ¶ 62 (1994) ("First MVPD Competition Report") (from the outset, the FCC recognized that DBS would "readily compete with cable")

⁷³ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389 (rel. Jan. 14, 2002) at Table C-1 ("Eighth MVPD Competition Report").

focused on one another, rather than on dominant cable incumbents; (iii) marginalize the extent of any other existing or potential competition from other MVPD market sources; and (iv) attempt to taunt the merger Applicants with statements lifted from a private lawsuit that never came close to being adjudicated to a conclusion, and that is of little relevance here. Each of these prongs is discussed in more detail below, and when examined, illustrates the degree to which the merger opponents have misrepresented the state of the MVPD market, as well as the competitive effects of the proposed merger.

1. Cable Dominates the MVPD Market

To read the pleadings of the NRTC, Pegasus and the NAB, in particular, one would believe that DBS, and not cable television, was the dominant multichannel video programming distribution technology in the United States. To the contrary, the Commission has recognized that cable is “the dominant technology for delivery of video programming to consumers in the MVPD marketplace.”⁷⁴ Nationwide, cable controls more than three quarters – 78 percent – of the MVPD market.⁷⁵ The vast majority of U.S. households is passed by cable, and most households subscribe: 64 percent – almost two thirds – of all households owning a television subscribe to cable television.⁷⁶ Nor is

⁷⁴ Eighth MVPD Competition Report ¶ 5.

⁷⁵ *Id.* at ¶¶ 6-7.

⁷⁶ *Id.* at ¶ 18.

cable subscribership falling. Indeed, cable penetration rose by over a million subscribers last year, an increase of almost two percent.⁷⁷

Plainly, this is a market in which the cable companies continue to hold a dominant market position. And to the extent that DBS has emerged as “the principal subscription competitor to cable television service,”⁷⁸ cable’s huge installed subscriber base of 70 million households is by far the greatest source of potential growth for the DBS service, and will remain the primary focus of competitive activity by DBS providers, in the future.

As stated in the Application, however, the key determinant to the continued emergence of DBS as a strong MVPD competitor will be the degree to which the service can keep pace with the technological enhancement of incumbent cable television systems. Even analog cable operators historically have had tremendous advantages over DBS operators in terms of system incumbency, consumer resistance to satellite dish installation, and extremely low consumer equipment costs relative to DBS providers. To the extent that DBS has been able to distinguish itself in the marketplace as having certain quality advantages over analog cable systems, such as a diverse number of programming channels offered with a digital quality picture and sound, the rollout of digital cable systems is reducing or eliminating this competitive advantage.⁷⁹

⁷⁷ *Id.* at ¶ 18.

⁷⁸ *Id.* at ¶ 57.

⁷⁹ *See e.g.* NRTC Petition at 20, 22; *see also* NRTC’s Appendix, Exhibit I, Declaration of Paul W. MacAvoy at 6 (“MacAvoy Declaration”).

Indeed, as noted in the Application, digital cable is profoundly threatening to DBS. Among other things, digital cable:

- erases DBS firms' historical quality and channel advantages;
- allows cable firms to offer a video/cable-modem bundle that DBS providers cannot begin to match;
- has led the large cable multiple system operators to target DBS much more aggressively than in the past, including with cable modem bundles, national advertising targeted at DBS services, "dish bounties," and other satellite-specific promotions; and
- has introduced true two-way VOD in a number of markets, which currently cannot be matched by one-way only DBS systems, and enables the development of vastly expanded interactive services.

In addition, although DBS has become a more substitutable service to cable now that local channels may be carried on DBS systems, unless the merger is consummated neither DIRECTV nor EchoStar has the capacity or subscriber base, especially in the presence of must carry obligations, to carry local channels in anything close to the 210 DMAs in the United States.

Even the merger opponents agree that digital cable is emerging as a formidable incumbent cable response to DBS,⁸⁰ but they fail, of course, to recognize the

⁸⁰ See Pegasus Petition, Attachment A, Report of Daniel L. Rubinfeld ("Rubinfeld Report") at 19; NRTC Petition at 20 (characterizing digital cable as "reasonably interchangeable" with DBS); MacAvoy Declaration (NRTC) at 6; NAB Petition, Declaration of J. Gregory Sidak Declaration at 9-10 ("Sidak Declaration").

implications of this point. If EchoStar and DIRECTV are to continue to succeed, they must match both the current dominance of incumbent cable operators as well as the dire competitive threat posed by the upgrade of these incumbents' systems. Absent a merger, there is a profound risk that DBS will devolve from its current position in the MVPD market as a quality and innovations leader to a lesser alternative that will cause its customers to abandon the DBS platform. And this development in turn will lessen the competitive pressure on cable firms, enabling them to continue to exercise market power.

2. NRTC, Pegasus and the NAB Greatly Overstate the Degree of Competition Between DBS Providers Relative to Cable

Consistent with their strategy of ignoring the “900 pound gorilla” presence of incumbent cable operators in the MVPD market, the Petitioners also use misleading anecdotes and false inferences to suggest that “EchoStar and DIRECTV compete very closely with each other,” while “competition with cable” from the DBS firms allegedly is “more attenuated.”⁸¹ Indeed, each of the NRTC, Pegasus and the NAB go to great lengths to portray EchoStar and DIRECTV as “vigorously competitive” with one another, in order to suggest that the merger will lead to a dramatic reduction in MVPD competition.⁸² They of course compete, but this competition is dwarfed in comparison to DBS competition with cable. The Petitioners' point is overstated, and the policy conclusion is incorrect.

⁸¹ See e.g., Pegasus Petition at 22.

⁸² NAB Petition at 15-31; NRTC Petition at 31-35; Pegasus Petition at 12-14, 21-29.

First, NRTC mischaracterizes the testimony of the merger parties’ economist, Dr. Willig, as concluding that EchoStar and DIRECTV “do not compete” in the MVPD market, which the NRTC asserts “defies logic.”⁸³ This is a strawman that clearly does not track Dr. Willig’s statement. What Dr. Willig observed was that “DBS pricing decisions appear to be driven by competition with cable companies,” that EchoStar and DIRECTV focus on gaining market share “by luring consumers away from the leading cable providers,” and thus, that DBS companies “focus” their competitive efforts “on cable providers, rather than the other DBS firm.”⁸⁴ Such statements, of course, are in no way inconsistent with the notion that DBS providers also compete to an extent with each other – as MVPD market participants, they clearly do. But the level of competition between DIRECTV and EchoStar, which together control less than 20 percent of the MVPD marketplace, is dwarfed by the level of competition between DBS and cable.

Second, to the extent that NRTC, Pegasus and the NAB attempt to support their claims of ultra-vigorous intra-DBS competition with “evidence,” most of it is flawed and misleading.

- The Petitioners claim parallel equipment discounting promotion and offers by both companies. In fact, they ignore that these actions describe the gradual move of both DBS companies towards the cable paradigm of free equipment, a clear effort to better

⁸³ NRTC Petition at vii.

⁸⁴ Merger Application, Exhibit A, Declaration of Dr. Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation at ¶ 11 (“Merger Application Willig Declaration”).

compete with cable. The DBS firms realized early on that they could not persuade cable subscribers to switch to DBS if the up-front costs were too high in relation to cable, and this dynamic has increased as they seek to grow deeper into cable's installed base.

- The Petitioners claim that five days after DIRECTV announced that it was beginning to offer local service at \$5.99 per month, EchoStar announced it was going to start providing a similar line-up of local channels for \$4.99, events which occurred in late November 1999.⁸⁵ In fact, it was exactly at that time, November 29, 1999, that the Satellite Home Viewer Improvement Act (“SHVIA”) of 1999 allowed EchoStar and DIRECTV to begin offering “local-into-local” service for the first time. Given the importance of this regulatory development (and its import in allowing the two DBS companies to begin competing more effectively with *cable operators*), it is hardly surprising that the two companies announced at roughly the same time that they would begin offering local channel service.⁸⁶
- The Petitioners claim that both DBS firms announced on December 27, 2001, that they were going to provide additional local channels in each market. In fact, on January 1, 2002, both DBS firms' must carry obligations went into effect, so that both firms were required *by law on the same day* to offer more local channels.⁸⁷
- The Petitioners claim that each of EchoStar and DIRECTV generally picked the most populous areas in the country to roll out their local-into-local service. In fact, EchoStar and DIRECTV lists of DMAs do *not* overlap completely, suggesting that each company's local-into-local decisions are based on different considerations, to a much greater extent than overlap cities suggest intra-DBS rivalry.
- The Petitioners emphasize that both EchoStar and DIRECTV announced the availability of HDTV-compatible set-top receivers within one day of each other.⁸⁸ Petitioners fail to note, however,

⁸⁵ Willig Declaration at ¶ 57.

⁸⁶ *Id.*

⁸⁷ *Id.* at ¶ 58.

⁸⁸ *See e.g.*, NRTC Petition at 33.

that each of these announcements occurred at the Consumer Electronics trade show, a venue where such announcements regarding new technologies are commonplace. The timing of this announcement is much more logically ascribed to the promotional benefits of making such announcements at the leading electronic trade shows, rather than competitive response.⁸⁹

The bottom line is that the incidents cited by opponents of the merger simply do not provide persuasive evidence of intense competition between the two DBS firms. Rather, each provider primarily targets cable, and to the extent that they appear to be lowering prices or adding services in approximate tandem, those tandem movements for the most part reflect the response of both operators to predictable extrinsic events.

More broadly, the basic question posed by the Petitioners, *i.e.*, whether the DBS providers compete at all, is misplaced. As Dr. Willig observes, the more relevant question for analyzing the impact of the merger on competition in the MVPD market is not whether EchoStar and DIRECTV “compete at all. Rather, it is the *degree* of competition between EchoStar and DIRECTV. . . .”⁹⁰

3. The Best Evidence Shows That the Degree of Competition Between EchoStar and DIRECTV Is Modest

Notwithstanding the optical illusion of contemporaneous action and reaction that Petitioners try to create, the data show that the DBS services of the Applicants do not compete fiercely against each other, and the loss of existing competition from the merger is correspondingly limited. Perhaps the best witnesses of

⁸⁹ Willig Declaration at ¶ 58.

⁹⁰ *Id.* at ¶ 59.

this, and certainly the greatest beneficiaries from the lack of perfect competition between the two satellite providers, are NRTC and Pegasus themselves. While these two entities purport to be concerned about the fate of rural consumers, they currently charge rural subscribers \$34.99 – \$3.00 more per month for DIRECTV’s Total Choice package, an expanded basic service, than DIRECTV charges its subscribers for the same programming package in other areas of the country. This subscription fee is also \$3.00 per month more than the price charged by EchoStar for its equivalent America’s Top 100 package.⁹¹

As explained above, the reasons for NRTC’s and Pegasus’s ability to overcharge their subscribers include the “huge differentiator” associated with sports programming and DIRECTV’s brand name.⁹² For whatever reason, EchoStar today does not effectively constrain the prices charged by Pegasus and NRTC in rural areas. As the Applicants will show below, national pricing will better constrain the DBS prices charged rural consumers by NRTC and Pegasus than EchoStar can today.

Dr. Willig’s examination of “churn data” confirms the relatively low degree of competition between DIRECTV and EchoStar. For example, using a DIRECTV subscriber survey, Dr. Willig studied the percentage of current DIRECTV

⁹¹ Ironically, it appears that the reason that NRTC and Pegasus are able to charge a supracompetitive price is precisely because, unlike EchoStar and DIRECTV, they do not compete with the major MSOs in urban areas.

⁹² NAB Petition at 63.

subscribers who were previously EchoStar subscribers.⁹³ The data showed that only nine percent of DIRECTV's current subscribers were previously EchoStar subscribers.⁹⁴ By comparison, roughly 61 percent of DIRECTV's current customers previously subscribed to cable.⁹⁵ Dr. Willig concludes that these figures confirm the views expressed by DBS executives that the "objective of each firm is to gain market share by luring customers away from the leading cable providers," not the customers of the other DBS firm.⁹⁶ Analyses by Dr. Willig of other churn data reflect as well that there is only limited competitive interaction between the DBS firms.⁹⁷

4. EchoStar and DIRECTV Have Been Unable to Discipline Cable Prices

The competition from EchoStar and DIRECTV that Petitioners are so eager to see preserved has not been enough to constrain the pricing behavior, improve the service quality, or enhance consumers' perception of most cable companies. One perennial fact observed by the Commission in its annual reports on the status of competition in the MVPD market is that cable operators continue to increase their prices

⁹³ See Willig Declaration at ¶ 61. Each month, DIRECTV surveys a random sample of roughly 350 subscribers and asks them a series of questions, including whether they have ever subscribed to cable or another DBS service. *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at ¶¶ 62-66.

at rates that far outpace inflation.⁹⁸ EchoStar and DIRECTV, by contrast, have only raised their rates *twice* since 1996.

The findings of a Consumers Union survey of cable and satellite subscribers, published in the September 2001 Consumer Reports, highlights the effects on customer satisfaction of an industry with inadequate competition.⁹⁹ The report of this survey summed up its findings on cable service with a lament: “In the national surveys of nearly 2,000 cable- and satellite-TV subscribers conducted for this report, cable companies received among the lowest marks of any service providers we regularly evaluate – even lower than those for technical support from computer manufacturers.”

⁹⁸ Eighth MVPD Competition Report at ¶ 9 (“During the period under review, cable rates rose faster than inflation. According to the Bureau of Labor Statistics, between June 2000 and June 2001, cable prices rose 4.24 percent compared to a 3.25 percent increase in the Consumer Price Index (“CPI”), which measures general price changes.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 Comm. Reg (P&F) 1414 at ¶ 9 (2001) (“Seventh MVPD Competition Report”) (“During the period under review, cable rates rose faster than inflation. According to the Bureau of Labor Statistics, between June 1999 and June 2000, cable prices rose 4.8 percent compared to a 3.2 percent increase in the Consumer Price Index (“CPI”), which measures general price changes.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* 15 FCC Rcd. 978 at ¶ 9 (2000) (“Sixth MVPD Competition Report”) (“During the period under review, cable rates rose faster than inflation, although the difference between the cable price index and the Consumer Price Index (“CPI”) is not as great as in the previous year. According to the Bureau of Labor Statistics, between June 1998 and June 1999, cable prices rose 3.8% compared to a 2% increase in the CPI, which measures general price changes.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 14 FCC Rcd. 923 at ¶ 9 (1998) (“Fourth MVPD Competition Report”) (“During the period under review, cable rates rose more than four times the rate of inflation. According to the Bureau of Labor Statistics, between June 1997 and June 1998, cable prices rose 7.3% compared to a 1.7% increase in the Consumer Price Index (“CPI”), which is used to measure general price changes.”)

⁹⁹ See *TV: The Digital Decision, A Guide to Choosing Between Digital Cable and Satellite TV – Or Sticking with Regular TV Service*, Consumer Reports (Sept. 2001).

When the Consumers Union asked the survey respondents if they had been charged a “substantial rate increase” in the last year, more than three times as many cable customers answered affirmatively than did satellite customers (40% to 13%). And when asked if their service was an “excellent value,” more than three times as many satellite subscribers responded affirmatively (“fewer than 10%” of cable subscribers to 30%). Cable customers were also much more likely to report frequent service disruptions, unwanted changes in program packages, and frequent channel-listing changes.

While cable rates have risen steadily and faster than the rate of inflation since they were deregulated in the early 1990s,¹⁰⁰ what follows are a few examples of some recent cable rate hikes in a few representative cities.¹⁰¹

- In Austin, Texas, AOL/Time Warner recently raised the monthly fee for expanded basic cable service to \$41.67. They had charged \$34.20 in 1999, \$37.74 in 2000, and \$39.69 in 2001. This is an increase of more than 21% in just three years. For a converter box, the increase over the same period was 93.8%, and the price for service charges increased 77.6%.¹⁰²
- Cable customers in Reno, Nevada saw Charter raise its expanded basic rates approximately 15% this year, to \$39.99 per month. Monthly service charges had been just \$16.45 in 1990, increasing 143% over the next eleven years.¹⁰³

¹⁰⁰ See Comments of Consumer Groups at 7-10.

¹⁰¹ See Attachment D for news articles announcing recent rate hikes.

¹⁰² Austin American Statesman, “Time Warner is upping cable rates,” Nov. 28, 2001.

¹⁰³ The Associated Press State & Local Wire – Reno, Nevada, “Cable television rates to jump in northern Nevada,” Nov. 26, 2001.

- Monthly cable fees in Syracuse, New York have been repeatedly raised by AOL/Time Warner by 5.4% in January 2001, 5.4% in August 2001, and another 5% in January 2002, with the number of channels remaining the same.¹⁰⁴
- AT&T Broadband raised its monthly rates for expanded basic service an average of about 8% around the country, after two similar rate hikes in 2001.¹⁰⁵

When Comcast recently increased its rates in line with the other dominant cable operators around the country, cable consumers in the Washington, D.C. area experienced this lack of effective competition first-hand.¹⁰⁶ Comcast's Basic Plus package went from \$36.04 to \$38.17 a month, another 6% increase. This particular Comcast package compares closely to EchoStar's Top 50 programming package with local channels, except in price: EchoStar still charges only \$28.98 per month. That's a yearly difference of over \$110.

Mark Cooper, director of research for the Consumer Federation of America, correctly observes that the primary reason for these enormous rate hikes is the lack of effective competition: "The simple fact of the matter is that they [cable operators] know they can pass through all those increases. The only people who raise prices in the middle of a deep recession are the monopolists. They use market power to force those

¹⁰⁴ The (Syracuse, NY) Post-Standard, "Time Warner raises cable rates again," Dec. 1, 2001.

¹⁰⁵ The Boston Globe, "AT&T will hike cable rates 8.7%," Nov. 22, 2001; The Miami Herald, "AT&T to raise cable rates," Nov. 3, 2001; Atlanta Journal and Constitution, "AT&T Broadband to raise cable TV fees for metro Atlantans," Nov. 3, 2001.

¹⁰⁶ See Attachment E, "*Dear Comcast Customer*" Letter.

increases through to the public.”¹⁰⁷ Gene Kimmelman, co-director of Consumer Union’s Washington, D.C. office, agrees: “This reflects ongoing price gouging by cable monopolies. It’s particularly astounding that they’re raising prices at a time when the economy is stalled.”¹⁰⁸

It is against the backdrop of these quintessential elements of cable market power that the Commission must analyze the proposed transaction. As reflected in the views of the Consumers Groups and others,¹⁰⁹ as well as the attached economic analyses,¹¹⁰ the proposed merger is the only clear path to introducing effective competition to cable operators throughout the country.

In sum, EchoStar and DIRECTV both compete in the MVPD market, and to some limited degree they compete against one another. But the undeniable facts remain that the MVPD market is dominated by incumbent cable operators, both EchoStar and DIRECTV compete primarily against those cable operators, and the two firms must merge to stay competitive with those cable operators.

¹⁰⁷ The (Albany, NY) Times Union, “Higher cable TV bills coming,” Nov. 22, 2001.

¹⁰⁸ The Seattle Times, “AT&T to raise cable fees 5.5%,” Nov. 3, 2001.

¹⁰⁹ *See e.g.*, Comments of Consumer Groups at 21; Comments of the National Taxpayers Union at 1; Comments of the Missouri Chamber of Commerce at 1; Comments of the Competitive Enterprise Institute at 1; Comments of Frontiers of Freedom at 1; Comments of Farm Bureau Financial Services at 1; Comments of the Third Millennium Communications & Electronics Co. LLC at 4; Comments of the Small Business Survival Committee at 1.

¹¹⁰ Willig Declaration at 4, 70-71.

5. The Merger Opponents Wrongfully Ignore Other MVPD Providers and Potential Entrants

Another part of the strategy of the merger opponents is to argue that, apart from cable and DBS, other MVPD competitive services are “fringe technologies,”¹¹¹ with no prospect of “entering the market on a time frame or a scale sufficient to constrain a DBS monopolist.”¹¹² Again, such statements miss the mark.

First, the statements are inaccurate. There are other MVPD services across the country that retain significant subscribership. C-band satellite, Multichannel Multipoint Distribution Service (“MMDS”) providers, Satellite Master Antenna Television (“SMATV”) systems, and cable overbuilders all compete with DBS and incumbent cable systems. In fact, the combined MVPD market share of these technologies surpasses 3.25 million households – nothing like the dominance of cable, of course, but about one fifth of the total share of DBS subscribership.¹¹³ In addition, the merger opponents do not accurately characterize the extent to which new MVPD market entry is possible or probable. Thus, the Commission itself has recognized that “competitive [MVPD] alternatives continue to develop.”¹¹⁴

Second, even if there were no other competitive distribution technologies or prospects for additional near-term entry in the MVPD market – neither of which is the

¹¹¹ NRTC Petition at 23. It is odd that NRTC would make this characterization as it is one of the four major distributors of C-Band programming. Eighth MVPD Competition Report at ¶ 67.

¹¹² Pegasus Petition at 36.

¹¹³ Eighth MVPD Competition Report at ¶¶ 67-76, 107-112.

¹¹⁴ *Id.* at ¶ 5.

case – the fact remains that the dominant providers in the market remain cable operators, who have a 78% share. These are the providers that need “constraining,” and New EchoStar will achieve that goal.

(a) *Satellite Competition.* As indicated above, the formative years of the DBS industry have demonstrated that effective competition against the dominant cable providers in the MVPD market now requires the combination of the facilities and spectrum to which EchoStar and DIRECTV have access. At the same time, other companies have ample opportunity to use satellite spectrum and orbital locations, as well as other technologies, in an attempt to introduce additional competition in the MVPD market. Nothing in this merger will act to preclude such additional entry.

In this regard, Mr. Sidak is simply wrong in his assessment that “[b]ecause orbital slot allocation is governed by the International Telecommunication Union, not the FCC, the number of orbital locations is fixed.”¹¹⁵ In fact, several orbital locations allotted by the ITU to other countries in the Western Hemisphere have the technical capability to serve the entire continental United States. Two of these countries, Mexico and Argentina, have reached agreements with the U.S. allowing satellites from these orbital locations to serve the U.S. direct-to-home market subject to the same FCC licensing requirements that apply to the U.S. DBS orbital slots.¹¹⁶ Canada also has an ITU allocation for two DBS orbital locations that could be used to serve the U.S. market.

¹¹⁵ Sidak Declaration (NAB) at 20.

¹¹⁶ See *International Bureau Announces Conclusion of U.S.-Argentina Framework Agreement and Protocol for Direct-to-Home Satellite Services and Fixed-Satellite Services*, 13 FCC Rcd. 16581 (1998); *International Bureau Announces*

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MVPD competition could be brought to bear by any number of Ka-band licensees. Pegasus, for example, is free to use its valuable Ka-band licenses to provide MVPD service throughout the United States. Far from the dire picture of spectrum warehousing painted by opponents of the merger,¹¹⁷ there is wide dispersion of Ka-band and other FSS licenses among a variety of licensees.¹¹⁸ In fact, of the full CONUS Ka-band and FSS orbital locations (those from 83° W.L. to 133° W.L. according to Pegasus),¹¹⁹ licensees other than New EchoStar would hold a majority of the assets.¹²⁰

Non-full CONUS licensees, such as R/L DBS and Dominion, also will pose a competitive threat to New EchoStar. R/L DBS has proclaimed its ability to serve nearly every corner of the United States with regional programming from the 61.5 W.L. orbital location.¹²¹ Assuming this is true, it and its progeny will be able to compete head-to-head with New EchoStar.

Conclusion of U.S.-Mexico Framework for Agreement and Protocol for Direct-to-Home Satellite Services, 12 FCC Rcd. 13105 (1996).

¹¹⁷ NAB Petition at iii, 11-12; Pegasus Petition at 63-69; NRTC Petition at 50-56.

¹¹⁸ Even medium-power FSS satellites still lend themselves to various DTH initiatives, as shown for example by BellSouth's recent plan for a DTH offering. While BellSouth has not gone forward with that plan, the fact remains that ample FSS spectrum remains available for medium-power and high-power satellite DTH initiatives.

¹¹⁹ See Pegasus Petition at 71.

¹²⁰ Eleven other entities affiliated with neither EchoStar nor Hughes currently control orbital slots in the 83° W.L.-103° W.L. arc, which demonstrates that there are more than enough prime Ka-band slots controlled by others to ensure that the merger will not "stifle" competition in providing broadband services. See "FCC International Bureau Authorizes Second Round Ka-Band Satellite Systems," Press Release (Aug. 2, 2001).

¹²¹ See Ex Parte Presentation by Howard J. Symons, Petition of R/L DBS Company L.L.C., For Extension of the R/L DBS Direct Broadcast Satellite Construction Permit, Spot Coverage Map (June 6, 2000).

NRTC and its affiliate Pegasus will also likely compete against New EchoStar by using certain facilities of the combined entity if they desire to do so. Specifically, to the extent that DIRECTV's contract with NRTC grants NRTC the right to distribute certain video programming in certain areas, the merger would not alter its contractual rights. Since NRTC and Pegasus would not in those circumstances be constrained by New EchoStar's national pricing commitment, they would be able to continue to charge more to rural subscribers, as they do now, than DIRECTV or EchoStar, separately or together. In fact, however, the DIRECTV/ NRTC agreement makes clear that NRTC's *exclusive* rights are limited and will expire in the future. As a consequence, New EchoStar will be able to compete fully with NRTC/Pegasus throughout those areas where NRTC and Pegasus have distribution rights under their contracts. This may in turn mean that, for commercial reasons, NRTC and Pegasus no longer will be able to charge more than New EchoStar for the same service, but such a result would be a benefit, not a loss, for rural consumers.

C-band satellite services are maintaining efforts to attract rural subscribers. While C-band is certainly not an effective alternative in urban areas, it should not be discounted as an alternative in rural areas. NRTC itself is a major distributor of C-band service even as it resells DBS service. While acknowledging that the number of C-band subscribers has fallen over the past few years, PrimeTime 24, the self-proclaimed "leading provider of network television programming to the C-band

marketplace,” claims that, as of November 2001, there were almost 900,000 C-band subscribers in the United States.¹²²

(b) *Terrestrial Competition.* The Commission has also observed that entrants using a number of different technology platforms are having an impact on MVPD competition that cannot be ignored. Terrestrial services such as MMDS are capable of serving an estimated 36 million homes.¹²³ Although MMDS subscribership remained steady in the past year, the competitiveness of MMDS video offerings will likely be enhanced by MMDS operators’ roll out of high-speed Internet access service, which can be paired with video to create the type of bundled service offering that consumers increasingly find attractive.¹²⁴

The Commission recently recognized “the growing importance of providers that are overbuilding existing cable systems with state-of-the-art systems that offer a bundle of telecommunications services, including video, voice, and high-speed Internet access.”¹²⁵ The Commission has termed these overbuilders “Broadband Service Providers” (“BSPs”), and noted that despite the challenges inherent in BSPs’ strategy of entering markets with entrenched competitors, BSPs such as RCN and Knology are continuing to grow in terms of revenue and subscribership.¹²⁶

¹²² Comments of PrimeTime 24 Joint Venture at 3.

¹²³ Eighth MVPD Competition Report at ¶ 71.

¹²⁴ *Id.*

¹²⁵ *Id.* at ¶ 13.

¹²⁶ *Id.* at ¶ 109, 111.

Electric and gas utilities are moving forward with ventures involving video distribution. The Commission noted that although the utilities are “not yet major competitors in the telecommunications or cable markets,” characteristics of these entities, “such as ownership of fiber optic networks and access to public rights-of-way, could make them competitively significant.”¹²⁷ Importantly, utilities appear to hold great promise for competition in rural areas, as the Commission observed that “utilities, particularly some municipal utilities in rural areas, are willing to build advanced telecommunications networks offering a full range of services where incumbent cable operators and telephone companies are not.”¹²⁸

Finally, the Commission has reported that it is “technically feasible” for a new terrestrial service, which the Commission has dubbed Multichannel Video Distribution and Data Service (“MVDDS”), to share spectrum allocated to DBS in the 12.2-12.7 GHz band.¹²⁹ The Commission has adopted a Further Notice of Proposed Rulemaking seeking comment on technical and service rules for licensing the new services.¹³⁰ Four companies, Northpoint Technologies, MDS America, Satellite Receivers, Ltd. and PDC Broadband Corporation have sought licenses or otherwise expressed interest in providing such a service. While EchoStar and DIRECTV have opposed the interference levels posited by proponents of MVDDS, they also have stated

¹²⁷ *Id.* at ¶ 104.

¹²⁸ *Id.*

¹²⁹ *Id.* at ¶ 64.

¹³⁰ *Id.*

on the record that competition from such services is welcome so long as no interference occurs.¹³¹

(c) *Analogous examples of “intermodal competition.”* The broad view of MVPD as the relevant market is consistent with that of other agencies regulating different but competing technologies. In their competitive analysis, agencies typically consider not only the provision of service by the particular mode of carriage utilized by the company at issue, but also other competing forms of carriage (frequently referred to as “intermodal” competition).¹³²

In an analogous case, for example, the Interstate Commerce Commission (“ICC”) took a broad view of the relevant market in approving the merger of the

¹³¹ *Cable and Satellite Broadcast Competition: The Status of Competition in the Multi-Channel Video Programming Distribution Marketplace Before the House of Representatives Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet* (statement of Charles Ergen, Chairman and CEO, EchoStar Communications Corporation) (Dec. 4, 2001) (“While EchoStar does not oppose the emergence of new competitors in the MVPD market, we are opposing the proposal by Northpoint, because Northpoint’s current proposal would cause electrical interference with the satellite reception of our established satellite TV customers as confirmed by the MITRE Corporation’s testing.”); *see also* Comments of EchoStar Satellite Corporation in CS Docket No. 99-250 (Aug. 16, 1999) at 1, 3 (“EchoStar welcomes new entry into the MVPD market and applauds the Commission’s proposal” to open the 12.7 – 13.2 GHz band for use by all MVPD providers... [T]he Commission should consider this band as yet another possible home for the service planned by Northpoint Technology.”)

¹³² *Market Dominance Determination & Consideration of Product Competition*, 365 I.C.C. 118, 130 (1981); *see also* *Market Dominance Determinations – Product and Geographic Competition*, STB Ex Parte No. 627, 1 n.2 (served April 6, 2001)(noting that Board’s market dominance analysis considers, among other things, “whether the complaining shipper can use other transportation modes, such as trucks or barges, to transport the same commodity between the same points”); *Williams Pipe Line Co.*, 68 F.E.R.C. ¶ 61, 136, at 61, 660 (1994).

Trailways bus line into Greyhound, at a time when those two lines accounted for the vast majority of intercity bus transportation in the U.S. As the ICC stated, “the relevant ‘product’ market is the intercity transportation of passengers,” including private automobile, airlines, intercity bus, and Amtrak.¹³³ The Commission went on to explain that, essentially, the national pricing of bus transportation was a sufficient safeguard: “bus passengers, even those with limited access to air, Amtrak, or private auto will continue to be protected from unreasonable rates by the market discipline of intermodal competition since remaining bus firms must set rates and service to attract passengers who do have these options.”¹³⁴ In affirming, the Court of Appeals for the D.C. Circuit cited approvingly the ICC’s findings that the market included other modes of transport, that “competition in the national market was necessary to promote the public interest,” and that “even in rural markets, the consolidation would have little effect because intermodal competition would provide a sufficient cap on unreasonably high prices or inadequate services.”¹³⁵

Like the Greyhound/Trailways transaction, the proposed merger should be evaluated in the broader market. Here, as there, all consumers will be protected because New EchoStar “must set rates and service to attract [consumers] who do have these options.”

¹³³ *GLI Acquisition Company Purchase Trailways Lines, Inc.*, ICC Decision No. MC-F-18505, at 7 (May 27, 1988).

¹³⁴ *Id.* at 10.

¹³⁵ *Peter Pan Bus Lines, Inc. v. ICC*, Nos. 88-1532, 88-1566, 88-1567, slip op. at 5 (D.C. Cir. May 8, 1989).

6. Petitioners Cannot Prove the Existence of a DBS Market from EchoStar's Pre-Trial Position in a Dismissed Proceeding

Petitioners NAB and Pegasus, among others, try to prove their economic case by recourse to statements that EchoStar made in a 2000 pre-trial request for extension of time in a now dismissed antitrust dispute with DIRECTV.¹³⁶ The Petitioners use these statements to suggest that EchoStar believes in the existence of a separate DBS market, that therefore there must be such a market, and that EchoStar has reversed course now only to serve its interest in approval of the merger Application. The Petitioners misread these litigation statements, and in any event their reliance on them to prove their economic case is misplaced, particularly since none of their own economic experts has argued in favor of a separate DBS market.

First, it is certainly not true that EchoStar's belief in a single MVPD market is of recent origin. EchoStar has always held the same view: that there is one MVPD market, in which cable is the incumbent and dominating player, and that DBS competes, although presently with distinct disadvantages, against cable within the MVPD market. It has also consistently recognized that certain factors have historically inhibited DBS from robustly competing with cable.

EchoStar has expressed that view on dozens of occasions, starting as early as 1995. In 1996, for example, EchoStar asserted that "the relevant market includes all

¹³⁶ NAB Petition at 37-40; Pegasus Petition at 12-14.

multichannel video programming distributors, not just DBS service providers.”¹³⁷ In 1997 EchoStar wrote in comments to the Commission: “Ever since it commenced DBS service in the spring of 1996, EchoStar has viewed cable subscribers as its primary target market. Accordingly, EchoStar has priced and structured its offering with the primary purpose of attracting cable subscribers.”¹³⁸

In December 1998, EchoStar expressed a similar view with respect to the potential impact of its transaction with MCI: “EchoStar emphasizes that the MVPD market – not any subset of that market – is the relevant market for analyzing the public interest impact.”¹³⁹ It also noted that “DBS service has emerged as the most likely alternative with the potential for introducing full-fledged competition against dominant cable operators in the MVPD market, but is still a long way from realizing that potential because of various spectrum-related and regulatory constraints.”¹⁴⁰ Appearing before a congressional committee in 1999 regarding EchoStar’s efforts to compete with cable systems, EchoStar’s Chief Executive Officer Mr. Ergen testified: “The relevant market for our service is the MVPD market. DOJ has found extensive evidence of customers

¹³⁷ *In re Application of Direct Broadcasting Satellite Corp.*, 11 FCC Rcd. 10494 (1996) at ¶ 8.

¹³⁸ Comments of Echostar Communications Corp., *In re Annual Assessment of the Status of Competition in Market for the Delivery of Video Programming*, CS Docket No. 97-141 (July 23, 1997) at 2.

¹³⁹ *In re Application of MCI Telecommunications Corp. and EchoStar 110 Corp.* (Dec. 2, 1998) at 7.

¹⁴⁰ *Id.* at ii.

switching from cable to DBS, contrasted with the early days of DBS, when subscribers most often came from uncabled areas.”¹⁴¹

While this view of the relevant market was certainly the prevalent one in 2000, this does not mean that it was free from any doubt. As zealous advocates, EchoStar’s lawyers in the litigation had the duty to explore fully the extent to which any such doubt could be used to bolster EchoStar’s case. This was the context of the statements seized on by Petitioners in EchoStar’s request for more discovery to shed additional light on the factual issues. In its *Request for Rule 56(f) Continuance to Respond to Defendants’ Motion for Summary Judgment*, EchoStar argued that the summary judgment requested by DIRECTV was inappropriate pending ongoing discovery and in light of the need for additional discovery on highly complex issues such as market definition. The statements cited by Petitioners described only beliefs about what the evidence could establish, and they did not purport to be statements of proven fact. Indeed, EchoStar explicitly noted that its assertions were based on a preliminary understanding of the case, stating that “expert witnesses will play an important role on several issues, including the definition of the relevant market.”¹⁴²

Finally, even if there were any potential counter-argument about the relevant market in 2000, it has been dispelled by developments that were then in their early stages and that have since matured decisively. As explained above, these

¹⁴¹ Charles W. Ergen, Testimony Before the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate (Jan. 27, 1999) at 3.

¹⁴² *Request for Continuance*, at 3.

developments include: on the one hand, the fuller extent to which DBS providers have since been able to capitalize on the local-into-local opportunity afforded by SHVIA since the end of 1999; and, on the other hand, the aggressive roll-out of digital cable.

B. NRTC, NAB and Pegasus Criticisms Of The FCC’s “Homes Passed” Estimate Are Not Persuasive and Rely on Inaccurate Data Sources

In discussing the lack of anti-competitive impact on rural markets of the proposed transaction, the Application referenced the Commission’s then-current statement on cable availability, which observed that over 96% of all television households in the United States are passed by cable television systems and that these cable operators continue to be the dominant distributors in the national MVPD market.¹⁴³ The Commission has since released its Eighth Annual MVPD Competition Report which places the current percentage of television households passed by cable at 97.1%.¹⁴⁴ NRTC, NAB and Pegasus argue that the statistics cited by the Commission overstate the percentage of TV households that have access to cable. These Petitioners, however, provide nothing but speculation to support their claims. And, even if the parties in this proceeding could agree on a percentage of homes not passed by cable, the practical

¹⁴³ Merger Application at 39-40 (citing Seventh MVPD Competition Report, 16 FCC Rcd. 6005, at App. B., Table B-1).

¹⁴⁴ Eighth MVPD Competition Report at ¶ 17.

significance of this number would be insignificant, since New EchoStar effectively would be unable to isolate such consumers for an anticompetitive action.¹⁴⁵

In every Annual Report on the status of competition in the MVPD market since the Commission first began issuing them, the Commission has relied on data collected by Paul Kagan Associates, Inc. for the number of homes passed by cable.¹⁴⁶ Likewise, each year the Commission has compared the number of homes passed with the number of television households to obtain a sense of the availability of cable services to television viewers.¹⁴⁷ No Petitioner argues that this is the incorrect comparison for the Commission to make; nor could they, since the availability of cable to unoccupied housing units and occupied households without a television is indisputably irrelevant. Instead, the Petitioners argue that the Kagan data relied upon by the Commission overstates the number of television households in determining the number of homes passed, and that as a result, the percentage of television households passed by cable may

¹⁴⁵ See Willig Declaration at ¶ 98 (explaining that the percentage of homes passed by cable is only relevant if New EchoStar is able to “find” the non-cable passed homes, a process that would be extremely difficult and costly).

¹⁴⁶ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd. 2060, 2068 n. 19 (1995) (“Second MVPD Competition Report”) (explaining source of data for First MVPD Competition Report); Third MVPD Competition Report, 12 FCC Rcd. 4358, 4368, 4465; Fourth MVPD Competition Report, 13 FCC Rcd. 1034, 1049, 1174; *In the Matter of Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284, 24322 (1998) (“Fifth MVPD Competition Report”); Sixth MVPD Competition Report, 15 FCC Rcd. 978, 990, 1080; Seventh MVPD Competition Report, 16 FCC Rcd. 6005, at ¶ 18, App. B. Table B-1; Eighth MVPD Competition Report, FCC 01-389, at ¶ 17, App. B. Table B-1.

¹⁴⁷ *Id.*

be inaccurate and could be as low as 81% instead of the 97% figure cited by the Commission.¹⁴⁸

The Petitioners' entire argument in this regard is based on the assertion that cable operators include unoccupied housing units and non-television households in the homes passed data that they provide to Kagan.¹⁴⁹ The assumption underlying this theory is that cable operators have no way to determine the number of television households in their service area.¹⁵⁰ Yet, this assumption is entirely unsupported by the Petitioners. Cable operators have every incentive to determine this figure because it defines their potential local customer base. The figure is relevant to any number of budgeting, marketing and other financial efforts undertaken by cable operators. Moreover, the number of television households in a service area is not unknowable. To the contrary, Nielsen Media Research publishes yearly estimates of TV households on a county-by-county basis for the entire U.S.,¹⁵¹ and provides studies at an even finer level of granularity at the request of private entities. There is every reason to believe that cable operators are well informed concerning their potential customer base when they respond to Kagan data requests.

Indeed, the Petitioners' own attack on the numerator of the calculation shows that the Kagan number of homes passed may in fact be *understated* in one

¹⁴⁸ NRTC Petition at 9; Pegasus Petition at 16; NAB Petition at 46.

¹⁴⁹ NRTC Petition at 9; NAB Petition at 46.

¹⁵⁰ NRTC Petition at 9-10 (quoting NTIA/RUS Report at 19 n. 62)

¹⁵¹ See Broadcasting & Cable Yearbook 2001 at B-160 – B241.

important respect. NRTC attacks the data based on each cable operator’s uncertainty about which of several possible “homes passed” criteria to use: feeder cables in place nearby; cable television “readily available”; “potential” to be connected; or, households “capable” of receiving service.¹⁵² As Dr. Willig notes, the correct criterion is the broadest one, i.e., the number of homes with the potential for being connected to the cable system.¹⁵³ The potential for a home to be connected to a cable system is enough for the purpose of disciplining a satellite provider’s conduct. All of the other criteria listed by the NRTC may be read as requiring *more than that* for a home to be considered “passed.” To the extent that a cable operator may be using a more restrictive “homes passed” criterion, the number of homes passed may in fact be *understated* from the economic point of view.

Petitioners also attempt to support their theory regarding the Kagan data by citing data from Warren Communications (“Warren”) on homes passed in six states, which exceeds the 2000 Census Bureau data on the number of occupied households in those states.¹⁵⁴ However, as Dr. Willig observes, Petitioners make no attempt to explain how data and collection practices by Warren Communications support their theory that *the Kagan* data is erroneous.¹⁵⁵ Petitioners also compare the Kagan data on homes

¹⁵² See NRTC Petition at 10.

¹⁵³ See Willig Declaration at ¶ 98, n.119.

¹⁵⁴ NRTC Petition at 11-12; NAB Petition at 46.

¹⁵⁵ See Willig Declaration at ¶ 98 (“No commenter has provided any evidence that the Warren data are more accurate than the Kagan data.”)

passed in the U.S. with Census Bureau data on occupied households in the U.S., but this comparison is likewise unavailing in support of Petitioners' theory because there is no indication that the data collection and analysis practices of Kagan and the Census Bureau are the same or even similar. Simply put, the Petitioners do not make a persuasive case supported by hard evidence that the Kagan data, on which the Commission, industry and investors have relied for years, is incorrect or overstated.¹⁵⁶

Certainly, the opposite appears to be true for the figures proffered by the NRTC the NAB and their economic experts. As Dr. Willig explains, Dr. MacAvoy and Mr. Sidak both present a series of maps that purport to show areas where cable is available and where cable is not available and purport to show that it is possible to identify these areas with a great deal of precision.

As an initial matter, it is important to realize that these maps are based on information that is provided to Warren Communications by the cable companies. To the extent this information is inaccurate or not kept current, Warren's information will not be accurate.¹⁵⁷

Dr. Willig independently tested the accuracy of the Warren data in two ways: First, he analyzed DIRECTV churn data and examined whether any customers who lived in zip codes that the Warren data suggest were not passed had churned from

¹⁵⁶ NRTC also attempts to manipulate the numbers to its own advantage by arguing that 23 million homes do not have access to cable. NRTC Petition at 14; *see also* Pegasus Petition at 17. By NRTC's own analysis this 23 million home figure includes unoccupied housing units and homes without televisions. *Id.*

¹⁵⁷ Willig Declaration at ¶ 95.

DIRECTV to cable. The data that Dr. MacAvoy and Mr. Sidak present suggest that a large number of zip codes are not passed by cable. But the DIRECTV data indicate that *more than one quarter* of the customers who lived in these supposedly non-cable passed zip codes and who left DIRECTV, *left for a cable provider*.¹⁵⁸

Next, to ensure that the problem is not with misreporting in the DIRECTV churn data, Dr. Willig asked Ginsberg Lahey, LLC, a Washington-based research firm, to check the accuracy of these results by contacting the local cable firms to ensure that subscribers in these zip codes could receive cable service. For a significant number of these zip codes, Ginsberg Lahey was able to confirm the accuracy of the DIRECTV churn data by verifying with the local cable provider that cable service was indeed available.¹⁵⁹ Ginsberg Lahey also contacted local cable firms in zip codes that the Warren data suggested were not passed by cable. In two weeks alone, Ginsberg Lahey discovered that *at least 20 zip codes that Warren indicated were not passed by cable were in fact cable passed*.¹⁶⁰

In any event, even assuming *arguendo* the correctness of Pegasus's characterization that "[t]here is a range of estimates and some controversy over the number of U.S. homes that lack access to cable,"¹⁶¹ the homes passed issue is only

¹⁵⁸ *Id.* at ¶ 96.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* Ginsberg Lahey found that cable service was available in the following zip codes: 13635, 13690, 24649, 25040, 25205, 30045, 30297, 30127, 37191, 40165, 46175, 47145, 42085, 55783, 63966, 66040, 70577, 72073, 77561, and 77650. The Warren database suggests that each of these zip codes is not passed by cable.

¹⁶¹ Pegasus Petition at 17.

relevant to the extent that New EchoStar would be able to discriminate against consumers in those areas not served by cable. This is not possible for at least three reasons. First, as described more fully by Dr. Willig, economic theory predicts that in the situation that Pegasus describes, where homes passed data may be unsound and yield uncertainty regarding the identification of customers in non-cable passed areas, a firm is not likely to engage in price discrimination.¹⁶² In particular, New EchoStar would need to be wrong only in a relatively small number of cases to make it unprofitable to charge different prices to non-cabled and cabled customers.¹⁶³

Second, as originally described in the Application, the geographical diversity of those television households not served by cable makes discrimination between television households that are served by cable and those that are not very difficult.¹⁶⁴ Indeed, this latter point is aptly demonstrated by the maps of the fourteen “clusters” of rural areas included in the MacAvoy Declaration.¹⁶⁵ Those maps quite clearly show that census blocks without access to cable are interspersed with census blocks that do have access to cable in a way that would not permit a DBS provider to discriminate between cabled and non-cabled areas. In short, as Dr. Willig observes, even if the Warren (or Kagan) maps and data were accurate, cable franchise areas do not correspond to geographic designations such as DMAs, counties, or even zip codes. Thus,

¹⁶² See Willig Declaration at ¶ 94.

¹⁶³ *Id.* (citation omitted).

¹⁶⁴ Merger Application Att. A, Willig Declaration at ¶ 37.

¹⁶⁵ MacAvoy Declaration (NRTC) at 10-25.

even if New EchoStar were to price differently based on the zip code of a customer, the zip code of a customer will not tell New EchoStar precisely whether that customer is passed by cable or not. Therefore, Dr. Willig found, it “cannot be concluded from these maps that New EchoStar could implement a price discrimination scheme based on whether customers had cable available or not.”¹⁶⁶

Finally, New EchoStar’s commitment to the one nation, one rate card plan, which is addressed in more detail below, also will ensure that no discrimination occurs. At bottom, the question that the NRTC and others have injected into this proceeding over the number of homes passed by cable is a red herring that is not decisionally significant.

C. Petitioners’ Analyses Begin From a False Baseline of Healthy Competition in the MVPD Market

The proposed merger will have significant pro-competitive effects in the relevant MVPD market, and the Applicants’ one nation, one rate card commitment can demonstrably address any alleged anti-competitive effects on this market. The Petitioners’ assertions that the merger will result in higher prices for consumers are wrong from the starting point. They are based on false, rosy assumptions about the welfare of MVPD consumers today. In particular, as shown above, Petitioners disregard at least two crucial facts: (1) EchoStar’s and DIRECTV’s services are *not* perfect substitutes for each other; and (2) neither company on its own has been able to rein in the

¹⁶⁶ *Id.* at 63.

behavior of large cable MSOs, which continue to raise their prices well in excess of the Consumer Price Index.

Instead of recognizing these facts, the Petitioners assume implicitly that there is now full-blown competition in the MVPD market between DBS and cable. Starting from that premise, they attempt to show that the merger will destroy much of this competition to the detriment of consumers. The premise is false, however.

To the question of whether MVPD consumers are well off today, the consumers' representatives correctly answer, no.¹⁶⁷ The Commission should not base its evaluation of the merger on the contrary assumptions entertained by the NAB, Pegasus and NRTC – that all is basically well today in the MVPD market.¹⁶⁸

D. The Merger Will Result In Lower Prices for MVPD Consumers In Urban And Rural Areas

Some Petitioners argue that the merger will decrease the number of competitors from 2 to 1 in some areas, and 3 to 2 in others, thereby resulting in increased prices for MVPD consumers and a net public welfare deficit.¹⁶⁹ In support of this

¹⁶⁷ Comments of Consumer Groups at 4-7.

¹⁶⁸ NAB Petition at 13-15; Pegasus Petition at 9-10; NRTC Petition at 1-2.

¹⁶⁹ *See, e.g.*, NAB Petition at 52-56 (“a horizontal merger may ‘create a single firm with substantial market power, enabling that firm to unilaterally raise prices. . .’” (quoting ABA Section of Antitrust Law, *Antitrust Law Developments* 493 (4th ed. 1997)); NAB’s Sidak Declaration at 21-30 (calculating supposed price increase that would result from “duopoly-to-monopoly merger” and from a 3-to-2 merger); NRTC Petition at 30 (merger would lead to “monopoly prices to rural Americans”); NRTC’s MacAvoy Declaration at 47-51 (predicting price increases as a result of merger); Rubinfeld Report (Pegasus) at 3.

proposition, Petitioners pursue two somewhat inconsistent lines of attack: (1) that New EchoStar will seek to maximize profits by instituting a patchwork of different prices in different areas of the country; or (2) that even with a national price commitment, New EchoStar will be able to raise its prices unilaterally in both urban and rural areas; and that the merger will facilitate collusion and allocation of territories between New EchoStar and cable operators.¹⁷⁰ The first category of arguments ignores the Applicants' national pricing commitment, the Applicants' past pricing practices, and the reasons why national pricing makes as much sense for satellite television services as it does for national offerings of Internet access and cell-phone services. The second category of arguments disregards that New EchoStar must set its price to be competitive in the most competitive markets where the largest number of potential subscribers are located. By setting its price above competitive rates or colluding with a cable operator, New EchoStar would forego large pools of U.S. consumers and fail to maximize its profits.

1. The One Nation, One Rate Card Plan Will Be an Effective Constraint on New EchoStar

The Petitioners question the value of New EchoStar's commitment of national pricing as a constraint on prices.¹⁷¹ Their arguments ignore the fact that national pricing is consistent with the Applicants' efficiency-enhancing incentives and with their prior practices. It is also consistent with the practices of other national providers in

¹⁷⁰ NAB Petition at 96-98 (Sidak Declaration at 34-35); Pegasus Petition at 53-55; NRTC Petition at 35-38 (MacAvoy Declaration at 52-55).

¹⁷¹ NAB Petition at 96-98; Pegasus Petition at 53-55; NRTC Petition at 35-38.

comparable network industries. The ability to offer local promotions for installation and equipment will not undermine the effectiveness of national pricing as a constraint.

Discrimination in the quality of service has not been a problem in the past, and the same incentives that have prevented the Applicants from practicing such discrimination to date will remain in place after the merger to prevent it in the future.

As set forth in the attached Declaration of Dr. Willig, national pricing, which both EchoStar and DIRECTV have always used, makes sound economic sense. Offering a national price will allow New EchoStar to take advantage of this national footprint when marketing its services – using television advertising, for example, and making the price of the service part of such campaigns. In contrast, tailoring packages to particular areas would cause the loss of the economies of scale inherent in a national marketing campaign.¹⁷² Moreover, customer service and direct sales are also done on a national basis, and implementing local price variations would require customer service representatives to be knowledgeable about a wide range of prices, only some of which would be available to any particular customer.¹⁷³

Even if these efficiencies did not attend national pricing, it would be extremely difficult to charge different programming prices in different areas. As Dr. Willig explains, evidence of this difficulty is demonstrated in areas where NRTC sells DIRECTV service at a price \$3 per month higher than DIRECTV charges for the same

¹⁷² See Willig Declaration at ¶ 94. As Dr. Willig observes, while it is true that some local variations exist with respect to promotions, these are largely with respect to equipment, installation and value-added gifts, for example, an umbrella. *Id.* at 60-61.

¹⁷³ *Id.*

service. In such areas, EchoStar could maintain or perhaps strengthen its competitive position vis-à-vis DIRECTV and charge an extra \$1 or \$2 in NRTC areas (which are easily identifiable). However, EchoStar has not reacted to this price disparity by charging higher prices, providing additional evidence of the inefficiencies of regionally pricing DBS services.¹⁷⁴

Nor could New EchoStar implement a price discrimination scheme based on whether customers had access to cable or not.¹⁷⁵ Dr. Willig shows that the task of isolating consumers without cable is inherently difficult and imprecise (for example, the Warren data used by Sidak and MacAvoy are rife with inaccuracies). And as Dr. Willig explains, it would only be necessary for New EchoStar to be wrong in a relatively small number of cases before it would become unprofitable to charge different prices on this basis.¹⁷⁶ Such a price discrimination scheme, therefore, simply would not make good economic sense.

The fact that in the past the Applicants have used a limited number of local promotions to attract new subscribers in no way undermines their national pricing commitment. In a “Catch-22,” the Petitioners attack the notion of national pricing both if New EchoStar renounces the ability to offer local promotions (they say it would be inefficient) *and* if New EchoStar retains that ability (they say local promotions will

¹⁷⁴ Willig Declaration at ¶ 93.

¹⁷⁵ Sidak Declaration (NAB) at 34-35; MacAvoy Declaration (NRTC) at 52-53.

¹⁷⁶ Willig Declaration at ¶ 94.

undermine the value of the national pricing commitment).¹⁷⁷ The truth is that local promotions can be a valuable tool to the same limited extent that Applicants have used them in the past, for example, in testing a promotion before taking it national, and that such limited promotions will not detract from the effectiveness of national pricing as a safeguard against price discrimination.

The local promotions that EchoStar and DIRECTV have offered over the years have been limited in geographic scope, time, value and number of subscribers affected. In the last year, for example, EchoStar and DIRECTV have offered local promotions in only a handful of areas. These areas have been targeted due to localized, specialized reasons such as cable bounty programs targeted at local rate increases. Importantly, the promotions have been limited in duration and very limited in scope. Over the last year, for example, subscribers gained by local promotions were a very small percentage – less than 5% of EchoStar’s total new subscribers for that period. Such limited local promotions for installation or equipment have not affected at all the levels at which the Applicants have set their national rates in the past and, according to Dr. Willig, will not do so in the future. For example, the effect on the profit-maximizing national pricing level would be negligible if New EchoStar were to offer in the first year of its operations only promotions of the same scope as those EchoStar and DIRECTV offered in the past. Indeed the Applicants are willing to commit to reasonable requirements to ensure that national pricing is an effective constraint on pricing behavior, consistent with efficiency and market dictates.

¹⁷⁷ NAB Petition at 94-95; NRTC Petition at 31-35.

The Applicants also have engaged in no regional discrimination in the quality of service for several reasons. These reasons include the importance of national brand building and the significance of the DBS quality rankings by national consumer services evaluating quality on a national basis, such as J.D. Power. Some Petitioners nonetheless assert that New EchoStar will have an incentive to discriminate in the quality of the service it offers to subscribers with fewer MVPD alternatives.¹⁷⁸ The facts, however, disprove this assertion. Dr. Willig analyzed DIRECTV's customer satisfaction survey to determine whether DIRECTV currently engages in any form of non-price discrimination. Dr. Willig found that "the results suggest that rural customers are just as satisfied with DIRECTV's overall service and customer service as non-rural customers."¹⁷⁹ EchoStar, for its part, has generally received significantly fewer complaints, both on an absolute and a proportionate basis, from consumers in rural areas than from urban households. This fact alone disproves the Petitioners' assertion that New EchoStar will have an incentive to discriminate against customers with fewer choices, for if this speculation were valid, each company today would have the incentive to reduce its service quality in those rural areas. EchoStar has not done so, proving that it values the image of its brand over the alleged incentive to pick and choose to whom it offers its top-ranked customer service.¹⁸⁰

¹⁷⁸ Rubinfeld Declaration (Pegasus) at 16; NAB Petition at 98, Sidak Declaration (NAB) at 36; NRTC Petition at 31, MacAvoy Declaration (NRTC) at 55.

¹⁷⁹ Willig Declaration at ¶ 69.

¹⁸⁰ American Customer Satisfaction Index of the University of Michigan Business School, Aug. 20, 2001. *See* <http://www.theacsi.org>.

2. “One Nation, One Rate Card” Will Translate Effective Competition in Urban Areas Into Benefits to All Households and Renders the “3 to 2” and “2 to 1” Arguments Baseless

Petitioners allege that, even with a national price commitment, New EchoStar would raise its prices or collude with cable operators to maximize its profits. Petitioners specifically argue that the merger will reduce the number of competitors from 2 to 1 in areas without access to a non-satellite MVPD provider, which will permit New EchoStar to charge “monopoly” prices, and that it will also reduce the number of competitors from 3 to 2 in areas served by non-satellite MVPD, leading to higher “duopoly” prices and facilitating collusion.¹⁸¹ The cost/benefit analysis posited by Petitioners to reach this conclusion, however, assumes that New EchoStar would have no interest in growing its base of subscribers, and the only question would be how to maximize its profits from its existing subscriber base. Under Petitioners’ analysis, New EchoStar would increase its prices if the additional profits from *existing* subscribers that have no realistic alternative service exceed the lost revenues from *existing* subscribers

¹⁸¹ See, e.g., NAB Petition at 52-56 and Sidak Declaration (NAB) at 21-30 (calculating supposed price increase that would result from “duopoly-to-monopoly merger” and from a 3 to 2 merger); NRTC Petition at 30 and MacAvoy Declaration (NRTC) at 47-51 (predicting price increases as a result of merger); Pegasus Petition at 21-22, 29-30 (speculating that the merger will lead to “unilateral anti-competitive effects enabling a single DBS firm to increase price independently of how rivals behave, or will enable one satellite and one cable firm to coordinate behavior resulting in “greater freedom to raise prices”); CWA Petition at 2 (the reduction of competitors from 2-to-1 or from 3-to-2 will allow the merged firm to raise prices); Letter from the National Consumers League, National Farmers Union and the National Grange to William F. Caton, Acting Secretary, FCC (Feb. 4, 2002), at 1 (merger to monopoly will lead to higher prices).

choosing to cancel New EchoStar's service. However, Dr. Willig explains that such an approach would not be in New EchoStar's economic interests, for the simple reason that New EchoStar would not be maximizing revenue if it restricted itself to existing subscribers.

A subscriber growth strategy is far more profitable for a firm such as New EchoStar that would serve a little more than 20% of the nation's MVPD households with a relatively high cost satellite fleet and uplink centers and relatively low marginal costs. As Dr. Willig explains, given the national pricing commitment, the prospect of gaining even a small percentage of new subscribers from the largest DMAs in the country would be much more valuable to New EchoStar than any prospect of extracting extensive rents from rural subscribers.¹⁸² In other words, the benefits of gaining additional subscribers in the largest DMAs by charging a competitive price would be much more valuable to New EchoStar than the additional margin from any conceivable rate increase above a competitive price. And this comparison does not even take into account the revenue streams from advertising or from pay-per-view, VOD, and interactive services. These services are likely to be relatively more attractive in more affluent, urban areas, and they are more reason why New EchoStar would not want to forgo the huge pools of urban subscribers.

This profit maximizing strategy is consistent with the way in which both DBS companies have uniformly favored growth to date, even though the prospects of growth are dampened by the constraints on EchoStar's and DIRECTV's ability to take on

¹⁸² Willig Declaration at ¶ 39-41.

digital cable as an equal and from their ability separately to offer local channels to all DMAs and thereby compete more effectively with cable providers in all markets. EchoStar, for example, aggressively prices its America's Top 50 and 100 packages at \$22.99 and \$31.99 per month in order to convert cable subscribers, even though Pegasus and NRTC charge a full \$3.00 more per month in rural areas, leaving EchoStar ample room to raise its prices in those areas without losing rural subscribers. This growth strategy will make even more sense post-merger as New EchoStar takes advantage of the spectrum and other efficiencies gained by combining the two companies' resources in order to better compete with digital cable and therefore increasing the prospects for urban subscriber growth.

Therefore, based on current and past practices in the DBS industry, as well as sound economic theory and modeling, there is no question that New EchoStar will set its national price at a competitive level based on the MVPD prices prevailing in the most populous markets in the nation. Precisely because of these profit-maximizing incentives, national pricing will act as a means of bringing to all Americans, wherever they are located, the benefits of MVPD competition, wherever in the country it is the most intense. Competitive pressures from MVPD distributors operating in the largest cities will translate into benefits for consumers that are not directly served by these distributors.

Accordingly, the merger will not, as alleged by Petitioners,¹⁸³ be a "2 to 1" in any respect that matters for any area that is not passed by cable any more than it will

¹⁸³ NAB Petition at ii, Sidak Declaration (NAB) at 12); NRTC Petition at v; ACC Satellite TV Comments at 5.

be a “3 to 2” for any household that is served by a cable system. To maximize its profits, New EchoStar will have to set its prices at levels allowing it to compete for subscribers in the most densely populated and most heavily contested markets.

3. There Is No Realistic Possibility of Collusion Among the Cable MSOs and New EchoStar

For the same reasons that New EchoStar will attempt to maximize its profits by competing vigorously with those MVPD distributors serving the largest DMAs, the concerns expressed by Petitioners about collusion among New EchoStar and cable operators are unfounded. First of all, this particular tango would require New EchoStar to dance with as many as 10 cable MSO partners simultaneously. New EchoStar would have to coordinate not only with one cable operator but at least with most, if not all, of the largest cable MSOs operating in the nation’s most populated areas.

As explained by Dr. Willig, if any one of the major cable MSOs – AT&T/Comcast, AOL/Time Warner, Cablevision, Charter or Adelphia – were to refuse to participate in a deal to set prices at artificially high levels, a pool of millions of potential customers would automatically become unavailable to New EchoStar, making such a deal among the remaining parties economically unattractive.¹⁸⁴ Nor is Mr. Sidak’s postulation of a “tacitly collusive strategy of market allocation” where “DBS would keep the rural customers and cable would be free to take the urban customers,”¹⁸⁵ a realistic

¹⁸⁴ Willig Declaration at ¶¶ 72-73.

¹⁸⁵ Sidak Declaration (NAB) at 34-35.

possibility. Such a deal could not happen for a simple reason, among others: the failure of consideration. New EchoStar would be giving up a huge pool of potential subscribers without getting anything in return. In particular, a promise on the part of large cable operators to hold back from expanding into the few truly unpassed rural areas would be meaningless, as cable operators would be unlikely to find such expansion profitable anyway. In short, under this theory, New EchoStar would be willing to act irrationally by forgoing the opportunity to gain subscribers in the nation's most populated urban areas and getting nothing in return.

Ever since the inception of their services, both EchoStar and DIRECTV have consistently followed a strategy of making their services increasingly competitive with cable systems in order to convert cable customers and obtain a large percentage of new MVPD subscribers. The proposed merger is the next logical step in that direction in order to keep pace with digital cable, and it is illogical to view it as an attempt to revert to the bygone era of rural-only satellite television. Such a strategy would be equivalent to economic suicide for New EchoStar.

E. Rural Cable Operators Will Continue To Be A Competitive Factor

The fear expressed by the American Cable Association that rural cable operators may be forced to discontinue operations is both overblown, inconsistent with the cable industry's representations to the Commission in other proceedings, and ultimately irrelevant.¹⁸⁶ Apparently, what these rural cable companies fear most is that

¹⁸⁶ ACA Petition at 2, 13-20.

due to the efficiencies of the proposed merger, New EchoStar will be able to bring more services to rural America at lower prices. It is this threat of enhanced competition from DBS that they believe will make it more difficult to maintain and expand their customer base.¹⁸⁷

First, as the cable industry has repeatedly pointed out in the broadband and open access proceedings, rural cable operators can incorporate digital upgrades at an affordable cost, and have increasingly been doing so.¹⁸⁸ Using such technological innovations as the much touted “Headend in the Sky,” small analog cable companies unable or unwilling to invest in new facilities can expand their channel capacity to compete with other MVPD providers. Indeed, in its comments to the Commission in the open access proceeding, the American Cable Association asserts that its “ACA Cable Modem Survey shows members are making substantial progress in deploying cable modem service” and that

[t]he efforts of ACA members are providing hundreds of thousands of consumers the option of high-speed cable modem service in smaller markets. The number of homes passed by ACA members surveyed should exceed 1.7 million within 24 months. Other facilities-based providers have chosen not to invest in these markets. In this way, ACA members deliver a choice of broadband Internet access where none would otherwise exist . . . Emerging

¹⁸⁷ ACA Petition at 14-23.

¹⁸⁸ See Comments of the American Cable Association, CS Docket No. 00-30, at 5-8 (Apr. 25, 2000) (describing progress by ACA members, including Mediacom Communications Corporation, Galaxy Cablevision, Pine Tree Cablevision and Rural Route Video in providing cable modem service to small markets.)

competition from satellite delivered Internet access should add to consumer choice in even the smallest markets.¹⁸⁹

And just this past month, NCTA and several smaller rural cable operators lobbied the Commission on their digital upgrades “seeking to demonstrate to policy-makers that cable TV companies were rolling out broadband services in markets outside major metropolitan areas.”¹⁹⁰ NCTA’s president and CEO is quoted as follows:

Cable operators – even those serving midsize and rural markets – are widely delivering on the deployment of high-speed Internet service and other broadband services.¹⁹¹

Second, even if a particular cable operator were to discontinue operations, the cable plant would remain available for use and would likely be used by a successor entity that could run it more efficiently and avail itself of the decreasing cost of digital upgrades. The possibility of harm to a particular competitor does not constitute the type of harm to competition that the Commission is called upon to evaluate.

III. THE MERGER WILL MAKE TRUE BROADBAND SERVICES AVAILABLE FOR THE FIRST TIME TO ALL AMERICAN HOMES

A. The Merger Will Create The First True Satellite Broadband Service

¹⁸⁹ See Petition to Deny of the American Cable Association, ET Docket No. 00-185, at 12 (Dec. 1, 2000).

¹⁹⁰ See Telecommunications Reports, “NCTA Touts Cable Modem Deployment in Rural Areas,” (Feb. 4, 2002). See also *Ex Parte* Letters from Lisa A. Schoenthaler, NCTA Senior Director, Office of Rural/Small Systems and Association Affairs to William Caton, Acting Secretary, Federal Communications Commission (Feb. 8, 2002).

¹⁹¹ *Id.*

Some commenters claim that the merger will result in an elimination or reduction of competition by reducing the number of broadband competitors from “two to one” in some areas, and from “three-to-two” in other areas.¹⁹² These commenters completely miss the point. They appear to begin with the assumption that all Americans enjoy vibrant competition among providers of true broadband services *today*; they then seek to prove that this competitive marketplace will suffer as a result of the proposed merger.

In fact, however, the merger of EchoStar and Hughes will *create* for the first time a truly competitive broadband alternative to DSL and cable modem service. In doing so, it will help alleviate the real problem, which these commenters assume away:

- by any measure, the broadband revolution is far from reaching every corner of the United States. For many Americans living in remote areas, DSL or cable modems remain out of reach. Satellite high-speed service is the only platform with a national footprint, yet today’s satellite broadband services are not comparable in price or quality to DSL or cable modem services, resulting in a low level of subscription to satellite services by rural Americans; and
- even the remaining consumers today located in areas served by DSL or cable modems lack access to effective satellite broadband competition.

The high-speed Ku-band access services provided by the Applicants today do not cure either part of this problem. As a threshold matter, they do not satisfy the Commission’s definition of an “advanced service.”¹⁹³ Nor could either company

¹⁹² See, e.g., Comments of the State of Alaska at 6; NAB Petition at 102; NRTC Petition at 50.

¹⁹³ See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33 (rel.

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standing alone deploy on a timely basis an advanced residential broadband service of mass scale and appeal at an affordable price. Partly due to these issues, SPACEWAY has been developed with a focus on the larger commercial, or “enterprise,” customers while EchoStar’s Ka-band program has remained modest in scope. Both of these Ka-band programs will need to be refocused and integrated with one another to achieve the required economic scale for ubiquitous residential true broadband service.¹⁹⁴ Therefore, the effects of this transaction on the broadband market are more akin to an increase in the number of broadband competitors from “zero to one” in most areas and “one-to-two” or “two-to-three” in other areas of the country. New EchoStar is the best hope for true and competitive satellite broadband service to virtually all Americans at an attractive price.

Ultimately, the question for Congress and the Commission is simple: will the government try to tackle the limited availability of advanced broadband services across America only through a costly web of cross-subsidy and regulation? Or, will it allow a multi-billion dollar private capital initiative to create a true broadband service competitor that will provide service virtually to every home in America? The latter alternative is the better one for the public interest. Indeed, the approval of the proposed

Feb. 6, 2002), at ¶ 60 (“none of these [satellite] lines satisfies the Commission’s definition of advanced services.”) (“Third Advanced Services Report”).

¹⁹⁴ As discussed in more detail below, the estimates about the stand-alone Ka-band capacity of each company made by one Petitioner’s expert are over-inflated by a host of inaccurate assumptions, such as the collocation of two SPACEWAY satellites in one orbital location and the mistaken belief that EchoStar can use the spectrum licensed to another company through its minority investment in that company.

merger will help fulfill several of the Commission's stated broadband principles and policy goals by:¹⁹⁵

- encouraging the ubiquitous availability of broadband access to the Internet to all Americans;
- promoting competition across different platforms for broadband services; and
- ensuring that broadband services exist in a minimal regulatory environment that promotes investment and innovation.

The importance of being able to offer a seamless bundle of video and broadband services cannot be overemphasized in considering what tools will be necessary to become and remain competitive with cable companies capable of leveraging their tremendous power in video into the broadband market. The Commission recognized years ago that “[m]ulti-service offerings and bundling services for sale seems to enhance subscription to alternative services offered by cable companies. . . . Indications are that consumers value receiving those services through ‘one-stop-shopping.’”¹⁹⁶ Cable is far ahead of any other service in fulfilling consumers’ demand for “one-stop-shopping,” thanks to its bandwidth advantages and market power in the MVPD market. Cable’s strategy was succinctly described by one commenter in the Commission’s cable modem open access proceeding:

The cable industry has informed everyone else outside the Commission that it is *cable itself* that is advantageously

¹⁹⁵ See “FCC Launches Proceeding to Promote Widespread Deployment of High-Speed Broadband Internet Access Services,” News Release (Feb. 14, 2002).

¹⁹⁶ Fifth MVPD Competition Report at ¶ 60.

positioned to leverage *cable's* dominant incumbent position in *cable's* existing video markets, in order to secure *cable's* dominance of the broadband market. Cox openly declares that it has 'outlined a clear strategy: Leverage the power of our delivery network to offer customers not just cable television, but advanced services including . . . high-speed Internet access.'

* * *

The cable industry expects its leveraging to solidify cable's dominance of existing video markets, as well.¹⁹⁷

Present-day, spectrum-constrained, satellite providers simply cannot offer a bundled video, broadband and interactive service comparable to that being rolled out by those cable companies offering digital cable service.

1. The Current State of Deployment of Advanced Telecommunications Capability

The problem with broadband is a threshold one: availability. Many areas of the country still have *no access whatsoever* to what the Commission has described as "advanced telecommunications capability" (referred to here as "true broadband" services).¹⁹⁸ Such services are defined by the Commission as having upstream (customer-to-provider) and downstream (provider-to-customer) transmission speeds of

¹⁹⁷ Reply Comments of SBC Communications, Inc. and BellSouth Corporation, *In the Matter of Inquiry Concerning High Speed Access to Internet Over Cable and Other Facilities*, GN Docket No. 00-185 (filed Jan. 10, 2001), at 6 (citing a Cox Communications press release).

¹⁹⁸ The Commission has also used the terms "advanced service" and "advanced telecommunications service" to refer to these capabilities. See Third Advanced Services Report at ¶ 8, n.23 (noting the Commission's adoption of the terms "advanced telecommunications services" or "advanced services" in its Second Report on such services, because it determined that the term "broadband services" "had come to include a much broader range of services and facilities" than those examined by the Commission.)

more than 200 kbps.¹⁹⁹ The Commission distinguishes true broadband services from those having 200 kbps capacity in only one direction, such as currently available satellite offerings, which the Commission defines as “high speed.”²⁰⁰ The Commission’s data make clear that in terms of actual levels of subscribership, true broadband is less broadly deployed than high-speed services. In other words, a significant number of Americans, both urban and rural, still do not subscribe to true broadband service, whether because it is not available to them, the service is too costly, or for other reasons.

The present patchwork quilt of true broadband availability demonstrates that while the pace of deployment is acceptable, *the coverage is far from complete*. Even in areas served by cable, the availability of true broadband service remains limited. For example, out of more than 60 million homes passed by cable modem plant in July 2001, only about 5.2 million had high-speed cable modem lines and less than two-thirds of these met the definition of “advanced service.”²⁰¹ This number is, of course, a subset of

¹⁹⁹ *Id.* at ¶ 8. According to the Commission, a transmission speed of 200 kbps “is enough to provide the most popular applications, including web-browsing at the same speed as one can flip the pages of a book.” *Id.* at ¶ 11.

²⁰⁰ *See id.* at ¶ 9.

²⁰¹ The Commission reported that of the 5.2 million high speed cable lines existing in June 2001, 64 percent met the definition of advanced services, *id.* at ¶ 44, meaning that there were approximately 3.3 million such lines. Relying on a report by the National Cable Television Association (“NCTA”), the Commission reported that “more than 60 million homes” were passed by cable modem plant in July 2001. *See id.* at ¶¶ 44-45 & n.93. These figures yield a penetration rate of roughly 5.5 percent of cable modem capable homes assuming 60 million homes are passed by cable modem service. The NCTA has reported that as of November 2001, there were 6.4 million cable modem subscribers and 70 million homes passed by cable modem service. *See* http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2 . Estimates vary as to the percentage of U.S. homes that have access to cable modems, ranging from 66

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the total number of homes passed by cable,²⁰² which in turn is a subset of the total number of U.S. homes. Thus, while the availability of advanced services via cable modem is growing, with the number of subscribers predicted to double in one year's time,²⁰³ advanced service via cable modem is currently being provided to only a small fraction of all U.S. homes.

Likewise, the Commission has noted that service via asymmetric digital subscriber line ("ADSL"), the most popular residential wireline offering, is available to less than half of all U.S. homes.²⁰⁴ Moreover, only about 37 percent of the 2.7 million ADSL lines reported at the end of June 2001 met the Commission's definition of advanced services.

While satellites offer the best hope for filling the gaps left by cable modem and DSL, satellite broadband today is not fully comparable to cable modem and DSL, leaving many Americans without a true broadband alternative. The Commission found that none of the current satellite offerings qualifies as an advanced service under its

percent to roughly 80 percent of U.S. households by year-end 2001. Third Advanced Services Report at ¶ 46 & n.98.

²⁰² See Eighth MVPD Competition Report at ¶ 17 (reporting that by the end of June 2001, the number of homes passed by cable was estimated at 104 million).

²⁰³ See Third Advanced Services Report at ¶ 66 (citing a Morgan Stanley report on broadband cable that estimated growth in subscribers from year-end 2000 to year-end 2001).

²⁰⁴ See *id.* at ¶ 51 (quoting an estimate that ADSL was available to "about 45 percent of U.S. homes" at the end of 2001). Assuming that there are 107 million households, the number of households without ADSL access amounts to 58.85 million.

definition.²⁰⁵ It follows that in areas where advanced services via cable modem or DSL are not available, the number of competitors providing true broadband services is essentially zero. Nor is the situation likely to change soon. A number of reports have suggested that a sizable number of homes in the U.S. will not have access to cable modem or DSL technology in the near future, if ever. A report cited by the Commission puts the number of homes that may never have such access at 20 to 30 million.²⁰⁶ Many of these homes will be in rural areas, as reflected in another study cited by the Commission which found, for example, that “about 25 to 30 percent of rural telephone subscribers are not likely to have access to high-speed services in the near future.”²⁰⁷

This conclusion is consistent with the Commission’s general finding that there is a “positive correlation” between “population density and the presence of high-speed subscribers.”²⁰⁸ With respect to advanced and high-speed services in the aggregate, the Commission reports that such services are currently utilized in “fewer than 40 percent of the most sparsely populated zip codes,” in contrast to the most densely populated zip codes, nearly all of which report use of such services.²⁰⁹ As the NRTC

²⁰⁵ *Id.* at ¶ 60 (“none of these [satellite] lines satisfies the Commission’s definition of advanced services.”).

²⁰⁶ *See id.* at ¶ 78 (citing studies by Salomon Smith Barney and Merrill Lynch).

²⁰⁷ *Id.* at ¶ 113 (citing a study by the National Telephone Cooperative Association).

²⁰⁸ *Id.* at ¶ 109.

²⁰⁹ *See id.* at ¶ 35 and App. C, Table 11 (observing that “well over 90 percent” of “the most densely populated zip codes” have high speed subscribers. The Commission defined the most densely populated zip codes as those in the top three deciles of its study in terms of density. Those most sparsely populated zip codes were those in the bottom three deciles. *Id.*, App. C at 4, n.13. It should be noted that the Commission’s data report

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observes, a joint report by the National Telecommunications and Information Administration (“NTIA”) and the Rural Utilities Service (“RUS”) in 2000 noted that “only 5% of towns with fewer than 10,000 residents have access to cable modem service, and only 1.4% of such towns have access to DSL service.”²¹⁰ And as discussed above, not all of these cable modem and DSL lines meet the definition of advanced services. In one important respect, however, rural areas with no access to true broadband are in the same position as urban and suburban areas without this service – the current number of providers offering this service in these areas is essentially zero.

Even in those areas where cable modem and DSL services are available, real broadband competition has not been effective in restraining prices that are high and rising. This likely reflects the current lack of effective broadband competition even in urban markets. As the Commission has found, cable modem service is by far the most widely used mode of high-speed and advanced service. According to the Commission, cable modem lines accounted for 54 percent of the estimated 9.6 million high-speed lines reported as of June 2001,²¹¹ with subscribership figures expected to double in one year’s

the presence of subscribers in a zip code, and that this data cannot necessarily be used to precisely calculate the percentage of the population to whom a service is available. *See id.* at ¶ 25.

²¹⁰ NRTC Petition at 44 (citing NTIA/RUS Report at 18-21).

²¹¹ *See* Third Advanced Services Report at ¶ 44 and App. C, Table 1.

time according to a report cited by the Commission.²¹² ADSL lines accounted for roughly 28 percent of all high-speed lines.²¹³

On the other hand, satellite-based and terrestrial fixed wireless systems accounted for only 2 percent of all high speed lines, with less than 195,000 subscribers.²¹⁴ These data reflect that subscribership for high-speed satellite services, which again do not meet the definition of true broadband, with only approximately 140,000 residential and small business subscribers to Hughes' DIRECWAY and EchoStar's StarBand combined,²¹⁵ pales in comparison to the figures for high-speed cable and wireline technologies.

Cable likewise dominates in providing true broadband service, accounting for approximately 56 percent of the reported 5.9 million true broadband lines in service

²¹² See *id.* at ¶ 66 (citing a Morgan Stanley report on broadband cable that estimated growth in subscribers from year-end 2000 to year-end 2001).

²¹³ *Id.* at ¶ 48 & ¶ 71. Other wireline technologies, such as T1, symmetric DSL, and optical fiber services, which are used primarily by businesses, accounted for approximately 16 percent of all high-speed lines. *Id.* at ¶ 48.

²¹⁴ See Third Advanced Services Report, App. C, Table 1 (data for satellite and fixed wireless services, which was aggregated by the Commission due to confidentiality concerns, reflect that such services accounted for 194,707 of the nation's 9,616,341 high speed lines).

²¹⁵ As a percentage of homes with Internet service, the figure for satellite service is even smaller. The NTIA's most recent study reflected that only 0.5 percent of all Internet homes utilized high-speed services other than cable and DSL, while 12.9 percent of such homes used cable modem, and 6.6 percent used DSL. See U.S. Department of Commerce, National Telecommunications and Information Administration and Economics and Statistics Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet* (Feb. 3, 2002), at 39 (reporting that technologies other than standard dial-up, cable modem, and DSL, were used by only 0.5% of Internet households).

as of June 2001.²¹⁶ The Commission reported that cable companies increased residential subscribership for advanced services by 261 percent in the 18 months preceding its *Third Advanced Services Report*.²¹⁷ Wireline technologies including ADSL accounted for 35 percent of all true broadband lines, and residential subscribership to ADSL advanced services grew by 683 percent in the 18 months leading up to the Commission's *Third Advanced Services Report*.²¹⁸ Fiber accounted for less than 8 percent of all true broadband lines.²¹⁹ As noted above, none of the satellite operators currently offers true broadband service, reflecting the fact that satellite providers account for zero percent of this market. With cable far outstripping other high-speed technologies in terms of availability, it comes as no surprise that competition is lacking in the high-speed and advanced services market, and that, as NRTC has observed, prices for such services are high and rising.²²⁰

²¹⁶ See *Third Advanced Services Report*, App. C, Table 1.

²¹⁷ *Id.* at 16, n.70.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See NRTC Petition at 50 (citing reports that conclude “price appears to be a key obstacle to broadband penetration.”)

2. EchoStar’s and Hughes’ Current Ku-Band Broadband Offerings Are Competitively Inadequate

a. Current Ku-Band Offerings Are Simply Not Competitive in Today’s Market

What many Petitioners describe as a loss of competition from the merger²²¹ relates to two interim alternatives that have not been able to realize anything close to the full potential of satellite broadband offerings. The Commission itself has described the DIRECWAY and Starband offerings as “still in the early stages of deployment,”²²² and although each company has tried to make the most of these delivery modes, it is clear that these services are subject to significant constraints that will limit their long-term viability, especially in light of the emergence and rapid deployment of more advanced broadband service alternatives.

Foremost among these constraints are transmission speeds, capacity limitations and overall cost. As noted above, current satellite offerings do not meet the Commission’s definition of “advanced services” because the satellite offerings are not capable of providing transmission speeds in excess of 200 kbps in both directions.²²³ These Ku-band offerings have limited capacity. As discussed in the attached Declaration of Mr. Arnold Friedman (“Friedman Declaration”) attached as C hereto, there are

²²¹ See NRTC Petition at 50-52; Pegasus Petition at 30; NAB Petition at 98-104.

²²² Third Advanced Services Report at ¶ 60.

²²³ *Id.*

operational limits on the number of subscribers that can be served on the Ku-band transponders that Starband and DIRECWAY lease from existing Ku-band satellite operators.²²⁴ Although satellite broadband providers seek to group transponders on the same satellite for operational efficiencies and customer service quality, there are limits on their ability to successfully do so. The Ku-band is used for many commercial purposes other than DIRECWAY and Starband services, and satellite operators have already committed many Ku-band transponders for such other uses. Moreover, Starband and DIRECWAY directly compete with other users for access to the available Ku-band capacity. As a result, it is not always possible to obtain additional capacity on the same spacecraft where DIRECWAY and Starband have already located existing broadband subscribers.²²⁵ These limitations directly impact the economics of the currently provided Ku-band services.

Obtaining Ku-band capacity is also expensive. In today's market, the cost to lease a single 36 MHz transponder is approximately \$2,000,000 per year. The cost of acquiring space segment capacity from third parties is a large component of the total cost of the monthly service cost for satellite broadband service. Thus, the cost of leasing Ku-band capacity increases the cost to provide DIRECWAY and Starband service, relative to the cost to provide DSL and cable modem service.²²⁶

²²⁴ Friedman Declaration at ¶ 12.

²²⁵ *Id.* at ¶¶ 13-14.

²²⁶ *Id.*

The long-term ability of services of this nature to compete with faster, true broadband services is therefore questionable, especially since, as the Commission observes, “new and unforeseen capacity hungry applications that require advanced service platforms will drive demand, and in turn deployment, in the future.”²²⁷ For example, the Commission notes that one report forecasts that “by 2005, the average broadband household will download about 70 megabits [sic] of files, consume more than 20 minutes of video streaming per day, and download three two-hour long movies per month.”²²⁸ Consumers will demand nothing less than true broadband service and more to facilitate their use of the Internet for such activities.²²⁹

Other constraints on the competitiveness of present-day satellite broadband services versus cable modem or DSL service include higher up-front costs for equipment and installation, and the need for professional installation.²³⁰ As explained in Mr. Friedman’s Declaration, the impact of these constraints is that current Ku-band

²²⁷ Third Advanced Services Report at ¶ 64.

²²⁸ *Id.*

²²⁹ A survey conducted by McKinsey & Co. and JP Morgan in April 2001 characterized consumer interest in broadband as already “surprisingly high.” McKinsey & Co. and JP Morgan, *Broadband 2001: A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market* (Apr. 2001), at 25. Ninety-four percent of survey respondents indicated that the “primary benefits of broadband – data speeds many times faster than with most dial-up connections, not tying up the phone line, always being on, never having any busy signals” were either extremely, very, or somewhat important to them.

²³⁰ Friedman Declaration at ¶ 8. Professional installation of satellite equipment is required by FCC licenses for transmit-receive Ku-band terminals used for two-way service to consumers. This requirement has negatively impacted installation costs and consequent pricing.

broadband offerings are unable to compete with cable modem and DSL offerings.²³¹ The price of these satellite services is significantly higher than that of cable modem and DSL services.²³² Monthly charges for the Starband and DIRECWAY services, for example, start at approximately \$70 and \$60 respectively,²³³ compared to approximately \$30-60 for cable modem service from major providers²³⁴ and \$45-59 per month for standard DSL service.²³⁵ Second, equipment and installation costs are much higher for satellites than cable modem or DSL services. The suggested retail price of equipment for satellite broadband service is more than \$500, plus the customer must obtain professional installation at a cost starting at \$199, for a total price tag of over \$700. Moreover, satellite subscribers typically have no alternative other than to purchase their satellite equipment, as the equipment is usually not offered on a lease basis. Cable modem and DSL installations, on the other hand, entail significantly lower costs to bring the subscriber on line. Cable modems are offered by one major provider for \$199 or a \$5 monthly rental

²³¹ *Id.* at ¶ 9.

²³² *Id.*

²³³ *See* Third Advanced Services Report at ¶ 48. DIRECWAY service is obtained through Hughes' distributors. The current monthly fee for DIRECWAY service is \$59.99 and for Starband service is \$69.99. *See* Friedman Declaration at ¶ 9.

²³⁴ *See* Friedman Declaration at ¶ 9. A \$40-55 price range was reported by Comcast Corporation's website, www.comcast.com, visited Feb. 18, 2002. Cox Communications-Northern Virginia offers a high-speed Internet access service for \$30-40 per month. *See* www.coxcable.com/Fairfax/RoadRunner/rates.asp (visited Feb. 21, 2002). Time Warner Cable advertises high-speed Internet access in Bergen County, New Jersey for \$45-60 monthly including the cost of modem rental. *See* www.timewarnercablenj.com/road_runner/faq.html#gq17 (visited Feb. 21, 2002).

²³⁵ Third Advanced Services Report, App. B, at ¶ 25.

fee, with a self installation kit.²³⁶ DSL installation costs to consumers ranged from no cost to \$250 according to a recent Commission survey.²³⁷

The sum effect of all of these factors is that current Ku-band satellite broadband offerings are not as competitive, and therefore not as attractive as cable modem and DSL offerings. Low rates of subscribership to satellite broadband offerings – only 140,000 satellite subscribers to date compared to subscribership numbers in the millions for cable modem and DSL – demonstrate this lack of competitiveness of satellite offerings. Logically, a merger that will result in the combination of two interim and struggling broadband alternatives that are already not competitive with cable modem and DSL services will not produce a further loss of broadband competition.²³⁸ According to

²³⁶ These prices were reported by Comcast Corporation's website, www.comcast.com, visited Feb. 18, 2002. Cox Cable-Northern Virginia offers cable modem rentals for \$15 per month with a \$124.99 professional basic installation fee. The modems may also be purchased from computer equipment retailers. See www.coxcable.com/Fairfax/RoadRunner/rates.asp (visited Feb. 21, 2002). Time Warner Cable in Bergen County, New Jersey charges a basic installation fee of \$69-99, depending on the configuration of the subscriber's computer. See www.timewarnercablenj.com/road_runner/faq.html#gq17 (visited Feb. 21, 2002).

²³⁷ Third Advanced Services Report, App. B. at ¶ 25.

²³⁸ See Pegasus Petition at 30. The NAB has also suggested that EchoStar and DIRECTV “compete in the deployment of advanced services.” NAB Petition at 30-31. However, the “evidence” supplied by NAB of supposed competitive reactions is a disjointed litany of events that cannot even be characterized as tandem movements by the two DBS operators, let alone as indicia of intense competition. NAB claims, for example, that the following events are competitive reactions: “On March 17, 1999, DIRECTV announced it would invest \$1.4 billion in Spaceway Broadband Satellite System, with the stated goal of ‘establish[ing] satellites as the preeminent means of delivery broadband services. On April 19, 1999, EchoStar announced that it would work with SkyStream Data Injection Equipment to insert data into the transport stream to reclaim lost bandwidth.” *Id.* at 30 (citations omitted). This “evidence” of intense satellite broadband competition is as unavailing as the Petitioners’ “evidence” of intra-DBS competition in the video market, as discussed in Section II.A.2 above.

Professor Willig, “[d]espite the fact that satellite-based Internet access is technically available in all areas of the United States, the low penetration rate of this technology -- even in areas without any access to DSL or cable modem service -- raises questions about whether households in both rural and urban areas are likely to accept it on a large scale.”²³⁹

b. Current Satellite Offerings Clearly Have Not Functioned as a Check on Broadband Prices

Petitioners such as NRTC, Pegasus and NAB argue that what they characterize as competition between DIRECWAY and StarBand must be preserved as a check on broadband prices. The lack of satellite competitiveness is borne out not only by the low subscribership rates discussed above, but also by the rising cable modem and DSL prices also observed by these Petitioners. NRTC’s own data reveal that its characterization of the current market is simply wrong – NRTC states that “the price of high-speed services is an impediment to 36% of those interested in subscribing,” and that “the lack of advanced services competition has resulted in monopoly pricing [of DSL services] by ILECs.”²⁴⁰ These facts contradict NRTC’s argument that the merger will reduce or eliminate competition. Consumers are already subject to monopoly pricing notwithstanding the presence of both DIRECWAY and StarBand in the marketplace.

²³⁹ Willig Declaration at ¶ 29.

²⁴⁰ NRTC Petition at 50 (citing comments of Focal Communication Corporation and Pac-West Telcomm, Inc. and quoting comments of the Competitive Telecommunications Association before the NTIA) (internal quotation marks omitted).

3. Neither Company's Stand-Alone Ka-Band Ventures Would Allow Timely Deployment Of An Affordable Broadband Product to Residential Subscribers

As the Application explains, the future of satellite broadband lies with the deployment of next-generation systems in the Ka-band capable of competing with the advanced services offerings of cable companies and DSL providers.²⁴¹ Because of the challenges involved in bringing these satellite systems to fruition, however, deployment of these new satellites has taken longer, and will require more capital than many Ka-band licensees have been able to sustain. Just recently, Astrolink reported that it had terminated its Ka-band spacecraft contract with Lockheed Martin, after having built 90% of its first spacecraft, and after spending about \$710 million on its Ka-band system and finding itself unable to finance the remaining cost of implementing the Astrolink broadband system.²⁴² Indeed, the current satellite programs are not immune to downturns in the capital markets or changes in the projected demand for broadband services. However, as discussed in Section III.B. below, the efficiencies flowing from the merger will enable New EchoStar to deploy a competitive true broadband satellite offering for the benefit of all U.S. consumers, rural, suburban and urban alike.

²⁴¹ See Merger Application at 47.

²⁴² “Decision Nears on Astrolink as Lockheed Ends Funding, *Communications Daily*, Nov. 1, 2001. See also Letter from Peter A. Rohrbach and David Martin, Counsel for Astrolink International LLC, to William F. Caton, Acting Secretary, FCC, Re: Astrolink International LLC, File Nos. 182 through 189, SAT-P/LA-95 & SAT-MOD-19971222-00200 (Feb. 8, 2002) at 2.

a. Hughes' Ka-Band Venture – SPACEWAY

The Hughes SPACEWAY system is licensed to operate at two U.S. orbital slots with full-CONUS coverage: 99° and 101° West Longitude. Consistent with the FCC license for the system, and Hughes' system design, the first spacecraft to be deployed at each of these locations is constructed to utilize 500 MHz of spectrum in each direction (19.7-20.2 GHz downlink; 29.5 – 30.0 GHz uplink).²⁴³

Deploying the SPACEWAY system requires a capital expenditure in excess of \$1.8 billion, and the development of very complex technology that has never before been deployed in a commercial satellite network, such as on-board processing and switching. It also involves the substantial commercial risks associated with implementing cutting edge technology in outer space. In order to support these expenditures and mitigate the attendant risks, the Hughes SPACEWAY business plan targets enterprise customers.

There are a number of reasons why focusing on enterprise customers increases the commercial viability of the SPACEWAY system and reduces the business risk.

- Hughes' experience from Ku-band VSATs is that enterprise customers are willing to subscribe to broadband services more quickly than residential customers.

²⁴³ Hughes also is licensed to operate a Ka-band spacecraft at the 131° W.L. "wing" slot, which the Commission has acknowledged is not suitable for CONUS service, as well as spacecraft at a number of other locations that are suitable only for international service.

- Targeting enterprise users provides a greater opportunity to generate additional revenue from value-added broadband services.
- Because Hughes already provides Ku-band VSAT services to hundreds of thousands of enterprise Ku-band VSAT terminals, SPACEWAY services can readily be marketed to this large base of installed enterprise users.
- Enterprise customers are not as cost-sensitive as residential users to the up-front costs of acquiring VSAT equipment, or the complexities associated with professionally installing that equipment.
- Serving the enterprise sector provides the opportunity for Hughes to recover more quickly the enormous capital cost of deploying this system; conversely, focusing on a ubiquitous residential service is a far riskier endeavor that would take far longer to recover such costs.
- The profit margins of residential service are significantly lower, partly because subscriber acquisition costs are significantly higher.

In short, the focus on enterprise users is based on the expected higher and quicker “take up” rate by those users, larger profit margins through increased opportunity for value-added services, as well as more modest subscriber acquisition costs, and it has justified Hughes’ making capital investment in the SPACEWAY system and incurring the associated technology risks. By contrast, costs of actually marketing a ubiquitous residential service on a broad scale and equipping residential users to use SPACEWAY-enabled services most likely would not be feasible without the merger.

The SPACEWAY spacecraft at 99° and 101° W.L. will be capable of providing coverage of the 50 states, Puerto Rico and the U.S. Virgin Islands. However, the fact that those spacecraft will be technically capable of serving users throughout the

U.S. does not mean that it is economically feasible to actually market broadband service to, and equip, residential households, particularly those in rural areas.

The recent experiences of terrestrial broadband providers demonstrates that U.S. consumers are very price sensitive in the case of broadband services, and are willing to stay with or revert to dial-up phone service if the cost of broadband service is too high.²⁴⁴ Thus, DSL and cable modem service providers are moving toward a model in which consumers can self-install their modems, and in which there is no up-front cost to the subscriber – the inexpensive modem often is provided free of charge by the service provider, and there is no installation charge.²⁴⁵ Current monthly costs for DSL and cable modem service are as low as \$30-60. DSL and cable modem service can therefore be offered to residential customers at a lower “all-in” cost than is possible with satellite-delivered broadband. As a result, both Starband and DIRECWAY currently substantially subsidize Ku-band equipment costs.

Thus, actually marketing and deploying SPACEWAY services to U.S. households will require a substantial additional investment by Hughes that is far and beyond the \$1.8 billion of capital costs for the SPACEWAY system. Particularly in the current economic climate, it is extremely risky for Hughes to make this type of investment to provide service to residential customers. Such an investment makes sense only if the costs of acquiring residential users are at a level that is sustainable by the

²⁴⁴ See Willig Declaration at ¶ 29 (observing that “consumers appear to be very sensitive to the price of broadband services”) (citing studies of consumer demand for broadband service).

²⁴⁵ See Friedman Declaration at ¶¶ 9, 11.

expected revenue stream from those residential users, after taking into account anticipated subscriber churn. As set forth below, the combined scale produced by the merger offers the *only* way to drive down those subscriber acquisition costs, and thereby to justify the substantial investment needed to market and deploy true broadband services to residential users, including those in rural areas. Moreover, the subscriber acquisition costs for such a large customer base will consume significant cash resources, something that Hughes alone has a very limited financial ability to provide, and the merged entity will be better able to provide.

b. EchoStar's Limited Ka-band Development

EchoStar's development of a Ka-band offering is not nearly as advanced as Hughes' SPACEWAY program. While it has been granted licenses for three Ka-band orbital locations (83°, 113° and 121° W.L.), the limited amount of spectrum licensed for its use at two of these locations (500 MHz in each direction) and its lack of experience with enterprise customers, have resulted in relative modest plans for deploying its Ka-band satellite.²⁴⁶ EchoStar 9 has been designed with a limited number of spot-beams and

²⁴⁶ Pegasus and the State of Alaska suggest that EchoStar's statements in the Application regarding the development of its stand-alone Ka-band offerings are somehow inconsistent with statements made in other proceedings. *See* State of Alaska Comments at 7; Pegasus Petition at 48-49. Alaska and Pegasus misread the Application. While identifying the risks involved with Ka-band ventures, the Applicants do not, as Pegasus and Alaska suggest, state that each has "changed its mind" about deploying a system. *See* Comments of the State of Alaska at 7. Neither is there any inconsistency with regard to EchoStar's statements in the VisionStar transfer of control proceeding concerning the need for spectrum. In that proceeding, EchoStar stated: "EchoStar . . . with two full-CONUS licensed orbital locations (compared to 3 or 4 locations assigned to certain other licensees) does not have adequate bandwidth to serve the same number of potential customers that certain current and future competitors can provide." *Transfer of Control Application, In the Matter of VisionStar, Inc.*, File No. SAT-T/C-20001215-000163 (filed

(Continued ...)

could be used to backhaul DBS programming to EchoStar's uplink facilities and/or to provide limited broadband services to consumers. However, its total capacity is quite limited (see below) and prior to the merger, EchoStar had no plans to roll out residential broadband Ka-band service on other than a trial basis.

While several Petitioners have speculated as to the commercial viability of launching a number of high-capacity Ka-band satellites into EchoStar's licensed orbital locations, the simple truth is that EchoStar cannot justify making the enormous capital investment in residential broadband service based upon its limited resources and MVPD subscriber base. As explained in the Application, EchoStar believes that it must achieve at least 5 million broadband subscribers within a five year period in order to recover the significant up-front investment and subscriber acquisition costs associated with launching and marketing a new two-way broadband satellite service.²⁴⁷ EchoStar currently does not have access to sufficient spectrum, orbital locations or capital resources to achieve these targets. All of these limitations, however, can be overcome by combining the resources of the Applicants once this merger is approved.

Dec. 15, 2000), at 6. While EchoStar further explained that the combination of EchoStar's and VisionStar's spectrum would "mitigate" the problem of inadequate spectrum, *see id.*, EchoStar never stated that the VisionStar transaction would *resolve* the inadequacy, as Pegasus suggests.

²⁴⁷ Merger Application, Attachment B, Joint Engineering Statement at 15.

c. Available Spectrum Resources

NRTC and Pegasus are simply wrong when they allege that each company could achieve miracles on its own and serve tens of millions of subscribers simply by using its own orbital locations.²⁴⁸ Mr. Morgan's conclusions to that effect rest upon several erroneous assumptions. Mr. Morgan wrongly assumes, for example, that it is feasible for Hughes to collocate two operating SPACEWAY satellites at the same orbital location. He also believes that Hughes could have unencumbered access to a full 1,000 MHz of spectrum at each orbital location.

A key element of the SPACEWAY design, and a key element to offering a competitive broadband service by satellite, is the ability to deploy the small transmit/receive user antennas on a ubiquitous basis, and without incurring the delay and expense involved with individually licensing each antenna. The reality, however, is that Hughes is only able to use 50% of its assigned spectrum for service to such ubiquitous terminals.

The Commission has designated 1000 MHz of spectrum at 18.3-18.8 GHz and 19.7-20.2 GHz bands for downlinks from Ka-band GSO FSS spacecraft, and 1000 MHz of spectrum at 28.35-28.6 GHz, 29.25-29.5 GHz, and 29.5-30.0 GHz for uplinks to Ka-band spacecraft.²⁴⁹ However, 280 MHz of this downlink spectrum (18.3-18.58 GHz) and 250 MHz of this uplink spectrum (29.25-29.5 GHz) is not suitable for the

²⁴⁸ See NTRC Petition at 54-55; Pegasus Petition at 45.

²⁴⁹ See *In the Matter of Second Round Assignment of Geostationary Satellite Orbital Locations to Fixed Satellite Service Space Stations in the Ka-Band*, 16 FCC Rcd. 14389, 14393 n.26 (2001).

deployment of small, ubiquitously-deployed satellite earth terminals. There are number of reasons for this. First, the Commission has indicated its “expectation” that this 280 MHz of downlink spectrum will generally be used for “gateway” type earth stations²⁵⁰ (which are not part of the SPACEWAY plan) and not for ubiquitous antennas. Second, the Commission has raised questions about whether the ubiquitous deployment of small terminals in this shared uplink and downlink spectrum is practicable, given the Commission’s stated desire to limit widespread FSS deployment in bands where terrestrial deployment is widespread or where feeder links to MSS satellite networks are being deployed.²⁵¹

The net result of this regulatory situation is that Hughes cannot plan on using the 18.3-18.58 GHz band or the 29.25-29.5 GHz band for its SPACEWAY system. These problems have a corresponding effect on the 18.58-18.8 GHz band that prevents Hughes from using that 220 MHz downlink segment for broadband service to ubiquitous

²⁵⁰ *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, IB Docket No. 98-172, at ¶ 48 & n. 100 (rel. June 22, 2000).

²⁵¹ *FWCC Request for Declaratory Ruling on Partial-Band Licensing of Earth Stations in the Fixed-Satellite Service That Share Terrestrial Spectrum, FWCC Petition for Rulemaking to Set Loading Standards for Earth Stations In the Fixed-Satellite Service that Share Terrestrial Spectrum, Onsat Petition for Declaratory Order that Blanket Licensing Pursuant to Rule 25.115(c) is Available for Very Small Aperture Terminal Satellite Network Operations at C-Band, Onsat Petition for Waiver of Rule 25.212(d) to the Extent Necessary to Permit Routine Licensing of 3.7 Meter Transmit and Receive Stations at C-Band, Ex parte Letter Concerning Deployment of Geostationary Orbit FSS Earth Stations in the Shared Portion of the Ka-band*, FCC 00-369 (released October 24, 2000) at ¶ 99.

small antennas. The SPACEWAY system is designed to use spectrum in 500 MHz segments, and it not feasible to change the design of the SPACEWAY system at this late date. Thus, Hughes cannot simply “add” this other 220 MHz of spectrum to its current system design.

In addition, contrary to the speculation of some of the Petitioners,²⁵² the 103° W.L. orbital location licensed to PanAmSat Corporation simply is not part of the SPACEWAY program. The spacecraft that PanAmSat is constructing for the 103° W.L. orbital location has a different configuration than the Boeing-manufactured SPACEWAY spacecraft licensed for 99° and 101° W.L. That PanAmSat spacecraft, being manufactured by Orbital Sciences Corporation (i) is incompatible with the SPACEWAY design, (ii) uses a bent-pipe configuration, and (iii) does not contain the advanced switching capabilities that are a central feature of the SPACEWAY system. Thus, the PanAmSat spacecraft under construction for 103° W.L. simply has not been optimized to provide the type of true broadband services that will be offered by SPACEWAY.²⁵³

Mr. Morgan is equally wrong in his assertion that EchoStar controls Celsat’s use of its licensed Ka-band slots,²⁵⁴ and even overstates the spectrum available to

²⁵² See NRTC Petition at 54-57, Morgan Declaration (NRTC) at 36-37.

²⁵³ Furthermore, PanAmSat is a publicly funded company, with fiduciary obligations to its 19.4 percent stockholders other than Hughes, and has no agreement with Hughes or Hughes Network Systems regarding the operation of any of PanAmSat’s satellites as part of the SPACEWAY system.

²⁵⁴ On the contrary, an EchoStar affiliate holds only a 17.6 percent interest in Celsat, and EchoStar simply has no control over Celsat’s use of its spectrum. See Merger Application at Attachment D.

that company.²⁵⁵ Nor is it appropriate for the Commission to speculate about possible alternative combinations between EchoStar and Celsat or any other Ka-band licensee in evaluating the specific merger before it.²⁵⁶

Mr. Morgan makes another fundamental mistake by grossly overstating the number of subscribers that could be served in the Ka-band spectrum that is available. Mr. Morgan wrongly relies on dial-up subscriber usage statistics.²⁵⁷ These figures simply do not apply to broadband users, who spend substantially more time online, and are much more likely to watch movie trailers, watch streaming video, listen to streaming audio and download software and music on demand. Thus, Mr. Morgan's assumption of an "average busy hour demand" of 2.75 kbps per subscriber" is flawed. As a result of these and other errors, Mr. Morgan substantially overstates the number of broadband subscribers that each company could serve.²⁵⁸

²⁵⁵ Mr. Morgan appears to assume that Celsat was authorized to operate over an additional 850 MHz of spectrum "outside the normal FSS Ka-band allocation." See Morgan Declaration (NRTC) at 37. The basis of this assumption is not clear. In fact, Celsat received authorization for 500 MHz spectrum in each direction at each of the 83° W.L. and the 121° W.L. orbital locations, and not an additional 850 MHz. Moreover, use of this spectrum is limited to feederlinks to and from Celsat's MSS system (Celsat is not licensed to provide ubiquitous broadband service). Celsat is licensed for downlinks at 18.3-18.8 GHz and uplinks at 28.35-28.6 GHz and 29.25-29.5 GHz. See *In the Matter of Celsat America, Inc.*, File Nos. 192-SAT-AMEND-97 and 88-SAT-AMEND-98, Order and Authorization, DA 01-1682 (Int'l Bur. rel. Aug. 3, 2001).

²⁵⁶ See 47 U.S.C. § 310(d) (in considering a transfer of control application "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee").

²⁵⁷ Friedman Declaration at ¶ 26.

²⁵⁸ *Id.*

B. Efficiencies Flowing From the Merger Will Make Possible Deployment of a Competitive, True Broadband Alternative

The many efficiencies gained by the merger will allow New EchoStar to deploy a true broadband alternative that is competitive in all major respects to DSL and cable modem services. It will also allow New EchoStar to price its broadband services at competitive levels in those areas unable and unlikely to receive cable modem or DSL services.

The merged company will combine the resources and subscriber bases of both companies which will result in substantial cost and service advantages over any possible individual Ka-band offering of EchoStar or Hughes. As Mr. Friedman explains, the combination of the Applicants' broadband programs through the merger will address many of the economic hurdles facing prospective Ka-band operators today, such as the relatively high costs during the early years of developing and manufacturing subscriber equipment.²⁵⁹ While some of these costs may be passed on to subscribers, it is clear that much of these costs would have to be borne by the satellite providers in order to attract a critical mass of subscribers relatively quickly. New EchoStar would be in a much better position to drive down the equipment costs for this service with a larger potential subscriber base.²⁶⁰

²⁵⁹ Friedman Declaration at ¶ 20.

²⁶⁰ *Id.* at ¶ 21.

The combined company would be able to market its broadband services to a much larger base of MVPD subscribers and bundle broadband and video services to new subscribers more efficiently and economically by, among other things, consolidating advertising and promotion budgets and sharing distribution channels. The merger will also allow New EchoStar to market its broadband services to the combined DBS customer base of the two companies. Indeed, current subscribers of DBS services are more likely to subscribe to satellite broadband services because these households have a clear line of sight to the satellites and because they have a demonstrated willingness to place the necessary equipment and antenna dishes on their homes.²⁶¹ In fact, half of Hughes' current broadband subscribers also subscribe to DIRECTV. As Professor Willig explains, the ability to market this broadband service to the combined subscriber base of both companies will lower the acquisition costs necessary to reach the critical mass of subscribers and also likely shorten the time period necessary to reach this level of subscribers.²⁶²

New EchoStar will also be able to manage its satellite fleet and spot-beam capacity more efficiently than either Applicant could do separately. Additional cost savings would also be achieved, according to Mr. Friedman, through the consolidation of customer service centers, uplink facilities, network operating centers, trunking facilities and billing functions.²⁶³

²⁶¹ *Id.*

²⁶² *See* Willig Declaration at ¶ 32.

²⁶³ Friedman Declaration at ¶ 22.

There also can be little doubt that New EchoStar must pass on these cost and efficiency advantages directly to consumers in order to be competitive with DSL and cable modem services, which in turn will spur competition among cable modem, DSL and any other broadband service providers.

A broad range of commenters understand the potential that this new service holds for closing the “digital divide” between urban and rural areas, including business owners who see the potential boost to the competitiveness of rural economies, rural healthcare providers who see the potential for improved telemedicine services via a true broadband satellite link to urban healthcare centers, rural educators desiring to provide their students with a true broadband link to the Internet equal to what is available to their urban counterparts, and citizens who simply seek access to the same types of services available in urban areas.²⁶⁴ These commenters recognize that the merger will be

²⁶⁴ See, e.g., Comments of Arnold Sherman, Executive Director, Montana World Trade Center, Missoula, Montana; Comments of Jeff Hoffman, Champion Rural Economic Area Partnership Alliance Director; Comments of W.A. (Bill) Gallagher, Farm Bureau Financial Services, Helena, Montana; Comments of Dave Lewis, State Representative, State of Montana; Comments of Susan Fischetti, Fischetti Enterprises, Inc., Eagle River, Alaska; Comments of Dick Maxwell, Executive Director, Buckeye Association of School Administrators, Columbus, Ohio; Comments of Amy Paster, Director, Church Point Chamber of Commerce, Church Point, Louisiana; Comments of Shelby Robert, Robert Farms, Gonzales, Louisiana; Comments of Sen. Noble Ellington, Chairman, Senate Judiciary A Committee, State of Louisiana; Comments of Russell Hanson, President, North Dakota Retail Association, Bismarck, North Dakota; Comments of Lois Hartman, Executive Director, North Dakota Firefighter’s Association, Bismarck, North Dakota; Comments of Jason Brostrom, NetExpress LLP, Bismarck, North Dakota; Comments of Jeffrey Masten, Medical X-Ray Center, Sioux Falls, South Dakota; Comments of Mary E. Jones, Ed.D. Sioux Falls, South Dakota; Comments of Edward T. Clark, M.D., Central Plains Clinic, Sioux Falls, South Dakota; Comments of Rick Bauermeister, Director of Business Development, Market Solutions Group, Inc., Sioux Falls, South Dakota; Comments of George Landrith, President, Frontiers of Freedom, Fairfax, Virginia; Comments of David Charles, M.D., National Alliance of Medical Researchers & Teaching Physicians, Washington, D.C.

a step forward toward parity between the services available in rural and urban areas , and not the “step backward” feared by the National Rural Electric Cooperative Association.²⁶⁵ The merger will help make this potential a reality for all of these constituencies.

C. The Merger Does Not Preclude Additional Entry

While the merger will create a true broadband service alternative, including in areas where none currently exists, it will not preclude new, additional entrants from providing high-speed and advanced services. Arguments to the contrary by some Petitioners, claiming that the merger will “stifle” Ka-band competition, or “prevent” Ka-band competition from emerging in rural areas,²⁶⁶ are mistaken.

NRTC and Pegasus argue that the merger will adversely affect broadband competition with regard to Ka-band services because the merged entity would control enough Ka-band slots to preclude new Ka-band entrants.²⁶⁷ Simple arithmetic reveals the flaws in this argument. Pegasus identified orbital slots capable of serving CONUS as those from 83° W.L. to 133° W.L. and complains that New EchoStar will control “between 8 and 11 of the slots.”²⁶⁸ Pegasus fails to mention that *eleven* other entities affiliated with neither EchoStar nor Hughes currently control orbital slots capable of serving CONUS, which demonstrates that there are more than enough prime Ka-band

²⁶⁵ See Comments of National Rural Electric Cooperative Association at 9.

²⁶⁶ See NRTC Petition at 52-56.

²⁶⁷ Pegasus Petition at 69-72; NTRC Petition at 52.

²⁶⁸ Pegasus Petition at 71.

slots controlled by others to ensure that the merger will not “stifle” competition in providing broadband services.²⁶⁹ Moreover, as explained above, SPACEWAY only has access to only two full-CONUS slots and EchoStar has access to at most three such slots, not three and five, respectively, as Pegasus and NRTC claim.²⁷⁰

Pegasus and NAB also argue that merger approval would violate Section 25.140(e) of the Commission’s Rules, which limits the number of FSS orbital slots to two per applicant.²⁷¹ This argument is without merit. The Commission has never held that Section 25.140(e) operates to preclude a merger that results in a transfer of control over orbital slots.²⁷² It does not. In any event, the Commission has never applied this rule to

²⁶⁹ See “FCC International Bureau Authorizes Second Round Ka-Band Satellite Systems,” Press Release (Aug. 2, 2001) and attached “Ka-Band GSO Orbit Assignment Plan,” which reflects that Lockheed Martin Corporation, DirectCom Networks, Inc., CAI Data Systems, Inc., TRW, Inc., Pegasus Development Corporation, CyberStar Licensee LLC, GE American Communications, Inc., Astrolink International, NetSat 28 Company, LLC, Motorola, Inc., and Loral Space & Communications Corporation are authorized to operate satellites at orbital locations ranging from 83° W.L. to 133° W.L.

²⁷⁰ See Pegasus Petition at 69; NRTC Petition at 52.

²⁷¹ Pegasus Petition at 71-72; NAB Petition at 110.

²⁷² See e.g., *In the Matter of Loral Space & Comm. Ltd. and Orion Network Syst.*, 13 FCC Rcd. 4592 (1998); *In the Matter of Hughes Comm. Inc. and Affiliated Companies and Anselmo Group Voting Trust/PanAmSat Licensee Corp.*, 12 FCC Rcd. 7534 (1997); *In the Matter of VisionStar, Inc.*, Order and Authorization, File No. SAT-T/C-20001215-00163, DA 01-2481 (Int’l Bur. rel. Oct. 30, 2001) (approvals of transfer of control applications which resulted in the transferee controlling more than two Ka-band slots. In none of these instances did Rule 25.140(e) operate to preclude the transfer). Pegasus and NRTC are likewise incorrect in their assertion that Commission Rule 25.140(f) precludes this transfer of control. See NRTC Petition at 52-53; Pegasus Petition at 71-72. Rule 25.140(f) limits an FSS applicant to one additional slot beyond its assigned authorizations, provided that its in-orbit satellites are filled and that it has no more than two unused orbital locations for previously authorized but unlaunched satellites in that band. 47 C.F.R. § 25.140(f). This rule too has never been held to preclude transfers of control, and Petitioners cite no authority to the contrary.

restrict assignments in the Ka-band because it concluded that there were sufficient slots to accommodate all applicants.²⁷³

The Commission has recently observed that new entrants using several different technology platforms have already begun, or are poised to begin, playing a significant role in providing high-speed and advanced services to many areas of the country including smaller markets. The Commission has reported, for example, “that there are at least 241 different companies using unlicensed spectrum to provide high-speed terrestrial fixed wireless Internet access in approximately 503 different counties” across the nation.²⁷⁴ Importantly, the Commission recognized that industry observers have pegged fixed wireless as a solution for rural areas, noting that “while fixed wireless has the potential to compete with DSL and cable modem service, the technology is best-suited for rural and underserved markets where these services are not available.”²⁷⁵

MMDS systems have been cited by the Commission as another competitor expected to gain strength in the next two years. MMDS, which currently reaches 55 percent of the population by Commission estimates, is expected to reach 90 percent of the population by the end of 2004.²⁷⁶ The Commission noted that industry observers predict that “[d]espite the setbacks that the fixed wireless industry has faced during the past year,

²⁷³ See *In the Matter of Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service Space Stations in the Ka-Band*, DA 01-1693, 16 FCC Rcd. 14389 (2001) at ¶¶ 16-17.

²⁷⁴ Third Advanced Services Report at ¶ 59.

²⁷⁵ *Id.* at ¶ 75 (citing industry observers).

²⁷⁶ *Id.* at ¶ 61.

including financial problems and halting of deployment plans by major operators, analysts believe that the industry still has the potential to grow and become a successful vehicle for offering high-speed services.”²⁷⁷

Furthermore, Loral, WB Holdings and Teledesic recently certified to the Commission that they have commenced construction of their Ka-band satellite networks.²⁷⁸

The Commission has observed as well that multiple providers are beginning to deploy third generation wireless (“3G”) systems, including “many commercial mobile radio service licensees [who] are beginning to deploy, or have developed plans to deploy, 3G services within their existing spectrum.”²⁷⁹ The Commission concluded that “successful deployment of 3G wireless services may significantly expand availability of advanced services, especially to consumers that are currently unserved by wireline connections.”²⁸⁰

Advances in technology will also expand the reach of DSL services. The Commission has reported that “DSL extension products” have been developed to relieve significant constraints on DSL availability. The Commission describes these products,

²⁷⁷ *Id.* at ¶ 71. The Commission has also pointed out that during 2001, it authorized the use of MMDS and Instructional Television Fixed Service spectrum for mobile in addition to fixed use, by licensees, and that industry analysts predicted that this action by the Commission “gives fixed wireless carriers and equipment vendors additional flexibility and may help revive the industry.” *Id.* at ¶ 76.

²⁷⁸ “Satellite Companies File Milestone Documents with FCC,” *Communications Daily* (Feb. 11, 2002) at 9.

²⁷⁹ Third Advanced Services Report at ¶ 80.

²⁸⁰ *Id.*

developed to serve subscribers who are located beyond the range of the central office or who are blocked by a digital loop carrier that cannot be modified with a remote access multiplexer or remote DSLAM, and capable of “bring[ing] consumers, especially those in low-density areas, within the range for DSL services.”²⁸¹ A new DSL standard recently announced by the International Telecommunication Union, G.SHDSL, also has the potential to expand DSL availability. G.SHDSL can reportedly be deployed nearly twice as far from the central office as symmetric DSL, while increasing the amount of available bandwidth. As a result the Commission has noted that this new standard “would . . . extend DSL capability to consumers that are currently beyond the reach of the central office.”²⁸²

With respect to cable modem deployment, the ACA has reported that its member companies are “leading the industry in delivering broadband services to smaller markets,” noting that the Commission “has received substantial data on ACA members’ broadband deployment in response to the High-Speed Access N[otice of Inquiry].”²⁸³

²⁸¹ *Id.* at ¶ 83. The Commission has also pointed out that the number of rural subscribers receiving DSL may be under-reported in Commission studies because the Commission only requires high-speed providers that have 250 or more subscribers in a given state to report subscriber numbers. “Thus, many smaller providers that serve discrete communities in sparsely-populated areas may not have reported, thereby creating the impression that there is less high-speed service in rural areas than there may actually be.” *Id.* at ¶ 35. The Commission further cites a report by the National Telephone Cooperative Association that “almost 80 percent of respondents to a recent survey of its members are offering high-speed services to all public centers in the carrier’s service territory.” *Id.* at n.82

²⁸² *Id.* at ¶ 84.

²⁸³ ACA Petition at 7-8 (citing ACA’s comments in *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities*, GN
(Continued ...)

According to ACA, small cable systems passed “nearly one million homes with cable modem service,” had invested “about \$300 million” in plant upgrades and equipment, and planned to nearly double the number of homes passed with cable modem service in the next 12-24 months.²⁸⁴

In sum, the merger will do nothing to stifle new entry in the broadband market. A multitude of new entrants are able to provide broadband service using a variety of technologies, and will compete with cable modem, DSL and satellite broadband services.²⁸⁵ Competition between the various technologies is consistent with the view expressed by FCC Chairman Powell in recent reports that “sufficient competition comes from the different types of broadband service available: via DSL, cable networks, or satellite dishes.”²⁸⁶

Docket 00-185 (Dec. 1, 2000), and its Reply Comments in that proceeding (Jan. 10, 2001).

²⁸⁴ See ACA Reply Comments, *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities*, GN Docket 00-185 (Jan. 10, 2001) at 4, 7 and Table 1. Although the ACA intimates that the merger will force small cable providers out of business, ACA Petition at 7-8, this contention is both overblown and inconsistent with the cable industry’s representations to the Commission in other proceedings regarding the aggressive roll-out of digital upgrades in smaller markets, as discussed in Section II.E, *supra*.

²⁸⁵ The number of current and up-and-coming participants in the broadband market make clear that the Commission should give no weight to the claim of Pappas Telecasting Companies that the merger would create a “broadband monopoly.” See Comments of Pappas Telecasting at 16-17.

²⁸⁶ Jonathan Krim, “FCC Rules Seek High-Speed Shift,” *Washington Post* (Feb. 15, 2002), at E1 (reporting on FCC Chairman Powell’s view of broadband competition and observing further “Powell and his supporters argue that it is difficult to foster competition within each mode of high-speed Internet access because of the huge cost involved in building networks”).

D. The Merger Provides A Market Solution to the Lack of True Broadband Availability While Avoiding the Need for Costly and Contentious Regulatory Measures

There are two ways to achieve universal broadband deployment: through adopting a complicated web of regulations, or through private capital investment. Both Congress and the Commission have recognized the superiority of reliance on market forces and encouraging private investment. Regulation as a tool for facilitating broadband deployment, on the other hand, has historically led to market inefficiencies. Some of the regulatory broadband initiatives contemplated by the Commission or aspired to by some parties would present exactly this problem. By contrast, the merger presents a market-based path to similar results – the creation of a broadband alternative without need for subsidy, cross-subsidy, franchise rights or any other government support.

Congress's preference for market-based solutions is evident in Section 706 of the Telecommunications Act of 1996, which directed the Commission to:

[E]ncourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.²⁸⁷

The Commission has interpreted this directive to mean:

²⁸⁷ Telecommunications Act of 1996, Pub. L. 104-104, § 706, 110 Stat. 153, reproduced in notes under 47 U.S.C. § 157.

[T]he language and spirit of the Act require that we promote advanced services deployment within a framework that relies significantly on market forces.²⁸⁸

Accordingly, the Commission explained that it is “actively engaged in removing barriers and encouraging investment in advanced telecommunications,” and described its efforts as working to:

[E]stablish a rational regulatory framework for these services, to promote investment through competition and the administration of our universal service support mechanisms, make efficient use of available spectrum and ensure that lack of access to public rights-of-way do not slow deployment.²⁸⁹

At the same time, struggling with some intractable problems associated with the digital divide, the Commission has had to contemplate initiatives that are not necessarily consistent with this preference for market solutions. These involve the highly controversial, complicated universal service subsidies that created so many long-running disputes in the telephone context. For example, in its *Third Report on Advanced Services*, the Commission stated that it has “encouraged investment in [advanced services] infrastructure in high cost areas” by modifying explicit subsidy provisions, high-cost loop support for rural carriers and access charges for rate-of-return companies.²⁹⁰ The Commission has also noted that it is considering changes to its

²⁸⁸ Third Report on Advanced Services at ¶ 33.

²⁸⁹ *Id.* at ¶ 6.

²⁹⁰ Third Advanced Services Report at ¶¶ 139-40. The Commission is currently reconsidering its order modifying rules for rate-of-return carriers. *See id.* at 56, n.336.

controversial physical collocation rules, as well as the definition of “core services” eligible for universal service support, to facilitate deployment of advanced services.²⁹¹

If possible, of course, the Commission should strive to promote broadband deployment without need to resort to universal service funds or any other system of subsidy. The efficiencies unleashed by the EchoStar/Hughes merger will facilitate universal broadband service without need for any such regulation or subsidy. The Applicants propose to use their private investment to create a true advanced service provider that will go a long way toward resolving the problem without demanding subsidies, without requesting monopoly rights, and without precluding entry by other providers.²⁹²

The single act of approving the merger will set in motion deployment of the very type of true broadband service Congress and the Commission have sought to make available to all Americans – competitive, widely available, advanced service capability.

²⁹¹ *Id.* at ¶¶ 155, 158. The Commission’s collocation rules were vacated in part and remanded in *GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000), and the Commission released an order on remand in August 2001. *See In re Deployment of Wireline Services Offering Advance Telecommunications Capability*, 16 FCC Rcd. 15435 (2001). Changes to the definition of “core services” are being considered in the pending rulemaking *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Public Notice FCC 01J-1 (rel. Aug. 21, 2001).

²⁹² The merger will require the Commission to do none of the “things” recently cited by an FCC official as “things government shouldn’t do: (1) Agree to ‘give me a monopoly and I’ll give you broadband’ requests. (2) Favor one technology over others through subsidies.” Edie Herman, “Telecom Experts Debate Why Broadband Subscription Lacks,” *Communications Daily* (Jan 24, 2002), at 3 (citing comments by FCC Chief of Office of Plans and Policy Robert Pepper).