### E. Nationwide Pricing Will Have the Same Beneficial Effect for Broadband as for MVPD Services

A number of Petitioners claim that the merger will lead to monopoly in the broadband market for those persons for whom satellite is the only alternative. New EchoStar will commit to a nationwide pricing policy for basic broadband services that will translate effective competition in urban areas into benefits to all households for broadband service, just as it will for MVPD services.[293]

## IV. THE MERGER WILL HAVE PRO-COMPETITIVE EFFECTS IN THE VIDEO PROGRAMMING MARKET

Consumers want more channels. MVPDs face bandwidth constraints. When New EchoStar finds itself with roughly twice the capacity as DIRECTV and EchoStar individually, it will have an unparalleled opportunity to give consumers the new channels they desire, and an ability to go beyond the entrenched programming interests to the independent programmers that historically have been shut out of the market. This new vitality in the programming landscape will shake up the MVPD market for the better.

### A. The Merger Will Promote, Rather Than Impede, Competition In the Market for Video Programming

Several Petitioners contend that the merger will have an anti-competitive effect on the video programming market, because New EchoStar allegedly will be the

[293] *See* Willig Declaration at ¶ 34.

only outlet for programming in markets not served by cable.[294] When it comes to program diversity, just the opposite is true. By freeing up hundreds of channels of spectrum for new programming and creating a truly effective counterbalance to the large, entrenched cable MSOs, New EchoStar will be able to provide a viable alternative platform to programmers that have been unable to secure cable carriage. The merger will also help the merged company alleviate the anti-competitive disparate treatment that EchoStar and DIRECTV now suffer at the hands of large programmers.[295] While certainly not welcome to those large companies, that change should translate to lower prices for consumers.

Concerns that New EchoStar could somehow become a bottleneck for programmers[296] are unfounded. Cable continues to hold 78 percent of the national market, and any programmer that is unable to reach a satisfactory arrangement with New EchoStar will have ample alternatives in the form of the major cable MSOs located throughout the country. Also, with respect to programming that is created and broadcast locally, as discussed in Section I**,** this merger will open up vastly more markets to retransmission of local programming – all 210 DMAs, equaling all Americans, to be precise – than would be the case if EchoStar and DIRECTV remain as separate entities. This means that local broadcasters will be able to reach a wider audience and, as a

[294] NAB Petition at 98; ACA Petition at 14-15; Pegasus Petition at 58.

[295] ACA Petition at 14-15.

[296] ACA Petition at 14-18; Johnson Broadcasting Petition at 2; Communications Workers of America Petition at 2; Word Petition at 4-6; NAB Petition at i and 57-58.

business matter, will be better able to negotiate favorable retransmission consent terms with cable operators facing real competition for the first time in most markets.

The Commission need only look at EchoStar's and DIRECTV's past behavior to see that the DBS industry, in order to offer an attractive alternative to cable, historically has been the first to launch new services, rather than pose a "bottleneck" obstacle to such content. Therefore, withholding new programming from subscribers not only would turn economic reasoning on its head, but would contradict the DBS industry's historical affinity for new, unique programming.

Nothing better demonstrates the potential for unleashing new and exciting content through a New EchoStar than the recently announced transaction between EchoStar and Vivendi Universal S.A. That transaction is a foretaste of the types of new content, including new networks and exciting new interactive services, that will be made available to a substantial nationwide audience. EchoStar has consummated its transaction with Vivendi and will carry the new content and service regardless of the outcome of this proceeding, demonstrating EchoStar's commitment to opening doors to new content and interactive Applications. From the programmers' point of view, this new demand for programming can only increase their overall ability to penetrate the marketplace, and to hold out an additional competitive alternative when bargaining with the major cable MSOs, many of which are vertically integrated with established national video programmers.[297]

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[297] For example, four of the top six for-profit video programming networks ranked by subscribership are vertically integrated with a cable provider, as are four of the top five video programming networks ranked by prime-time ratings. *See Annual Assessment*

(Continued …)

NRTC and Pegasus have raised objections and concerns over the Vivendi transaction.[298] Specifically, these Petitioners claim that the investment by Vivendi in EchoStar is contrary to statements made in the Application that EchoStar does not intend to pursue a strategy of vertical integration with programmers after the merger.[299] According to Petitioners, the Vivendi transaction demonstrates an intent by EchoStar to create a "harmful" vertical integration strategy that must be investigated and considered by the Commission when evaluating the Application.

This position is absurd. First, the economic interest that Vivendi has in EchoStar amounts to about 10% (10.7% of issued and outstanding equity, less than 10% on a fully diluted basis), and the voting stake is even smaller at about 2%, before the merger with Hughes is consummated.[300] Post-merger, these percentages will decrease to less than 5% equity interest and about 1% voting interest in New EchoStar.[301] Accordingly, post-merger, the equity and voting interests of Vivendi in EchoStar will sink below the attributable level of ownership (*i.e.*, 5%) that the Commission typically looks to when applying its program access rules that regulate the conduct of cable operators and affiliated programmers.[302] If, in the context of the cable program access

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*of the Status of Competition in the Market for Delivery of Video Programming*, Eighth MVPD Annual Report, FCC 01-389, App. D, Tables D-6 and D-7 (rel. Jan. 14, 2002).

[298] *See e.g.,* NRTC Petition at 68-72; Pegasus Petition at 73-76.

[299] *See e.g.,* Application at 6.

[300] *See* Letter from Pantelis Michalopoulos to Magalie Roman Salas at 1-2 (Dec. 18, 2001) ("Vivendi Notification Letter").

[301] *Id.* at 2.

[302] *See* 47 C.F.R. § 76.1000.

rules, the Commission does not have concerns with ownership interests that are below 5%, the Commission should similarly have little concern over the relationship of Vivendi and the merged EchoStar-Hughes entity.[303] Indeed, with voting rights below 5%, Vivendi will not have the ability to exercise any control or influence over the merged EchoStar-Hughes entity. Second, a programmer like Vivendi could not survive based on New EchoStar's 17% market share; it needs carriage on the major cable MSOs and could not discriminate against them. Similarly, New EchoStar needs programming from all the important networks, and most if not all of the smaller networks, to compete in the MVPD market and nothing about the merger or the Vivendi transaction changes that.

Third, as EchoStar and Hughes stated in the Application, acquiring EchoStar does not have a strategy of acquiring control over programmers with the purpose of influencing the management decisions for any programming service. The agreement with Vivendi does not change this and Petitioners' attempts to bootstrap the parties public statements to suggest otherwise falls flat. The Vivendi transaction is in substance an arrangement for the carriage of new and innovative programming. By committing a limited amount of spectrum to this programming, the deal provides pro-competitive incentives for Vivendi to invest in the programming, an investment that would be questionable if it had to rely solely on the integrated MSOs for its carriage. It is

[303] In addition to voting and equity interests below 5% in the merged EchoStar-Hughes entity, the Vivendi transaction also contemplates that Vivendi will receive one seat on EchoStar's board of directors. Importantly, however, the Vivendi-EchoStar agreement specifically provides that this board member will not participate in any decisions relating to other programmers and will not receive any competitively sensitive information about other programmers' dealings with EchoStar or the new merged company.

not based on any strategy by EchoStar and Hughes of acquiring control of programming assets.

If EchoStar had a vertical integration strategy it presumably would have invested in Vivendi -- not the other way around -- in an effort to somehow lock up programming from its competitors.[304] Instead, Vivendi invested in EchoStar and the two companies have entered into an arrangement that is the opposite of exclusive. As Vivendi observes in its comments:

> [T]he terms of the EchoStar-Vivendi Universal carriage agreement enable -- in fact, require -- Vivendi Universal to expand this initial viewership [of its new programming] to other MVPD platforms. Not only is the carriage agreement non-exclusive, but Vivendi Universal is *required* by the agreement to obtain carriage of these networks from cable operators such that within three years Vivendi Universal is able to reach at least as many viewers via cable as Vivendi Universal reaches over EchoStar's DBS platform.[305]

The non-exclusive character of EchoStar's relationship with Vivendi is hardly the type of relationship that should draw any concern from the Commission as having negative consequences for consumers.

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[304] Significantly, the Commission's cable program access rules are phrased in terms of a "cable operator that has an attributable interest *in* a satellite cable programming vendor. . . ." as opposed to vice versa. 47 C.F.R. § 76.1002(a)(emphasis added). While EchoStar has an option to acquire a 10% interest in the new programming services to be developed by Vivendi, this is strictly a potential investment in the potential economic upside from these services. Far from being inspired by any nefarious exclusionary intent, the agreement is conditioned on the services achieving significant penetration on other distribution platforms.

[305] Vivendi Comments at 7.

In short, EchoStar's relationship with Vivendi promises to bring tremendous benefits to consumers, including new, interactive services, programming diversity and more competition among programmers.[306] However, to provide the additional benefits set forth in the Application, including more of the kinds of diverse programming and enhanced services the Vivendi deal promises, EchoStar and Hughes will need the spectrum that will be made available because of the EchoStar-Hughes combination. Indeed, the new Vivendi services specifically illustrate one of the important consumer benefits associated with the EchoStar-Hughes merger – the creation of an attractive outlet for new independent programming and additional video diversity. The merger will eliminate the duplicative use of different DBS spectrum for the same programming, and free up that spectrum for many new exciting services from independent distributors of the kind envisioned in the alliance with Vivendi.[307] The agreement with Vivendi helps jumpstart this effort to reach an audience of critical mass for new content and achieve broad penetration on both satellite and cable, to the benefit of American consumers. EchoStar and Hughes believe that the merger will create an

[306] *See id.* at 3.

[307] A number of Petitioners argue that the Vivendi transaction shows that EchoStar and DIRECTV can obtain substantial new programming benefits without the merger. *See e.g.*, Pegasus Petition at 61. To the contrary, however, because of spectrum constraints and the need to carry duplicative national and local channels, the existing satellite carriers are severely limited in their ability to expand programming with innovative new offerings. It is beyond dispute that the merger will vastly increase the spectrum available for new programming such as that offered by Vivendi.

enhanced conduit for many other sources and types of new content to reach the U.S. public.[308]

### B. The Merger Is Necessary to Promote Competition Among MVPD's For Video Programming, Particularly in Light of Forthcoming Cable Consolidation and Recent Judicial Action

While the merger creates increased incentives for new and more diverse programming, it will also give the combined entity a greater ability to achieve programming costs comparable to those of competing cable MSOs. Because of their relatively small market shares, EchoStar and DIRECTV have not enjoyed the market position necessary to obtain the favorable programming deals available to cable. As noted by the CEO of Viacom in a recent interview: "[W]hat a lot of people don't know is that satellite broadcasters pay us more for the same programming than cable

[308] Some Petitioners have claimed that EchoStar's failure to disclose the Vivendi transaction at the time of the Application should reflect negatively with respect to EchoStar's character qualifications and should delay processing of the Application. *See e.g.,* NRTC Petition at 72; Pegasus Petition at 75 - 76. EchoStar and Hughes strongly disagree with these statements. At the time the Application was filed, an agreement between Vivendi and EchoStar had not been executed. While the Application assumed that there would be a $1.5 billion equity issuance by EchoStar to *someone* prior to the consummation of the merger, *see* Application at Attachment F, the Applicants could not appropriately speculate about Agreements that had not been reached. As a result, there was no reason or requirement to disclose anything about the transaction -- there was no guarantee that the transaction was actually going to take place. Shortly after the transaction was entered into and made public, EchoStar and Hughes filed a letter pursuant to Section 1.65 of the Commission's Rules notifying the Commission of the transaction and its relevant details. *See* Vivendi Notification Letter at 1. This went above and beyond EchoStar's obligations under the rules. The transaction was not even ready to close when EchoStar filed its notification letter.

operators."[309] For example, with fewer subscribers, EchoStar and DIRECTV are not able to realize the maximum benefit from various "volume discount" arrangements whereby the fee paid per subscriber for programming declines as the number of potential viewers grows. In the Applicants' view, another explanation for the disparity between cable and DBS programming terms is the anti-competitive leverage enjoyed by the large programmers and the perverse incentives of cable-controlled programmers. Notably, the comments of ACA – although critical of the merger overall – lend support to this point. ACA notes that a "core component of the merger plan is to extract major concessions from programmers."[310] According to ACA, doing so will give the combined entity a "structural cost advantage" over small cable companies that lack the bargaining leverage of major cable outlets.[311] This effect is not anti-competitive, however. It is a necessary part of allowing DBS to compete with its principal competitors, the cable MSOs with tens of millions of subscribers. It is consumers who will benefit from the elimination of the unwarranted premiums now paid by EchoStar and DIRECTV.

Perhaps nothing more clearly illustrates the need for EchoStar and Hughes to stay competitive through the merger than the pending purchase of AT&T Broadband by Comcast. If consummated, this transaction will further increase cable and program

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[309] Los Angeles Times, *Q&A – Redstone Sees More Growth for Viacom,* Nov. 18, 2001, at C1 (statement of Sumner Redstone), *available in* 2001 WL 28929748.

[310] ACA Petition at 14.

[311] *Id.* at 15.

ownership concentration.[312] The resulting cable behemoth will dwarf New EchoStar in terms of numbers of subscribers nationwide, and will far surpass the individual subscriber bases of EchoStar and DIRECTV separately.[313] Such a giant would have the leverage to extract even greater cost concessions from video programmers, putting the DBS firms at an even larger competitive disadvantage. Moreover, if the behavior of Comcast is any indication, the new cable grant will continue Comcast's anticompetitive practice of excluding regional sports and other vertically integrated programming interests from DBS. The merger of EchoStar and Hughes will only begin to redress this imbalance, giving the combined entity the legitimate leverage to try to eliminate existing disparities.

Finally, if the AT&T/Comcast merger is not enough to portend heightened cable power, the recent D.C. Circuit decision in *Fox Television Stations, Inc. v. FCC*[314] should be. In that case, the court vacated entirely the cable/broadcast cross-ownership

[312] The Washington Post, *Giant Cable Merger Planned, AT&T, Comcast Set $72 Billion Deal*, Dec. 20, 2001.

[313] The merged entity – AT&T Comcast – would have roughly 22 million subscribers. However, that figure does not include the MVPD subscribers served by entities in which AT&T Broadband currently has an interest; for example, AT&T Broadband has a 25 percent interest in Time Warner's cable systems. According to AT&T Broadband, "[i]f [Time Warner Entertainment] and [Time Warner, Inc.] subscribers were nonetheless added to AT&T's totals, AT&T would be attributed with approximately 32,926,000 subscribers." *See* Letter from Douglas Garrett to Magalie Roman Salas, *Ex Parte* Submission, MM Docket No. 92-264, CS Docket No. 99-251, Dec. 18, 2001, at 2. If attributable subscribers are thus included, the combined AT&T Comcast would have more than 40 million subscribers – nearly 33 million AT&T subscribers and roughly 8 million Comcast subscribers – representing approximately half of all MVPD subscribers.

[314] *See Fox Television Stations, Inc. v. FCC*, Case Nos. 00-1222, 00-1263, 00-1359, 00-1381, and 01-1136, 2000 WL 233650 (D.C. Cir. Feb. 19, 2002).

("CBCO") rule,[315] reasoning that "the probability that the Commission would be able to justify retaining the CBCO is low and the disruption that vacatur will create is relatively insubstantial…"[316] The ruling opens the door to staggering cable power. For the first time ever, a cable operator will be able to own up to two broadcast stations in a market – a crucial link in any competing distributor's attempt to provide local-into-local service in that area. To the DBS operator negotiating retransmission agreements with cable-owned broadcasters, the playing field will be far from level – it will look more like a cliff that the DBS operator must scale.

### C. The Merger Will Not Impair Competition for Local Channel Retransmission

In its petition, NAB claims that local broadcasters will be harmed by an EchoStar-Hughes combination because in monopoly markets local broadcasters will "face a monopsonist purchaser in retransmission consent negotiations for their local signals."[317] According to NAB, as a result, broadcasters will not "fare as well as they might if they had two rival DBS companies with which to negotiate."[318] Apparently, the NAB is concerned that local broadcasters will not be able to extract as high a royalty fee for retransmission of local broadcast stations from a merged EchoStar and Hughes entity,

[315] 47 C.F.R. § 76.501(a).

[316] *Fox Television Stations, Inc.* at *24.

[317] NAB Petition at 58.

[318] *Id.*

as opposed to negotiating with them separately. NAB's concern, however, is not a genuine competitive marketplace consideration.

First, broadcasters enjoy an unusual failsafe: they need not worry that a satellite carrier will not carry them in any area in which it provides local service – they can simply elect must-carry. Second, any remaining concern can only exist (even as a theoretical matter) in a local DMA that is not served by *any* cable provider. Wherever cable service exists (even analog cable), local broadcasters will still have ample ability to bargain for retransmission fees based on their right to withhold retransmission consent from a satellite carrier while providing it to the local cable franchisee. For channels with significant market appeal, this is a potent threat, owing to the significant competitive disadvantage to a satellite carrier if it is not able to offer the same line-up of local network affiliates that is provided on cable. Thus, this concern is, at most, one of quite limited scope.

Second, because the few areas with no cable service at all are generally lightly populated areas not currently served with local-into-local transmissions by either EchoStar or DIRECTV, the notion that the merger will deprive local broadcasters of the ability to play one satellite carrier off against the other is quite far-fetched. In fact, local broadcasters in those markets do not have that ability today, and are extremely unlikely to have it in the foreseeable future without this merger, because of the twin constraints of spectrum scarcity and compulsory must-carry obligations. Thus, it is the market situation in those DMAs, not the merger, that dampens today the ability of local broadcasters in a few locations to negotiate higher retransmission consent fees. Indeed, by extending local-into-local service to *all 210 DMAs*, the merger will open up the opportunity for retransmission consent fees to many local broadcasters that otherwise would have no such opportunity for many years (if ever). In short, the merger will be the only foreseeable way to make local satellite transmission available in those markets in the first place, which is virtually certain *not* to occur without the merger.

Third, if this theory were valid, it would be expected that retransmission consent fees would be significantly higher in those markets where both EchoStar and DIRECTV currently provide local-into-local service than in those markets where only one DBS provider currently provides such service.[319] As discussed in the Willig Declaration, however, there are no substantive differences between the retransmission rights obtained in the six markets in which DIRECTV provides local service and EchoStar does not, and the 35 markets in which both DBS firms provide local service.[320]

Finally, the very fact that EchoStar and DIRECTV have to pay for rebroadcasting local channels into local markets is something of a market anomaly. Local broadcast channels are already available to local television households for free over the air. Particularly in an area with limited cable services this means that *virtually all* television consumers already receive local programming using an over-the-air antenna. When New EchoStar offers local-into-local service in such a market, all it is doing is providing the same programming primarily to the same consumers, thereby *benefiting the*

[319] Currently, DIRECTV provides local-into-local service in 41 markets (in six of which EchoStar is not present), and EchoStar serves 36 markets (in one of which DIRECTV is not present). Thus, there are 35 markets where the two companies overlap, and 7 where they do not.

[320] Willig Declaration at n.17.

*broadcaster* (whether or not the broadcaster extracts an additional premium in the form of a higher retransmission consent fee).[321] The merger's potential downward price pressure on broadcasters' fees simply means that the market would work to bring such fees more closely in line with their true value.

## V. MANY PETITIONERS SUPPORT THE MERGER, AND MANY OPPONENTS' MOTIVES ARE UNRELATED TO THE PUBLIC INTEREST

Notwithstanding the merger's important consumer benefits, a handful of commenters oppose the Application, claiming that the merger will adversely affect consumer choice and competition. Notably absent from this category of commenters is the constituency with the most direct stake in matters of competition and consumer choice – the Consumer Groups themselves. The Consumer Groups, in fact, support conditional approval of the merger.[322] Instead, concerns about competition are pressed mostly by companies or groups that either compete against EchoStar or DIRECTV

[321] The Copyright Office has determined that retransmission of local signals should not require payment of a royalty to the original copyright holder because the fair market value of such retransmission is essentially zero: "The copyright owners have already sold the rights to transmit their programming to the entire local market. They have been fully compensated and are not injured by retransmission into the same market. We recognize that copyright owners are free to attempt to obtain additional compensation for this separate use of their work. We simply believe that they would likely fail in that endeavor." *See* Docket No. 96-3 CARP-SRA, Arbitration Panel Report (Aug. 29, 1997) at 51-52, *modified in Rate Adjustment for the Satellite Carrier Compulsory License*, Final Rule and Order, 62 Fed. Reg. 55742 (Oct. 28, 1997); *see also* 17 U.S.C. § 122(c).

[322] *See* Consumer Groups at 21 ("Because of these potential positive benefits, we urge the Commission to approve the transaction with conditions.").

(NRTC, Pegasus, ACA) or would like to improve their bargaining positions in miscellaneous disputes with the Applicants (NAB, other broadcast interests, Northpoint) or both (NRTC, Pegasus). The real motives of these Petitioners appear to relate to the benefits flowing from the merger – lower prices and more choices – and the impact this would have on Petitioners' bottom line, not to any harms that are cognizable in the Commission's analysis.[323]

Certain consumer interests recognize that, with conditions, the merger of EchoStar and DIRECTV will create a new competitor with the mix and reach of assets, capabilities, and customer bases necessary to compete nationwide with the likes of Comcast and other cable operators that neither company could muster on its own.[324] They explain that, *despite competition from DBS, rates for cable service have continued their upward climb*. In fact, "cable rate increases were larger with the presence of an expanding satellite sector than without it."[325] The Consumer Groups appreciate the

[323] *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475-76 (1940) (mere economic injury is not actionable or cognizable under the Communications Act, unless it can be shown to impact adversely upon the public); *Carroll Broadcasting v. FCC*, 258 F.2d 440, 443-44 (D.C.Cir.1958) ("Private economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public."); *Abilene Radio and Television Company (KRBC-TV),* 1 FCC 2d 979 (1965) ("It is not enough to show that the petitioner may suffer private economic injury, but it is incumbent upon petitioner to make at least a prima facie showing of injury to the public interest."). *Compare Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 223 (1993) ("It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.") (citation and internal quotations omitted).

[324] *See* Comments of Consumer Groups at 13-14.

[325] Comments of Consumer Groups at 9.

difference that the merger of DIRECTV and EchoStar will make in the competitive capabilities of DBS compared to either company alone. For this reason, the Consumers Groups support conditional approval of the merger.

In the face of the Consumers Groups' support, the Petitioners' "protestations in favor of vigorous competition ring hollow." *United States v. FCC*, 652 F.2d 72, 97 (D.C. Cir. 1980) (*en banc*). The objections are nothing more than transparent attempts to prevent the merger's pro-competitive benefits or extract additional conditions designed to give them an artificial and unwarranted advantage in the marketplace. To the extent that these protestors are injured, the injury flows from the merger's pro-competitive benefits.

It is not surprising that Pegasus and NRTC, for example, urge the Commission to reject this Application. While they shed crocodile tears over the threatened plight of rural consumers, they do not explain how these laments are consistent with their own pricing in rural areas: both Pegasus and NRTC now charge $34.99 for the expanded basic DIRECTV package in their territories – $3.00 more than DIRECTV charges for the same package in other areas and EchoStar charges for the equivalent package in the same areas. The sincerity of Pegasus' concerns about competition is further called into doubt by its representations, made to the press only a few days after filing its Petition to Deny, that Pegasus is waiting in the wings ready to be bought out by EchoStar.[326] As for the ACA, it has been even more forthcoming about

[326] *See Pegasus*: *Contract Bars Post-Merger Competition*, Multichannel News, Feb. 18, 2002 (quoting Pegasus executive vice president Howard Verlin as predicting that EchoStar will strike a deal with Pegasus and buy it out because that would make the most financial sense for both companies).

acknowledging its motives: the fear that the merged entity will be able to charge a lower price in rural areas.[327] This type of threatened injury to a competitor is the opposite from the harm to competition that the Commission is charged with evaluating – it is a clear benefit for rural consumers.

In contrast to the commenters who assert their parochial concerns, some firms who support a more competitive MVPD marketplace have strongly supported the merger. Electronics manufacturers, for example, have an unmitigated interest in greater competition and innovation in the MVPD marketplace because it spurs sales of their products. They have a particularly vital interest in developments that will increase the bandwidth available for advanced services like HDTV. Anything that would reduce competition or reduce output in the complementary MVPD market would be anathema to them. The promise of greater competition and expanded output and innovation is exactly why sophisticated manufacturers like Thomson and Sharp have come out strongly in favor of this merger. National retailers have a similar self-interest in greater competition in the MVPD market. Any development that threatened to raise prices to consumers or otherwise reduce output would threaten their sales, while increased competition will undoubtedly spur their sales. Their belief that this merger will increase competition is why retailers like Circuit City have come out in favor of the merger.

[327] *See* ACA Comments at 15-16. NAB's members may also have reason to fear increased competition from New EchoStar with over-the-air broadcast offerings [including digital television], but articulate no respect in which this additional competition is bad for the consumer.

## VI. THE COMMISSION MAY ADOPT THE ONE NATION, ONE RATE CARD COMMITMENT AS A CONDITION FOR APPROVAL, BUT SHOULD REJECT OPPORTUNISTIC ATTEMPTS TO IMPOSE COSTLY, NON-MERGER SPECIFIC CONDITIONS

### A. Applicants Accept Their Commitment to One Nation, One Rate Card As a Condition

EchoStar and DIRECTV will make specific commitments that are narrowly tailored to address the Commission's specific merger-related concerns. To reassure the Commission that this merger will not interfere with competitive pricing, EchoStar and DIRECTV are willing to accept a commitment to uniform national pricing as a condition for approval of the merger.[328]

This condition possesses attributes that the Commission has found appealing in other merger cases. First, the condition mitigates any concern about a loss of potential competition by EchoStar and DIRECTV against one another for the 2.9% of homes not passed by cable.[329] Rural consumers who have long been ignored by cable will receive price benefits from the intense competition occurring in urban areas. For this

[328] The Commission has previously adopted voluntary merger conditions as a basis for approval of the proposed merger. *E.g.*, *Applications of GTE Corporation, transferor, and Bell Atlantic Corporation, transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of Submarine Cable Landing License, Memorandum Opinion and Order*, 15 FCC Rcd. 14032, 14036 ¶4 (2000) ("GTE-Bell Atlantic Order") ("We believe that the voluntary merger conditions proposed by the Applicants and adopted in this Order will not only substantially mitigate the potential public interest harms of the merger, but also provide public interest benefits that extend beyond those resulting from the proposed transaction.").

[329] Eighth MVPD Competition Report at ¶17.

reason, the Consumer Groups support imposing the condition.[330] Second, as explained above, the condition is easy to enforce and difficult to evade. It will not burden the agency with a series of enforcement responsibilities that may tax its resources. In fact, this is the unusual case where the Commission can be reassured by concrete evidence – the Applicants' past practice of national pricing. Moreover, as stated with respect to above, the Applicants are willing to submit themselves to reasonable requirements to ensure that national pricing is an effective constraint on New EchoStar's behavior.

### B. The Conditions Proposed By Merger Opponents Are Punitive And Non-Merger Related

A handful of merger opponents, nevertheless, call for additional conditions to the Commission's approval of the transfer. These opponents consist primarily of parties with preexisting disagreements with EchoStar and DIRECTV. These parties urge the Commission to hold the merger hostage and address their individual unrelated grievances through merger conditions.

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[330] *See* Comments of Consumer Groups at 22-23; Letter from Senator Olympia Snowe dated November 1, 2001; Letter from Congressman Tom Udall dated November 14, 2001. Because Applicants agree to codify the national pricing plan as a condition to the merger, the Commission need not address the Consumer Groups' alternative request that it impose a structural remedy such as divestiture of satellites. *See* Comments of Consumer Groups at 4, 23. However, even if the Commission were to reach the issue, the Consumer Groups have not offered sufficient grounds for concluding that the extreme step of divestiture is required. In fact, divestiture of the very assets whose consolidation is essential to efficiency and competition would undo much of the precise benefit that the parties seek to achieve through the merger. In addition, as the merger condition on national pricing diminishes concerns about market concentration in some rural areas, the Commission need not address the argument advanced by Northpoint and the Consumer Groups that MVDDS licensing should precede the merger's approval. *See* Comments of Consumer Groups at 21-22.

The merger opponents, however, ignore the relevant legal standard. The Commission is not free to attach conditions to a merger in order to enhance the pro-competitive benefits offered by the transaction; instead, any condition attached must be narrowly tailored to a specific anti-competitive risk or harm created by the merger itself.[331] Congress invested the Commission with only limited authority to attach conditions to its approval of merger transactions.[332] In recent merger cases, the Commission has consistently acknowledged its limited authority to impose conditions only "where necessary * * * to ensure that the public interest is served by [a] transaction."[333] The Commission, moreover, will not entertain merger conditions if the benefits accruing from the merger outweigh any perceived harms.[334]

[331] In the *AT&T-TCI* and *MCI-WorldCom* merger proceedings, the Commission repeatedly declined invitations to impose conditions not directly related to anti-competitive effects of those transactions. In the *AT&T-TCI* proceeding, for example, the Commission declined to impose a condition granting competitors a right of access to the merged company's multichannel video programming facilities in light of its conclusion that the merger would be "unlikely to result in the loss of a significant source of current or future competition in MVPD services." *Application for Transfer of Control of Tele-Communications, Inc. to AT&T*, ("*AT&T-TCI Order*"), 14 FCC Rcd. 3160, 3173 ¶ 22 (1999). Likewise, because the Commission concluded that the MCI-WorldCom merger was "not likely to have anticompetitive effects on the provision of * * * private line service on any U.S. international route," it refused to condition its approval on a divestiture of any such facilities. *Application for Transfer of Control of MCI Communications to WorldCom, Inc.* ("*MCI-WorldCom Order*"), 13 FCC Rcd. 18025, 18101, ¶ 135 (1998).

[332] Section 214(c) of the Communications Act permits the Commission to attach to a certificate only "such terms and conditions as * * * the public convenience and necessity may require." 47 U.S.C. § 214(c). Likewise, section 303(r) of the Act restricts the Commission to "prescrib[ing] such restrictions and conditions * * * *as may be necessary* to carry out the provisions of the chapter." 47 U.S.C. § 303(r) (emphasis added); see also *GTE-Bell Atlantic Order*, 15 FCC Rcd. at 14,047 ¶ 24.

[333] *See, e.g.*, *AT&T-TCI Order*, 14 FCC Rcd. 3160, 3169 ¶15 (1999); *MCI-WorldCom Order*, 13 FCC Rcd. at 18032, ¶ 10; *Qwest Communications International,*

(Continued …)

The parties calling for conditions to this merger have failed to satisfy the public interest standard. They fail to link their proposed conditions to a specific identifiable harm arising out of the transaction, and they ignore the merger's clear benefits. Contrary to the 1996 Act's goal of promoting deregulation, these parties urge the Commission to subject New EchoStar to heavy-handed regulation, far beyond the level of regulation deemed necessary for the protection of the public interest by both Congress and the Commission's rules. Some Petitioners would have this Commission, rather than the consumer choice, dictate what programming New EchoStar carries. Other proposed conditions are simply poison pills designed to kill the merger in order to keep a competitive New EchoStar out of the market, or at least significantly hinder its ability to become a vigorous competitor.

*First*, some parties request that approval be conditioned on compliance with the Commission's existing rules on carriage of local stations.[335] However, those

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*Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, *Memorandum Opinion and Order*, 15 FCC Rcd. 5376, 5381 n.24 & ¶ 46 (2000) ("*Qwest-US West Order*").

[334] *Qwest-US West Order*, 15 FCC Rcd. at 5399, 5406 ¶¶ 46,62.

[335] *E.g.*, Paxson Communications Petition at 18-19; Family Stations, Inc. and North Pacific International Television, Inc. Petition at 5; Petition to Deny of Eagle III Broadcasting LLC, at 4. Northpoint also makes a gratuitous remark that the Applicants should be ordered to "refrain from engaging in anti-competitive conduct designed solely to derail their competitors," and comply with competition statutes and regulations." *See* Petition to Deny of Northpoint Technology, Ltd., at 4. EchoStar and DIRECTV have objected to Northpoint's proposals solely on the grounds of harmful interference, whose threat has been confirmed by independent tests. They welcome competition from Northpoint and have not objected to Applications filed by many other wireless cable companies proposing to use LMDS, MMDS or other frequencies.

rules are what they are and will apply to the merged company just as to any other. As the Commission concluded in declining to impose a condition mandating AT&T-TCI's compliance with the program access rules, because "nothing in the merger transaction would shield the merged company from the program access rules * * * [a] condition therefore is unnecessary."[336] The same answer applies here.

For example, Johnson Broadcasting and Family Stations argue that EchoStar and DIRECTV denied specific requests to carry local television stations.[337] But these commenters do not credibly suggest that the issue they pose arises out of the merger—the grant or denial of this Application will not resolve their complaints.

To the extent that parties are asking the Commission to impose carriage rules above and beyond those specified by its regulations, such a request should be rejected as unneeded and wholly unjustified.[338] In analogous circumstances, the Commission has refused to impose merger conditions that go beyond what Congress and the Commission have already found sufficient to protect the public interest.[339] Consumers' choice, rather than the Commission, should dictate what programming New

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[336] *AT&T-TCI Order*, 14 FCC Rcd. at 3179, ¶ 34; *see also id.* at 3179-81, ¶¶ 35-40.

[337] Johnson Broadcasting Petition at 4-7; Family Stations, Inc. and North Pacific International Television, Inc. Petition at 4.

[338] *See* Petition to Deny of Paxson Communications Corp. at 19; Comments of the Association of Public Television Stations and the Public Broadcasting Service at 4-5.

[339] *Cf. AT&T-TCI Order*, 14 FCC Rcd. at 3180 ¶¶ 37-38 (refusing to condition the merger on "restrictions that are beyond the scope of the Commission's program access rules"); *see id.* at ¶ 29 (rejecting common carrier conditions that exceed the congressional mandate.)

EchoStar carries beyond what the Commission's rules require. The merger opponents, moreover, have not credibly shown that the proposed merger will exacerbate their concerns about carriage of local programming. The proposed merger will actually have the opposite effect. Because the merger will generate efficiencies, New EchoStar "will be able to offer substantially more local programming as a combined entity than either of them would be able to do alone."[340]

*Second*, although Applicants firmly believe the additional spectrum freed up by the merger will permit New EchoStar to offer all local channels in all 210 DMAs on a single satellite dish, the Commission should reject attempts by PBS to impose a special condition on the combined company that it carry all its "must-carry" stations so that they are received on the same dish, nor entertain the argument of Pappas Telecasting Companies that EchoStar's current policy violates the must-carry requirements of Section 338.[341] This issue, as PBS readily concedes, is the subject of a pending Petition for Clarification or Modification filed by NAB and forcefully contested by EchoStar. That proceeding, not the instant one, is the proper forum for the Commission to issue a determination based on a full briefing by affected parties.[342] In prior merger proceedings,

[340] Comments of Consumer Groups at 13-14.

[341] *See* Comments of the Association of Public Television Stations and the Public Broadcasting Service at 7. Comments of Pappas Telecasting Companies in Opposition to Application at 9-13; *see also* Petition to Deny of Carolina Christian Television and LeSea Broadcasting Corp. at 4-9; Petition to Deny or Conditionally Grant of Paxson Communications Corp. at 12-13; Petition to Deny of Brunson Inc. at 6-9; Petition to Deny of Eagle III Broadcasting, LLC at 3-4.

[342] *E.g.*, *AT&T/TCI Order*, 14 FCC Rcd. at 3180 ¶ 38. The Applicants will not burden the record in this unrelated proceeding with a detailed recitation of EchoStar's defense to NAB's petition. Suffice it to say, EchoStar's decision to implement the
(Continued …)

the Commission repeatedly refused to consider disputed issues subject to a separate proceeding, and that same answer applies here.[343] Nevertheless, Applicants recognize and confirm their continuing obligations, and the obligations of the merged company, under federal law.

*Third*, and for substantially the same reasons, the "set aside" conditions proposed by Consumer Groups should be rejected.[344] The Consumer Groups ask that New EchoStar set aside eight percent of its total channel capacity for noncommercial education programming, but it fails to demonstrate a legal foundation for its request. Far from curing any harm from the merger, this requested condition seems to relate to a significant merger benefit, which will, however, accrue without need for any condition. Part of the whole point of these proceedings is to merge two companies into one and use the freed-up spectrum for non-duplicative programming. As a single DBS provider, New EchoStar will have a four percent public interest set-aside obligation under the

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second dish plan rested directly on the text of the Commission's must-carry regulation, which applies only where the subscribers acquire the second dish "at their own expense" and for "an additional carrier charge." *See* 47 C.F.R. § 76.66(i)(4).

[343] *Applications for Consent to Transfer of Control of Southern New England Telecommunications Corp*., 13 FCC Rcd. 21292, 21306, ¶ 29 (1998) ("The Commission has regularly declined to consider in merger proceedings matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability."); *see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization from TCI, Inc. to AT&T Corp.,* 14 FCC Rcd. 3160, 3180 ¶ 38 (rel. Feb. 18, 1999) ("If the parties believe any existing exclusivity agreements violate the program access rules, the program access complaint process is the appropriate forum in which to resolve any such grievance.")

[344] Comments of Consumer Groups at 15-16.

Commission's rules.[345] Because the set-aside programming choices available on EchoStar and DIRECTV today overlap to a fairly significant extent, the merger means simply that New EchoStar will have much more set-aside capacity to carry more qualified programmers. The 4% set-aside rule will be applied to a much larger capacity "pie," to the benefit of qualified noncommercial programmers that may today be unable to obtain carriage. As for programmers that are now carried by only one of the two companies (such as Word Network),[346] the merger will give them access to many more millions of subscribers compared with their visibility today. The Consumer Groups' fear that New EchoStar will not maximize diversity in noncommercial programming is entirely unfounded and speculative.[347]

The Consumers Groups revisit also an issue upon which the Commission has previously ruled. It asks that the Commission "reverse course" and require that EchoStar relinquish to an independent body the ability to make judgments on a programmer's qualifications to select the set-aside noncommercial programming to be carried in cases where the demand for set-aside capacity exceeds the available capacity.[348] However, the Commission has already previously rejected such an

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[345] *See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, Report and Order*, 13 FCC Rcd. 23254 (1998).

[346] *See* Petition to Deny of the Word Network at 5-7.

[347] The Commission has routinely rejected similar requests to deny proposed transactions based on such unsupported allegations. *See e.g. Application of WorldCom, Inc., and MCI Communications Corporation for Transfer of Control*, 13 FCC Rcd. 18025, 18134, 18145-58, ¶¶73-74, 193, 211, 213 (1998).

[348] *See* Comments of Consumer Groups at 4, 15.

arrangement, and for good reasons:  it exceeds the statutory scope and raises substantial constitutional concerns.  The Consumer Groups have not offered any factual evidence, new policy arguments, or nexus of any sort that would provide a basis for the Commission to depart from its prior ruling and impose such an extreme step of requiring that New EchoStar cede control over set-aside noncommercial programming to an independent body.  As a result, and consistent with its prior ruling, the Commission should reject the Consumer Groups' call to impose such a condition in this case.

*Fourth*, Northpoint also seeks to employ this transfer of control proceeding to raise an issue involving an entirely unrelated business dispute.  Northpoint asks for a merger condition that would require New EchoStar to adopt a set-top box compatible with its technology.[349]  This "proposed condition" is nothing more than an opportunistic and exploitive attempt to extract an individual benefit from the merger. Northpoint does not credibly show that the condition addresses a perceived harm *resulting from the transfer* – both EchoStar and DIRECTV now use technology that is incompatible with Northpoint's.  Plus, in order to transition to a new technology platform, both companies would have to swap out all of their subscribers' set-top boxes – a process that would be expensive and time consuming.  In any event, the Commission has already decided to exempt from its interoperability requirements all MVPDs supporting boxes that operate, and are available from unaffiliated vendors, nationwide. *See* 47 C.F.R. § 76.1204 a(2).  This proceeding is not the appropriate forum for the Commission to repeal that rule, and Northpoint offers no persuasive reason why the

[349] *See* Northpoint Petition at 11-12.

Commission should do so. The Commission has repeatedly rejected similar efforts by parties using the transfers proceedings as a way to extract benefits from the merger partners that have no nexus to the merger.[350] It should do so again here.

*Fifth*, the Consumer Groups and Northpoint raise a non-merger-specific issue involving the MVDDS rulemaking, asking that the Commission delay this Application's adjudication until those separate proceedings are complete.[351] Yet, the Consumer Groups' admission that the MVDDS docket is not "directly implicated in this proceeding" should be dispositive.[352] As noted, the Commission has remained firm in its policy of limiting the focus of its merger review proceedings to issues causally linked to the specific transaction itself. The Consumer Groups' request is also contrary to Commission precedent holding that transfer Applications will not be influenced by generic issues subject to a separate proceeding.[353] The Commission should refrain from

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[350] The Commission recently noted that it "recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other of the Applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act." *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc, Transferors, to AOL Time Warner, Inc., Transferee, Memorandum Opinion and Order*, 23 Communications Reg. (P & F) 157 (2001); *see also Joint Applications of Global Crossing Ltd. And Citizens Communications Company for Authority to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, 16 FCC Rcd. 8507, 8511 ¶ 11 (rel. Apr. 16, 2001).

[351] *See* Comments of Consumer Groups at 4, 21.

[352] *See id*. at 21.

[353] *E.g. Applications of Capital Cities/ABC, Inc. and The Walt Disney Company*, 11 FCC Rcd. 5841, 5859 at ¶ 27(1996) ("transfer and assignment process is not the appropriate forum to consider changes in its rules."); *see id*. at 5858 ¶ 22 ("nor can we

(Continued …)

entangling this Application in a matter that remains the subject of ongoing industry debate and a separate rulemaking proceeding. Indeed, that requested condition might, perversely, undermine some of the benefits to flow from the merger. The Applicants' concerns with the Northpoint proposal have everything to do with interference and nothing to do with competition. Harmful interference from an MVDDS service operating in the same spectrum may hamper New EchoStar in its attempts to make maximum use of the freed-up spectrum and improve quality of service.

*Finally*, the Commission should reject the Consumer Union's call to impose open access conditions on this merger. There is no open access "problem" involving New EchoStar's facilities that would require a solution.[354] In light of New EchoStar's lack of market power or bottleneck characteristics, such a condition is inappropriate here, whether or not it would be appropriate for a cable merger.

In the *AT&T-TCI* Order, the Commission indicated that market forces rather than government mandates were the best vehicle to further development and deployment of competitive broadband services. It reached this conclusion after finding significant actual and potential competition affording consumers adequate choice across existing and emerging platforms:

> Currently, there are a large number of firms providing Internet access services in nearly all geographic markets in

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conclude that a transfer proceeding is the proper forum in which to consider changes in the applicable program access or retransmission consent rules.")

[354] *See* Comments of Consumer Groups at 23-24; *see also AT&T/TCI Order*, 14 FCC Rcd. 3160, at ¶¶ 93-94.

> the United States, and these markets are quite competitive today. . . Although AT&T-TCI together might be able more quickly to deploy high-speed Internet access services and win a significant number of residential Internet access customers, it appears that quite a few other firms are beginning to deploy or are working to deploy high-speed Internet access services using a range of other distribution technologies.[355]

As a result, the Commission concluded that the proposed merger would not threaten competition among Internet access services.[356] The Commission added that, in any event, "the open access issues would remain equally meritorious (or non-meritorious) if the merger were not to occur."[357] Whether or not this reasoning was correct in that case, it certainly applies to this transaction.

### C. The Remaining Grievances Do Not Belong In These Proceedings

Several other commenters try to link their own private grievances regarding DIRECTV and EchoStar to the merger. These grievances range from the scope of EchoStar-DIRECTV's specific obligations under the must-carry rules, to contractual or regulatory disputes, to the alleged quality of customer service.

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[355] AT&T/TCI Order 14 FCC Rcd. 3160, at ¶¶93-94 (footnote omitted); *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd. 2398, ¶ 101 (1999) ("We observe further that the record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers.")

[356] *See* Separate Statement of Chairman E. Kennard, *AT&T/TCI Order* ("We have taken a de-regulatory approach, an approach that will let this nascent industry flourish.").

[357] *See AT&T/TCI Order*, 14 FCC Rcd. at 3207 ¶ 96.

But the merger opponents have failed to demonstrate that this merger proceeding is the appropriate forum for resolving such issues. Clearly, it is not. Fundamentally, the commenters fail to demonstrate how grant of the Application and consummation of the merger would cause the specific harms they claim; for that reason they lack standing to raise them here.[358] These commenters also fail to recognize that other more appropriate forums exist for airing their issues, including the federal and state regulatory complaint processes. Indeed, in most cases the merger opponents already have taken advantage of those vehicles. Like the must-carry issues discussed above, other complaints regarding EchoStar's service performance,[359] or regarding its dealings in the collective bargaining context,[360] are equally out of place.

Nor should the Commission accept the attempts by Paxson and PrimeTime24 to inject into this proceeding issues from copyright and contract litigation

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[358] *See California Ass'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 91 n.6 (D.C. Cir. 1988) ("*CAPH v. FCC*") (opponents of broadcast license transfer lack standing where their objections are based on alleged practices of transferor and speculative assertions that transferee will perpetuate those practices). The merger opponents, like the Petitioners in *CAPH v. FCC*, cannot trace the harms they allege, pertaining to EchoStar's obligations under the "must carry" rules and other related issues, to the transaction at issue. Instead, their "real plea is that the transfer will furnish no cure—it will not cause the injury to abate." *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 825 (D.C. Cir. 1985). But this plea is not sufficient to establish standing. *Id. See also Microwave Acquisition Corp. v. FCC,* 145 F.3d 1410, 1413 (D.C. Cir. 1998) (appellant lacked standing because, *inter alia*, the relief sought would not remedy the alleged injury).

[359] Letter of Toni Dockter dated August 1, 2001, at 1. As the Commission concluded in the *AT&T-TCI Order*, the "enforcement of state regulations [is] best carried out at the state level." *AT&T-TCI Order* ¶ 58.

[360] CWA Petition at 5.

regarding the retransmission of distant signals. Both companies fail to credibly show that the issue is relevant here, and the Commission has already rejected a similar attempt by PrimeTime 24 in the past.[361]

In sum, many individual complaints about EchoStar and DIRECTV lack the required type of nexus to the merger and are not relevant here. Commenters should pursue their issues in the other proceedings and forums that are available to them. While the merger may injure EchoStar-DIRECTV rivals, such injury arises from the pro-competitive benefits flowing from the merger, and will be accompanied by an equal if not greater degree of merger-related benefits to American consumers.

## VII. CONCLUSION

Four long-sought goals of Congress and the Commission are:

- to create meaningful competition for the entrenched cable industry in order to moderate its pattern of constantly spiraling prices;
- to secure satellite carriage of as many local stations as possible;
- to ensure that true broadband services are affordably available to all Americans, urban and rural alike; and
- to foster increased choice and diversity of video programming content.

[361] Paxson Communications Petition at 6-9; Comments of PrimeTime 24 Joint Venture at 7-11; *see also Application of MCI Telecommunications Corporation, Assignor, and Echostar 110 Corporation, Assignee, Order and Authorization*, FCC 99-109. ¶ 30 (rel. May 19, 1999).

By approving the merger of EchoStar and Hughes, the Commission can achieve each of these four critical goals faster, more directly, and with less need for burdensome regulation than through any other conceivable action it could take. Stated another way, what years of legislative and regulatory initiatives have largely failed to achieve, the Commission can accomplish with one stroke by approving this pro-competitive merger.

**Respectfully submitted,**


| | |
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***DECLARATION***

I, David K. Moskowitz, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

__________/s/_________________
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Dated: February 25, 2002

## DECLARATION

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on February 25, 2002.

/s/
Eddy W. Hartenstein
Corporate Senior Executive Vice President
Hughes Electronics Corporation

## *CERTIFICATE OF SERVICE*

I, Todd B. Lantor, hereby certify that on this 25th day of February 2002 a true and correct copy of the foregoing was served via hand delivery (indicated by *) or by first-class mail, postage pre-paid upon the following:

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