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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

April 25, 2002

VIA HAND DELIVERY AND ELECTRONICALLY

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
455 Twelfth Street, S.W.  
Washington, DC 20554

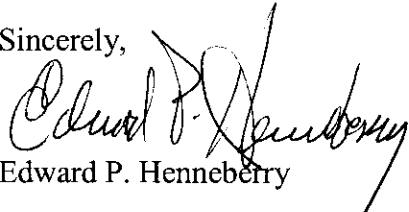
Re: **Ex Parte Reply to Opposition**  
**National Association of Broadcasters**  
*In the Matter of EchoStar Communications*  
*Corporation, General Motors Corporation, and Hughes*  
*Electronics Corporation, CS Docket No. 01-348*

Dear Ms. Dortch:

On behalf of the National Association of Broadcasters, please accept the original and one copy of the enclosed Ex Parte Reply to Opposition in the above captioned matter.

If you have any questions, please feel free to contact me at (202) 383-6926.

Sincerely,

  
Edward P. Henneberry

Enclosures

cc: The Honorable Michael K. Powell  
The Honorable Kathleen Q. Abernathy  
The Honorable Michael J. Copps  
The Honorable Kevin J. Martin  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

\_\_\_\_\_  
In re Application of \_\_\_\_\_  
ECHOSTAR COMMUNICATIONS CORPORATION, \_\_\_\_\_  
GENERAL MOTORS CORPORATION, \_\_\_\_\_  
HUGHES ELECTRONICS CORPORATION, \_\_\_\_\_  
Transferors, \_\_\_\_\_  
and \_\_\_\_\_  
ECHOSTAR COMMUNICATIONS CORPORATION, \_\_\_\_\_  
Transferee, \_\_\_\_\_  
For Authority to Transfer Control. \_\_\_\_\_  
\_\_\_\_\_

CS DOCKET No. 01-348

To: The Commission

EX PARTE REPLY TO OPPOSITION

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Date: April 25, 2002

## SUMMARY

EchoStar and DIRECTV have proposed a merger with demonstrated anticompetitive effects in local markets across the United States. Their defense of the merger is to rely on unenforceable promises and ephemeral benefits. The Applicants have twice had the opportunity to justify their merger and they have twice failed to do so, despite the fact that the burden is on them to do so.

It is undisputed that this is a merger to monopoly in many local markets and for millions of consumers. By DIRECTV's own account, 29 percent of its subscribers (over 3 million households) do not have access to cable. When one adds to that number the EchoStar subscribers who do not have access to cable, the inhabitants of non-cabled areas who do not subscribe to DBS today, and the 15 million households in areas served by weak, analog cable systems that are likely to go extinct because they cannot justify the expense to upgrade to digital, it is clear that a significant segment of the population will be subject to a multichannel video programming distribution monopoly if this merger is approved.

In nearly all other markets, this will be a merger to duopoly, and will eliminate the vigorous head-to-head rivalry between the two DBS companies. EchoStar, of course, consistently insisted that DBS was a separate market until this merger was proposed, including in its antitrust litigation against DIRECTV in which it alleged the two competed in a "High-Power DBS Market." The fact that the two DBS companies' prices track one another but not cable, as Appendix A shows, is further evidence of the intensive rivalry between EchoStar and DIRECTV.

Mergers to monopoly or duopoly such as the one proposed here, are routinely condemned by antitrust authorities. The Applicants do not even attempt to counter the voluminous precedent condemning such mergers. They are also silent as to the rocketing growth and robust health of

the DBS industry. Both EchoStar and DIRECTV showed record results in 2001 and the first quarter of 2002 – although they absurdly depict themselves as teetering near oblivion in their Opposition.

Against the uncontroverted evidence of competitive harm, the Applicants fail to demonstrate the “extraordinary efficiencies” necessary to justify such an anticompetitive acquisition. The main efficiency promised is their recent “miraculous” discovery that they can carry all local broadcast stations in all 210 Designated Market Areas. But EchoStar took back that promise almost as soon as it was made, filing a Supreme Court petition explicitly stating that it “does not intend to carry all channels in every market unless the decision below is upheld.”<sup>1</sup> EchoStar also resists any merger condition that would eliminate its “two-dish” reception scheme, and has set no deadline for when its 210 market promise would be fulfilled (although any such deadline would be unenforceable anyway).

In any event, carriage of local stations in all 210 DMAs is not a merger-specific efficiency because each party could deliver all local stations on its own or the Applicants could do so together through a production joint venture. The NAB and its broadcaster members prefer to rely on the present competitive rivalry between the two DBS companies and the substantial benefits that accrue to the DBS companies when they carry local stations (more subscribers, less churn, and extra revenues from subscribers for local stations) to achieve local-to-local carriage, rather

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<sup>1</sup> *Satellite Broadcasting and Communications Ass’n et al., Petition for Writ of Certiorari, Satellite Broadcasting and Communications Ass’n v. FCC*, 70 U.S.L.W. 3580, at 8 n.2 (U.S. Mar. 7, 2002) (No. 01-1332) (emphasis added).

than the promises of a company that the Commission has chastised for “its ‘disingenuous’ behavior and lack of candor.”<sup>2</sup>

The other purported efficiencies listed by the Applicants consist principally of additional programming and various enhanced services and certain cost savings. However, the Applicants fail to quantify these alleged efficiencies in any meaningful way. Such vague, unverifiable efficiency claims are far too speculative to be given any weight, particularly when placed against the known competitive harms that occur with mergers to monopoly or duopoly.

The Applicants’ proposed solution to the obvious anticompetitive effect of a merger to monopoly is a national pricing plan. But the Applicants are not actually proposing uniform national pricing, as Mr. Ergen himself admits when he reserves to himself the ability to respond to specific offers in a particular location. (Indeed, the Applicants have to ignore the critically important elements of equipment and installation even to pretend that they would offer national pricing.) In addition, there are any number of ways that New EchoStar could discriminate between rural (monopoly) and urban (duopoly) customers.

Further, a national price would be above the competitive level for two reasons. First, with only one DBS company and one cable company in most urban areas, the urban price itself would be a supracompetitive duopoly price. Second, a single national price would be set somewhere between the urban duopoly price and the higher rural monopoly price.

If the Commission accepts EchoStar’s proposal it will find itself entwined in old-fashioned utility rate regulation—exactly the regime the Telecommunications Act of 1996 intended to replace with one based on competition.

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<sup>2</sup> *In re National Association of Broadcasters and Association of Local Television Stations*, DA 02-765, CSR-5865-Z, at 19 n.116 (Media Bureau Apr. 4, 2002).

The Applicants have failed to carry their burden of demonstrating that the proposed merger would serve competition in the public interest. Therefore, the Application should be denied.

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APPENDIX A: Cable v. DBS-Indexes of Monthly Prices Over Time

APPENDIX B: Supplemental Declaration of Richard G. Gould

APPENDIX C: Reply Declaration of J. Gregory Sidak



competitive harms, EchoStar and DIRECTV instead rely on hollow promises. In doing so, the Applicants fail utterly to carry their burden of demonstrating that the merger would serve the public interest.

Both the public interest standard and relevant merger law require the parties to detail with specificity why they believe the anticompetitive effects of the merger are overcome by procompetitive factors. That specificity is completely lacking from either the Application or the Applicants' Opposition.

Most tellingly, the Opposition fails to grapple with the central point of the numerous petitions to deny filed on February 4, 2002: the merger of EchoStar and DIRECTV will create a monopoly in many local markets and a duopoly in nearly all other local markets. The result will be higher prices for urban and rural consumers. In addition, local broadcasters, the primary source of local programming, will be subject to the market power of an unregulated gatekeeper.

Instead of attempting to refute the clear evidence of anticompetitive effects, the Applicants claim the merger is justified by alleged efficiencies. The chief claimed efficiency is a "promise" to offer local-to-local service in all 210 television markets. But this "promise" is really no promise. As the publisher of a leading satellite industry trade publication described it, the announcement is "a very shrewd political Hail Mary with no downside because it's unenforceable."<sup>4</sup> In fact, EchoStar, unsurprisingly, immediately backtracked on this promise. Within days of making this commitment to both the Commission and Congress, EchoStar filed a Petition for a Writ of Certiorari at the Supreme Court, stating that if it wins its "must carry" case,

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<sup>4</sup> David Lieberman, *EchoStar promises more local TV after merger*, USA TODAY, Feb. 27, 2002 (quoting Bob Scherman, Publisher of Satellite Business News) <<http://www.usatoday.com/life/cyber/tech/2002/02/26/echostar-directv.htm>> (visited Apr. 18, 2002).

“the merged entity does not intend to carry all channels in every market. . . .”<sup>5</sup> The other efficiencies claimed by the Applicants are vague, general and unquantified. As such, they cannot justify what would otherwise be an anticompetitive merger.

The Applicants attempt to overcome the inconvenient fact that this is a merger to monopoly in many local markets, for many millions of consumers,<sup>6</sup> by their “pledge” of a national pricing plan. This “pledge” is as ephemeral as EchoStar’s “promise” to carry all local television stations. When one reads the fine print, it becomes clear that EchoStar interprets its pledge to allow responses to local competitive situations, and that the pledge encompasses only some elements of the total DBS price. The simple truth is that a national pricing plan is unworkable. If it did work, it would still mean a uniform price above the competitive level. Further, a uniform price would stifle local competition and enmesh this Commission in an unwieldy regulatory tangle that is the antithesis of the deregulatory mandate Congress gave the Commission in the Telecommunications Act of 1996.

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<sup>5</sup> *Satellite Broadcasting and Communications Ass’n et al.*, Petition for Writ of Certiorari, *Satellite Broadcasting and Communications Ass’n v. FCC*, 70 U.S.L.W. 3580 (U.S. Mar. 7, 2002) (No. 01-1332).

<sup>6</sup> By DIRECTV’s own account, based on surveys of its own customers, nearly 30 percent of its customers do not even have access to cable. As discussed below, the Applicants make no effort to refute – indeed, fail even to mention – this devastating admission.

## II. THE APPLICANTS FAIL TO REBUT THE EVIDENCE OF ANTICOMPETITIVE EFFECTS RESULTING FROM THE ACQUISITION

In this license transfer proceeding, the burden is on the proponents of the merger to show that it is in the public interest.<sup>7</sup> Similarly, under the Clayton Act, a merger that creates a highly concentrated market, as here, is presumed to lessen competition and the burden shifts to the proponents to demonstrate that the effect of the merger will not be anticompetitive.<sup>8</sup> The Applicants here fail to carry their burden of demonstrating that the merger, which would further concentrate already highly concentrated local multichannel video programming distribution (“MVPD”) markets, will not lessen competition. In instance after instance, where the legal standard requires a showing with specificity, the Applicants provide generalities or promises that prove to be illusory upon examination.

### A. This Is a Merger to Monopoly in Many Markets.

The parties have not challenged – nor can they – the fact that for many millions of predominantly rural consumers DBS will become the only MVPD. Dr. Willig’s initial declaration glossed over this fact by claiming that the relevant geographic market was national

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<sup>7</sup> See *In the Matter of 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*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 F.C.C.R. 6547, 6554 ¶4 (2001) (“The Applicants bear the burden of proving that the transfer will advance the public interest.”).

<sup>8</sup> See United States Dep’t of Justice & Federal Trade Comm’n, *Horizontal Merger Guidelines*; *FTC v. H. J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

because the DBS firms charged a national price.<sup>9</sup> Yet in his reply declaration, Dr. Willig stated that Pegasus, a DIRECTV retailer for rural areas, charges an additional \$3 above DIRECTV's own monthly subscriber fees.<sup>10</sup> Furthermore, in another FCC proceeding Dr. Willig recently argued that the broadband Internet market should be evaluated at the local level.<sup>11</sup> As the Sidak Reply Declaration points out, the appropriate geographic markets clearly are local.<sup>12</sup>

The parties attempt to minimize the number of households not passed by cable to detract from the competitive impact of the many local MVPD monopolies, relying on data supplied to the Commission by the cable industry.<sup>13</sup> But that data cannot possibly be accurate, as the National Rural Telecommunications Cooperative ("NRTC") demonstrated.<sup>14</sup> NRTC also refuted effectively the Applicants' attempt to challenge its analysis.<sup>15</sup> Much more likely to be accurate is

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<sup>9</sup> Declaration of Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, ¶ 93 (Nov. 30, 2001) ("Willig Declaration").

<sup>10</sup> Reply Declaration of Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, ¶ 93 (Feb. 25, 2002) ("Willig Reply Declaration").

<sup>11</sup> Declaration of Robert D. Willig on Behalf of AT&T Corp., in Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337 at 20, ¶ 35 (Feb. 28, 2002).

<sup>12</sup> Reply Declaration of J. Gregory Sidak, ¶¶ 18-19 ("Sidak Reply Declaration") (Attached as Appendix C).

<sup>13</sup> Opposition at 59-66.

<sup>14</sup> Petition to Deny of National Rural Telecommunications Cooperative, CS Docket 01-348 (filed Feb. 4, 2002).

<sup>15</sup> Ex Parte Reply to Opposition of National Rural Telecommunications Cooperative (filed Apr. 4, 2002). The Applicants attack the Warren Communications data which is the source of the 81 percent estimate, claiming to have located twenty zip codes that Warren lists as not passed by cable that are in fact passed by cable. Willig Reply Declaration at 63-66. But, Dr. Willig's analysis fails to consider that the Warren data presents census blocks which are wired for cable, not zip codes. See Reply Declaration of Paul W. MacAvoy on behalf of the National Rural

the study by the National Telecommunications and Information Administration and Rural Utilities Services which calculates that the number of homes passed by cable may be as low as 81 percent.<sup>16</sup>

But most significantly, neither the Applicants nor Dr. Willig cite or deal with DIRECTV's own internal data showing that 29 percent of its subscribers (over 3 million) have no access to cable.<sup>17</sup> Assuming the same percentage for EchoStar (which in all likelihood actually tilts more rural than DIRECTV) would mean that over 5 million DBS subscribers have no cable access today. These predominantly rural DBS subscribers (as well as an unknown number of their neighbors who also lack cable access but do not currently subscribe to DBS) would be subject to an MVPD monopoly if this merger is approved. The DIRECTV claim is consistent with a New York Times report that in as many as 22 states over 30 percent of homes lack cable access.<sup>18</sup>

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Telecommunications Cooperative, ¶¶10-11 (Apr. 2, 2002) (“MacAvoy Reply Declaration”); Sidak Reply Declaration at ¶¶ 41-43. Zip codes are much larger than census blocks, so the fact that one person in a zip code territory has cable service does not mean everyone in every census block within that zip code has cable access. There are 8 million census blocks but only 42,193 zip codes. Nor does Dr. Willig provide data showing how many zip codes his research firm reviewed to come up with the 20 zip codes allegedly miscalculated by Warren as not passed by cable. Obviously, an error rate of .1 percent versus 10 percent would affect the reliability of the data. The failure to provide complete data from the study should cause the Commission to disregard it.

<sup>16</sup> National Telecommunications and Information Administration, United States Department of Commerce and Rural Utilities Service, United States Department of Agriculture, *Advanced Telecommunications in Rural America: The Challenge of Bringing Broadband Service to All Americans*, at 19 & n.62 (Apr. 2000).

<sup>17</sup> See Comments of DIRECTV, Inc., In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01-129, at 13 (filed Aug. 3, 2001) (only “71% of DIRECTV customers live in areas able to receive television service.”).

<sup>18</sup> See *Look, Up in the Sky! Big Bets on a Big Deal*, N.Y. TIMES, Oct. 30, 2001, at C-1.

As EchoStar once said:

“Millions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and EchoStar, there is no competition at all.”<sup>19</sup>

Further, the actual number of consumers who ultimately will be subject to a monopoly is much higher. The NAB’s Petition to Deny cited an exhaustive CS First Boston study of every cable system in the United States that gauged the likelihood that each system could financially justify upgrading its facilities for digital cable/cable modem services.<sup>20</sup> The analysis found that 8,270 cable systems serving 8.2 million subscribers “could become extinct over the next five to eight years,” with the vast majority of their subscribers becoming DBS customers.<sup>21</sup> CS First Boston estimated that this could add \$15 – 37 billion of shareholder value to a DBS industry currently valued at \$26-27 billion.<sup>22</sup>

It should also be considered that the 8.2 million represents only those households in areas served by weaker cable systems that subscribe to cable. Rural cable penetration is about 54 percent,<sup>23</sup> which means that approximately 15 million households are in the areas served by cable systems that are likely to go out of business in the next five to eight years, leaving all of these

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<sup>19</sup> Memorandum of Law in Support of Request for Rule 56(f) Continuance to Respond to DIRECTV Defendants’ Motion for Summary Judgment, *EchoStar Communications Corp. v. DIRECTV Enterprises, Inc.*, Civ. No. 00-K-212, at 12 (D. Colo. Nov. 6, 2000) (“EchoStar Memorandum”).

<sup>20</sup> Petition to Deny of National Association of Broadcasters, at 48-49.

<sup>21</sup> Credit Suisse First Boston Equity Research, Natural Selection: *DBS Should Thrive as the Fittest to Serve Rural America*, at 3 (Oct. 12, 2001).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 4.



households subject to a monopoly DBS provider (as well as the more than five million DBS subscribers and unknown number of other households who already have no access to cable).

In response to this detailed and logically convincing evidence of the likely demise of these rural cable systems, the Applicants, as is their practice throughout, provide no hard data, limiting themselves to a few cursory citations to promotional statements of cable trade associations.<sup>24</sup> Their fallback argument is that even if a smaller operator went bankrupt, the plant would be purchased by a successor who could run it more efficiently.<sup>25</sup> But the economic unattractiveness of low-density cable systems is not likely to change simply because the plant is owned by a larger entity: DBS firms will continue to be able to offer better services at a lower price because the geographic spread of households is immaterial to them. And even if these weak rural systems are purchased by larger MSOs, they will, with limited exceptions, be unable to justify economically making the investment necessary to offer digital cable/cable modem service. Who owns the system is largely irrelevant to such a decision.

**B. This Is at Best a Merger to Duopoly in All Other Markets.**

The NAB has presented voluminous evidence that EchoStar and DIRECTV are vigorous head-to-head rivals, and are certainly next best substitutes.<sup>26</sup> In response to the detailed descriptions of the EchoStar-DIRECTV rivalry put forth by the merger's opponents, the parties claim that "most of it is flawed and misleading," but then attempt to refute only a handful of the

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<sup>24</sup> Opposition at 78-79.

<sup>25</sup> *Id.* at 79.

<sup>26</sup> NAB Petition to Deny at 15-32.

nearly two score examples cited, while ignoring their own past statements that they compete intensely.

For example, in announcing a planned price cut in 1997, EchoStar said that it "fully expect[ed] that, once again, this price point *will force the rest of the DBS industry* to reevaluate their current offers in response to EchoStar's lead."<sup>27</sup> The same pattern -- of one DBS firm responding quickly to, and often matching, the other's pricing -- continues today. For example, in December 2001, the two firms announced that they would charge precisely the same amount (\$5.99) for local-to-local packages -- even though DirecTV could easily have justified charging much more than EchoStar (since it offers all local stations on one dish rather than forcing consumers in many markets to acquire a second dish), and even though a "cable-matching" price would likely have been much higher (since cable firms charge much more for "broadcast basic" packages).

Consistent with this bitter head-to-head rivalry, EchoStar had proclaimed that "EchoStar is DIRECTV's closest competitor" and that "DIRECTV and EchoStar react primarily to each other when setting equipment and service prices."<sup>28</sup> EchoStar now attempts to minimize these statements and its consistent opinion (until now) that DBS is a separate market by disingenuously belittling its November 2000 Rule 56(f) motion to the district court in its litigation against DIRECTV -- in which it repeatedly stated that "DBS is a separate product market" from an MVPD market -- as a mere "pre-trial request for extension of time in a now dismissed antitrust dispute"<sup>29</sup> that "did not purport to be statements of proven fact."<sup>30</sup> The parties now claim that

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<sup>27</sup> See NAB Petition at 17 (quoting EchoStar press release) (emphasis added).

<sup>28</sup> EchoStar Memorandum at 12.

<sup>29</sup> Opposition at 56.

“EchoStar has always held the same view: that there is one MVPD market,” citing a series of dated submissions to the Commission from 1996 to 1998, as well as testimony from Mr. Ergen to Congress in 1999.<sup>31</sup>

However, the Applicants choose to ignore the fact that the Rule 56(f) motion was followed up in April 2001 by an Amended Complaint in which EchoStar alleged that the two companies compete in a “High-Power DBS Market.”<sup>32</sup> Presumably, EchoStar filed its Amended Complaint in good faith. More recently, Mr. Ergen explained in a December 2001 interview that the parties “believe that there was a submarket of satellite, and still believe, that *there is a submarket of satellite, particularly in rural [areas]*.”<sup>33</sup>

The Applicants also ignore the fact that DBS prices track one another (but not cable), strongly suggesting that the two firms constrain each other’s pricing. See Appendix A. While cable rates have risen significantly in recent years, at a pace ahead of inflation, DBS program prices have remained relatively flat, increasing only twice since 1996.<sup>34</sup> As former FTC Chairman Robert Pitofsky testified to Congress recently, cable operators continually raise their

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<sup>30</sup> *Id.* at 57.

<sup>31</sup> *Id.* at 56-58.

<sup>32</sup> Amended Complaint, *EchoStar Communications Corp. v. DIRECTV Enterprises, Inc.*, Civ. No. 00-K-212, ¶ 76, at 24 (D. Colo. Apr. 5, 2001).

<sup>33</sup> *Ergen Makes His Case*, SATELLITE BUS. NEWS, Dec. 31, 2001, at 11 (emphasis added).

<sup>34</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-389, CS Docket No. 01-129, Eighth Annual Report at 5 ¶ 9 (Jan. 14, 2002) (over the year reviewed, cable prices rose 4.24 percent versus 3.25 rate of inflation); Ergen House Testimony at 5 (“cable companies ... rais[ed] their prices an average of 6% per year over the last 10 years, more than twice the rate of inflation [while] satellite TV has maintained low monthly rates for service with minimal rate increases and even then, well below the rate of inflation.”).

rates while DBS prices remain stable because “the two satellite competitors keep prices down.”<sup>35</sup> This view is supported by the parties’ own statement that the merger will reduce “churn,” i.e., customers will have no ability to switch from one DBS company to the other because their customer bases will be consolidated.<sup>36</sup>

Whether DBS is a separate product market, as EchoStar argued until recently, or a differentiated sector within an overall MVPD market, is not significant. What is significant is that this merger clearly would eliminate DIRECTV as the next best substitute for EchoStar and create a duopoly (and in many cases monopoly) in the already highly concentrated MVPD market.<sup>37</sup> The Applicants’ claims that they do not compete closely are mere rhetoric (and new-

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<sup>35</sup> Jeffrey Bartash, *EchoStar, Hughes face Senate qualms*, CBS Marketwatch.com website (Mar. 6, 2002) (noting that “cable prices have risen about 7 percent every year since 1996, while annual satellite rates have climbed a scant 1 percent”) <http://cbs.marketwatch.com/tools/quotes/news.asp?symb=dish&sid=14836&siteid=mktw> (visited Apr. 18, 2002).

<sup>36</sup> EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation and EchoStar Communications Corporation Consolidated Application, at 36.

<sup>37</sup> Other MVPD providers and potential entrants have a trivial impact on the MVPD landscape. Despite the parties’ claim that other MVPD providers “retain significant subscribership” (Opp. at 48), MMDS and other small MVPD providers have proven failed entrants. The latest Commission competition report estimates their total collective share at less than 3.7 percent. *See* Eighth Annual Report at 6-7. Further, the number of entrants is shrinking, as overbuilders falter. *See* Linda Haugsted, *WINfirst the Latest Struggling Overbuilder*, Multichannel News (Mar. 18, 2002) (“WINfirst’s [bankruptcy] filing shrinks the number of overbuilders still moving ahead.”); Linda Haugstead, *Capital Constraints Cripple WINfirst, Too*, Multichannel News (Mar. 11, 2002) (“The inability to continue to raise large sums for telecom-network buildouts has killed or crippled many once-hot start-up ‘broadband service providers’ over the last couple of years.”).

In addition, the parties speculate that entry by DBS competitors may come from the use of orbital slots granted by the International Telecommunication Union to Mexico, Argentina and Canada. Opposition at 49. The DOJ/FTC Merger Guidelines require potential entry to be “timely, likely, and sufficient” to deter competitive efforts of concern. *See* Merger Guidelines § 3.2 (“The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact”). The

found rhetoric at that) that fly in the face of both common sense and the actual and extensive data supplied by the NAB and others.

**C. The Applicants Do Not Even Attempt to Refute the Overwhelming Legal Precedent Against Mergers to Monopoly or Duopoly.**

No public interest benefits are likely to arise from merger to monopoly or duopoly. It is no coincidence that mergers to monopoly are never approved by the courts or the agencies. Not surprisingly, the parties fail to cite a single instance where this has occurred. Mergers to duopoly are also routinely condemned. The parties fail even to mention, much less distinguish, the recent and leading precedent here: *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001). Instead, the parties practice the ostrich approach; they fail to discuss relevant case law at all, presumably in the hope that the Commission will not notice. Thus, they ignore what FTC Commissioner Thomas Leary recently described as the “broad consensus in the economics community that 2-1 and 3-2 combinations are likely to be particularly troublesome”.<sup>38</sup>

The reason for this consensus is that the high degree of market concentration that is the inevitable byproduct of a merger to monopoly or duopoly is likely to give the surviving market participant(s) the unilateral ability to raise prices and to increase the likelihood of coordinated

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Commission should use the same level of scrutiny, under which the foreign DBS slots fail any reasonable standard of likely entry within two years.

<sup>38</sup> Commissioner Thomas B. Leary, Three Hard Cases and Controversies: The FTC Looks at Baby Foods, Colas and Cakes, Prepared Remarks before The Association of the Bar of the City of New York’s Milton Handler Annual Antitrust Review (Dec. 4, 2001). See *FTC v. Swedish Match, Inc.*, 131 F. Supp. 2d 151 (D.D.C. 2000); *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025 (W.D. Wis. 2000); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997); *United States v. United Tote, Inc.*, 768 F. Supp. 1064 (D. Del. 1991); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989).

interaction.<sup>39</sup> Thus, where a “merger further consolidates an already highly concentrated market . . . the Government establishes a rebuttable presumption that the merger is illegal under Section 7.”<sup>40</sup> Here, virtually all MVPD markets are already highly concentrated and the merger would increase the Herfindahl-Hirschman Index in the overwhelming majority of these markets by an amount that under the Merger Guidelines creates a presumption that a merger is “likely to create or enhance market power or facilitate its exercise.”<sup>41</sup>

The Sidak Declaration filed with the NAB’s Petition to Deny demonstrated how “troublesome” this merger to monopoly and/or duopoly would be: it would cause a consumer welfare loss of approximately \$3 billion over five years.<sup>42</sup> Professor MacAvoy projected a similar level of consumer welfare loss.<sup>43</sup> While Dr. Willig criticizes the Sidak and MacAvoy estimates, he fails to support his own broad assertions that the merger will not cause consumer harm. Notably, Dr. Willig does not provide any analysis of elasticities, marginal cost reductions or efficiencies.

To refute the Sidak and MacAvoy estimates of consumer welfare loss, Dr. Willig would have to analyze subscriber and pricing data of the two DBS providers and then make projections of post-merger prices and quantities of the single surviving DBS provider.<sup>44</sup> The required data is within the control of the DBS companies. Yet the Applicants and Dr. Willig have failed to

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<sup>39</sup> Merger Guidelines, § 2.

<sup>40</sup> *United Tote*, 768 F. Supp. at 1068.

<sup>41</sup> Merger Guidelines, § 1.51(c).

<sup>42</sup> Sidak Declaration at ¶ 51.

<sup>43</sup> MacAvoy Declaration at ¶ 38.

<sup>44</sup> MacAvoy Reply Declaration at ¶2.

provide any meaningful analysis of such data in either their Application or their Opposition. Instead, Dr. Willig relies on a small survey of new DIRECTV subscribers and two sets of churn data, which are uninformative, as Mr. Sidak demonstrates.<sup>45</sup> Thus, once again, the Applicants have failed to carry their burden of demonstrating that the merger will not have an anticompetitive effect.

#### **D. The DBS Companies Are Thriving Absent Merger**

EchoStar complains that it operates “with distinct disadvantages, against cable” and that “certain factors have historically inhibited DBS from robustly competing with cable.”<sup>46</sup> The Applicants cite a “profound risk” that “its customers [will] abandon the DBS platform” absent the merger.<sup>47</sup> They use this picture of a dire future to justify what would otherwise be an anticompetitive merger.

But, as is their pattern, these statements are not backed up with facts, and the publicly available facts are directly opposite to their assertions. Both EchoStar and DIRECTV are prospering as never before, thanks largely to their ability to offer local channels. According to recently released subscriber numbers, EchoStar added 400,000 net subscribers in the last fiscal quarter and passed the 7 million subscriber mark in February 2002, up from 5.26 million subscribers at the beginning of 2001 (a growth rate of 33 percent in fourteen months).<sup>48</sup>

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<sup>45</sup> Sidak Reply Declaration at ¶¶ 11-17.

<sup>46</sup> Opposition at 56.

<sup>47</sup> *Id.* at 12.

<sup>48</sup> EchoStar Press Release, “EchoStar Reports Record Fourth Quarter Revenue, EBITDA; EchoStar’s DISH Network Satellite TV Service Reaches 7 Million Customer Milestone” (Feb. 28, 2002) <[http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=dish&script=410&layout=-6&item\\_id=263854](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=263854) (visited Apr. 18, 2002); EchoStar Press Release, “EchoStar Reports Record Results for Fourth Quarter 2000; DISH Network Captures 55 Percent of Net New Direct

Meanwhile, DIRECTV reported 10.7 million subscribers at the end of 2001, a 13 percent increase over the 9.5 million subscribers at the end of 2000.<sup>49</sup> It also recently reported a net gain of 342,000 subscribers in the first quarter of 2002, substantially above expectations, and an 11% revenue growth rate over 2001.<sup>50</sup> This situation is similar to that in United Tote, where the merging parties “saw their market share increase year after year” and the Court found “unsupported in the facts and in the cases” the defendant’s claim that “it will be financially and strategically unable to keep up with the technological changes . . .”<sup>51</sup>

### III. THE APPLICANTS’ CLAIMS OF EFFICIENCIES ARE HOLLOW AND UNSUBSTANTIATED.

As the Merger Guidelines explain, and the *Heinz* decision confirms, efficiencies virtually never justify a merger to monopoly or duopoly.<sup>52</sup> The Applicants fail to carry their burden of showing that this is that rare case. Their proffered “efficiencies” are supported by no real analysis and in most instances consist of the vaguest generalities.

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Broadcast Satellite TV Customers in 2000” (Mar. 21, 2001) <[http://www.corporate-ir.net/ireve/ir\\_site.zhtml?ticker=dish&script=460&layout=-6&item\\_id=158165](http://www.corporate-ir.net/ireve/ir_site.zhtml?ticker=dish&script=460&layout=-6&item_id=158165)> (visited Apr. 18, 2002).

<sup>49</sup> Hughes Electronic Corporation Press Release, “HUGHES REPORTS FOURTH QUARTER 2001 FINANCIAL RESULTS: Strong DIRECTV U.S. Subscriber Growth Beats Expectations” (Jan. 15, 2002) <[http://www.hughes.com/ir/pr/02\\_04\\_15\\_earnings.xml](http://www.hughes.com/ir/pr/02_04_15_earnings.xml)> (visited Apr. 18, 2002).

<sup>50</sup> Hughes Electronic Corporation Press Release, “HUGHES REPORTS FIRST QUARTER 2002 FINANCIAL RESULTS: Strong DIRECTV U.S. Performance for the Third Consecutive Quarter Drives Results” (Apr. 15, 2002) <[http://www.hughes.com/ir/pr/02\\_04\\_15\\_earnings.xml](http://www.hughes.com/ir/pr/02_04_15_earnings.xml)> (visited Apr. 18, 2002).

<sup>51</sup> 768 F. Supp. at 1083-1084.

<sup>52</sup> *Merger Guidelines*, § 4 (“[e]fficiencies almost never justify a merger to monopoly or near-monopoly.”); *Heinz*, 246 F.3d at 720 (“high market concentration levels . . . require, in rebuttal, proof of extraordinary efficiencies. . .”).



**A. The Promise of Local to Local in 210 Markets is Unreliable.**

When the parties began to seek approval for their merger, they told Congress and the FCC that they were “constrained in offering local broadcast TV channels and other desirable programming to consumers due to constraints on scarce and limited satellite spectrum allocated by the government.”<sup>53</sup> Indeed, according to the parties, “[t]he limited channel capacity of DBS providers . . . as well as the burdens to be imposed upon that capacity in the form of satellite must carry, continue to limit DBS’s ability – *even with the implementation of spot-beam satellites and other new technologies* – to offer local programming to many consumers . . . confin[ing local-to-local service] only to the relatively large metropolitan areas.”<sup>54</sup> Because of this capacity constraint, the Applicants claimed that the highest number of DMAs to which each could provide local-to-local service was approximately fifty and that by eliminating duplication of spectrum they could together reach 100 DMAs.<sup>55</sup>

Now, less than four months later, and only when opposition to the merger has arisen, the parties miraculously have found a way to provide carriage of all local broadcast stations in all 210 DMAs.<sup>56</sup> This “miracle” supports the Petitioners’ filings, which point out that technological

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<sup>53</sup> *Hearing on the Status of Competition in the Multi-Channel Video Programming Distribution Marketplace Before the U.S. House Subcommittee on Telecommunications and the Internet*, 107<sup>th</sup> Cong. (Dec. 4, 2001) at 5 (statement of Charles Ergen, Chairman & CEO, EchoStar Communications Corporation) (“Ergen House Testimony”).

<sup>54</sup> Consolidated Application at 29 (emphasis added).

<sup>55</sup> Ergen House Testimony at 6 (“The new EchoStar will expand local network television coverage from the current 42 markets the companies serve to over 100 markets, with local TV channels offered in at least one city in each state, including Alaska and Hawaii.”).

<sup>56</sup> Opposition at ii.

innovation is an on-going process, which has steadily expanded the number of channels that could be carried by the same DBS spectrum.

However, in reality, this “promise” is no promise at all. On February 25, 2002, the parties explained that in order to serve “*all* Americans and **comply fully with mandatory carriage requirements,**” their “engineers have designed a system that enables the receipt of local channels, other entertainment services and high-speed Internet access using one consumer-friendly mini-dish.”<sup>57</sup> Mr. Ergen repeated this promise to Congress: “we will comply with must-carry on a single dish and carry all stations in all markets.”<sup>58</sup> Yet, only one day later, in its March 7, 2002 Petition for a Writ of Certiorari to the Supreme Court of the United States in the “must carry” litigation, EchoStar explicitly stated that it “*does not intend to carry all channels in every market* unless the decision below is upheld.”<sup>59</sup> Explaining this reversal, EchoStar has since said that it will carry all stations that have “meaningful local content”<sup>60</sup> – a subjective criterion that could be used to exclude all stations other than established network affiliates.

Nor should EchoStar’s promise of a single dish to receive all local channels be given credence. In the very same Opposition filing where it prominently promises “one consumer-friendly mini-dish”<sup>61</sup>, buried in the back of the document, it urges the Commission to reject a

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<sup>57</sup> *Id.* at 4 (emphasis added).

<sup>58</sup> Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002.

<sup>59</sup> Satellite Broadcasting and Communications Ass’n *et al.*, Petition for Writ of Certiorari, *Satellite Broadcasting and Communications Ass’n v. FCC*, 70 U.S.L.W. 3580, at 8 n.2 (U.S. Mar. 7, 2002) (No. 01-1332)

<sup>60</sup> Letter from Karen Watson of EchoStar to Congress, March 15, 2002.

<sup>61</sup> Opposition at 4.

condition requiring it to offer all local stations on one dish, and makes plain that it has “forcefully contested” any such requirement and continues to do so.<sup>62</sup>

Finally, EchoStar has set no meaningful deadline for when its (in any event unenforceable) promise of 210-market carriage would be achieved. While EchoStar says that it would implement this “promise” starting “as soon as” two years after approval of the merger, there is not even a paper promise of when the 210-market plan would be fully implemented.

This behavior is consistent with EchoStar’s past behavior toward broadcasters, which shows a pattern of attempts to evade its commitments and responsibilities. Among recent such instances are:

- Continuing violations of the Distant-Signal compulsory license.
- Repeated violations of must carry obligations under SHVIA.<sup>63</sup>
- Placement of disfavored local broadcast stations on a satellite requiring subscribers to install a second dish for reception, which the Media Bureau held violates both Commission rules and SHVIA.<sup>64</sup>
- A Commission finding of lack of candor by EchoStar in the Young Broadcasting retransmission consent case.<sup>65</sup>

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<sup>62</sup> *Id.* at 140-141.

<sup>63</sup> See, e.g., *In re Long Family Partnership*, DA 02-231 (CSB Jan. 29, 2002) (North Carolina station “is entitled to mandatory carriage on EchoStar’s satellite system”); *In re Christian Television Corp.*, DA 02-229 (CSB Jan. 28, 2002) (Florida station entitled to mandatory carriage); *In re KM Television of Flagstaff, L.L.C.*, DA 02-221 (CSB Jan. 25, 2002) (Arizona station “entitled to mandatory carriage on EchoStar’s satellite system” under SHVIA).

<sup>64</sup> See *In re National Association of Broadcasters and Association of Local Television Stations*, DA 02-765, CSR-5865-Z, at 2 (Media Bureau Apr. 4, 2002) (“we find that EchoStar’s offer of a ‘free dish’ has not been implemented as such, and, in these instances, constitutes a violation of

- EchoStar and DIRECTV's failure to comply with the Commission's information request in this proceeding and violation of the Commission's ex parte rules by failing to file a required notice on a timely basis.<sup>66</sup>

As the Media Bureau said in recounting three earlier episodes involving EchoStar: "EchoStar has previously been fined by the Commission for rule violations and admonished for its 'disingenuous' behavior and lack of candor."<sup>67</sup> Based on EchoStar's historical record and almost instantaneous "take-back" of its local-to-local "promise", the Commission should not credit the Applicants' representation that they will offer local-to-local in all 210 DMAs.

**B. Less Anticompetitive Alternatives Are Available to Achieve Local-to-Local Service in All 210 Markets.**

**1. Each Party Separately Could Offer Local-to-Local Service in all 210 Markets**

Broadcasters prefer to rely on market forces to drive local-to-local carriage rather than EchoStar "promises" for the reasons described above. As the attached Supplemental Declaration of Richard G. Gould (Appendix B) again demonstrates, each party could offer local-to-local

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the statutory and regulatory prohibition of providing access to certain stations at a discriminatory price.").

<sup>65</sup> "EchoStar's conduct in filing material with the Commission requesting confidentiality, while concurrently engaging in a public debate over the issues raised in this proceeding and publicly disclosing selected portions of the alleged confidential material, constitutes an abuse of the Commission's processes." *In re EchoStar Satellite Corp. v. Young Broadcasting*, 16 F.C.C.R. 15,070, 15,075-76 (Aug. 6, 2001) ("EchoStar failed in its duty of candor to the Commission").

<sup>66</sup> Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar and Gary Epstein, Counsel for DIRECTV, March 7, 2002.

<sup>67</sup> *In re National Association of Broadcasters and Association of Local Television Stations*, DA 02-765, CSR-5865-Z, at 19 n.116 (Media Bureau Apr. 4, 2002).

service in all 210 markets separately. Rivalry between the parties gives them a strong incentive to continue to expand their local offerings as quickly as possible -- as reflected in DirecTV's announcement in December that it would get the jump on EchoStar by adding 10 new markets during 2002 that EchoStar does not serve.<sup>68</sup> The parties themselves acknowledge that DIRECTV alone will have the technical capacity to serve 103 DMAs with local-to-local service once its promised launch of DIRECTV 7S takes place -- although they now claim, incredibly, that having designed and launched the satellite to serve 103 DMAs, they will not bother using that state-of-the-art capacity in 33 of the markets for which it is designed.<sup>69</sup>

The assertion that DIRECTV will serve only 70 DMAs instead of the 103 that the Applicants themselves concede is technically feasible is yet another statement the Applicants do not (and undoubtedly cannot) back up with facts. While Dr. Willig asserts that it would not be economically feasible to serve more markets<sup>70</sup>, this assertion is not supported and makes no sense. Dr. Willig does not identify the costs of adding a local market, or even what markets are involved, or the value of the allegedly lost opportunity to offer other programming which he cites. Nor does he weigh these costs against the revenues and other benefits from adding local markets. (Crucially, Dr. Willig does not address the fact that the *major* cost of local-to-local service in the markets between 70 and 103 *would already be sunk* since, by assumption, the D 7-S satellite will be capable of serving these markets.) And the benefits of local-to-local are very large. They include, for instance:

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<sup>68</sup> See the description of competitive jockeying in local-to-local roll-outs to date in NAB's Petition at 19-24.

<sup>69</sup> Opposition at 13-14.

<sup>70</sup> Willig Reply Declaration at 6-11.

- as much as 20 percent lift in subscribership in markets where local-to-local service is offered;<sup>71</sup>
- a 25 percent reduction in churn<sup>72</sup>; and
- six dollars per subscriber per month (for programming that has zero copyright fees).

Given that the chief claim used by the Applicants to justify their merger is that only by merging can they offer local-to-local service, one would expect an analysis of the type described above. Yet the parties have failed to produce any analysis remotely of the type required. Why not?

## **2. The Applicants Could Form a Production Joint Venture**

To the extent the parties seek efficiencies from eliminating duplicate spectrum, they can obtain them through a production joint venture. The parties may have “tried to negotiate one and failed,” but they cannot maintain it is “*inherently unworkable.*”<sup>73</sup> The parties’ 11<sup>th</sup> hour 210 market proposal is a critical acknowledgment that a joint venture is technologically and economically feasible. In fact, given that the Applicants came up with their current “miraculous” plan in a few weeks, once they saw their merger was faltering, one would expect that they could arrive at a feasible joint venture plan in an equally short period. The obstacle simply is a failure to agree on how to allocate costs and responsibilities. This failure is not sufficient reason for the

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<sup>71</sup> Fax Update, SATELLITE BUSINESS NEWS, Apr. 17, 2002 (citing DIRECTV President Roxanne Austin).

<sup>72</sup> Mike Palkovic, DIRECTV Chief Financial Officer, presentation at Janco Partners 7<sup>th</sup> Annual Media and Telecommunications Conference, March 7, 2002.

<sup>73</sup> Opposition at 29 (emphasis added).

Commission to authorize a merger that will snuff out the zealous competition between two rivals that pushed each rival to offer more (and lower-priced) services to nearly 20 million households.

**3. Continuing Advances in Satellite Technology Will Create "New Capacity" That Does Not Exist Today.**

In its Petition, NAB showed that satellite capacity is not a static and frozen commodity but an ever-growing one, thanks to tireless work by brilliant engineers.<sup>74</sup> Among the developments cited by the NAB which have or will expand satellite capacity are spot beams; dishes capable of receiving signals from two or three orbital locations; compression techniques with existing equipment; expanded channel capacity possible through 8PSK with new set-top boxes; and MPEG-4 compression technology.<sup>75</sup> The Applicants make only a half-hearted effort to try to refute these irrefutable facts, adopting a pessimistic outlook totally at variance with the record of engineering advances in this field.<sup>76</sup> As NAB's technical expert, Dr. Gould, reiterates, the techniques he described to achieve higher DBS capacities "are feasible, practical, and are either here now or imminent."<sup>77</sup>

**C. Other Purported Efficiencies Are Advanced Casually with No Attempt at Rigor.**

Because merging parties can easily claim efficiencies from many aspects of a merger, the Merger Guidelines properly set rigorous standards. Efficiencies must be "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either

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<sup>74</sup> NAB Petition at 82-89.

<sup>75</sup> *Id.*

<sup>76</sup> Opposition at 6-8.

<sup>77</sup> Supplemental Declaration of Richard G. Gould, April 15, 2002.

the proposed merger or another means having comparable anti-competitive effects.”<sup>78</sup> The Commission demands the same rigor; its “analysis focuses on demonstrable and verifiable public interest benefits that could not be achieved if there were no merger.”<sup>79</sup> As a result, the parties “bear the burden of showing both that the merger-specific efficiencies will occur, and that these efficiencies and any other public interest benefits sufficiently offset any harms resulting from the merger such that the Commission can conclude that the transaction is in the public interest.”<sup>80</sup> Dr. Willig tries to reverse this burden, claiming that the “opponents have not attempted to quantify the size of these cost savings”.<sup>81</sup> But he has it precisely backwards, as both the Merger Guidelines and Commission and court precedent make clear.<sup>82</sup>

Under the Commission’s standard, the parties’ efficiencies arguments wilt. The parties casually mention “new content”, “new programming” and “exciting new interactive services”

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<sup>78</sup> Merger Guidelines, § 4.

<sup>79</sup> *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 F.C.C.R. 9816, 9883 ¶ 154 (2000) (“Public interest benefits may include merger-specific cost saving efficiencies and beneficial conditions proffered by the Applicants or by other parties, or imposed by the Commission.”); see *In the Matter of Applications for Consent to the Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License by GTE Corp., Transferor, to Bell Atlantic Corp.*, CS Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, 14 F.C.C.R. 14,032, 14,141 ¶ 240 (2000) (claimed efficiencies “must be merger-specific, and, therefore, efficiencies that could be achieved through means less harmful to the public interest than the proposed merger cannot be considered true benefits of the merger.”).

<sup>80</sup> *In the Matter of Applications of Ameritech Corp, Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, FCC 99-279, 14 F.C.C.R. 14,712, 14,847 ¶ 321 (1999) (“SBC-Ameritech Order”).

<sup>81</sup> Willig Reply Declaration at ¶ 19.



available through the merger by eliminating duplicate spectrum use.<sup>83</sup> There is no attempt, however, to state with any specificity what new and innovative programming and services would be offered, much less to quantify their value to consumers or to commit to offering them.<sup>84</sup> These “efficiency claims are vague [and] speculative, and cannot be verified by reasonable means.”<sup>85</sup> They are also not merger specific, as EchoStar demonstrates – in its transaction with Vivendi Universal S.A – that it “will carry the new content and service regardless of the outcome of this proceeding.”<sup>86</sup> There is no reason to believe that DIRECTV, like EchoStar, cannot contract on its own to offer new programming and services.

The parties also point to unspecified volume discounts they can achieve on programming and set-top box purchases.<sup>87</sup> These discounts, to the extent they occur, may not be efficiencies at all, but, particularly in the case of programming, merely wealth transfers with no efficiency effect. In any event, the Applicants should already be achieving substantial and increasing cost

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<sup>82</sup> See Sidak Reply Declaration at ¶ 20.

<sup>83</sup> Opposition at 120.

<sup>84</sup> The gains from these additional services may be insubstantial due to the concept of satiation; incremental services are subject to diminishing consumer surplus gains. Sidak Reply Declaration at ¶¶ 29-33. Indeed, Mr. Ergen himself seems to hold this view. In explaining what the recently launched EchoStar VII will do, he emphasized that it would improve signal quality, before adding “... and we will have some capacity for some additional channels. Again we continue to look at channels. *There isn't a lot that we don't carry out there anymore, we carry almost everything that's out there, but we look at a few additional channels.*” Transcript of April 12, 2002 Charlie Chat, filed at the Securities and Exchange Commission, April 15, 2002 (emphasis added).

<sup>85</sup> SBC-Ameritech Order, 14 F.C.C.R. at 14,847 ¶ 321.

<sup>86</sup> Opposition at 120.

<sup>87</sup> *Id.* at 26.

savings in these areas because of their rapid growth.<sup>88</sup> In addition, the parties do not attempt to demonstrate or verify these efficiencies. These half-hearted attempts to assert efficiencies should be quickly rejected for their failure to meet the rigorous test of substantiation that should be particularly applicable in circumstances such as these, involving merger to monopoly or duopoly.<sup>89</sup>

#### **IV. THE APPLICANTS FAIL TO SHOW THAT A NATIONAL PRICING PLAN IS EITHER WORKABLE OR DESIRABLE.**

EchoStar claims that concerns about its monopoly power in many local markets are misguided because it will offer a national pricing plan and be unable to discriminate. In reality, a national pricing plan is unworkable exactly because the parties *will* be able to discriminate. Even if the plan could be imposed, it would be anticompetitive.

It should be understood that “price” in the DBS industry includes many components, including basic and premium programming packages, installation, equipment and follow-up service charges, as well as any applicable rebates or discounts. Further, price is only relevant in terms of quantity and quality; in other words one can only be sure that two prices are equal if the number and quality of the programming services offered are identical. Not only do the Applicants fail to carry the burden of demonstrating that this could be done, their own statements and writings make clear that they intend nothing of the kind.

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<sup>88</sup> See Sidak Reply Declaration at ¶¶ 22-24.

<sup>89</sup> In fact, the premium paid for DIRECTV by EchoStar suggests an expected increase in profits of \$4.9 billion of which between two-fifths and four-fifths is attributable to increased market power. Sidak Reply Declaration at ¶ 21.