**KELLER AND HECKMAN LLP**
*Serving Business through Law and Science®*

1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Telephone 202.434.4100
Facsimile 202.434.4646
www.khlaw.com

**April 4, 2002**

**Jack Richards**
(202) 434-4210
Richards@khlaw.com

**Via Electronic Filing**

William F. Caton
Acting Secretary
Federal Communications Commission
Office of the Secretary
445-12th Street, SW
Washington, DC 20554

Re: **Notice of Written Ex Parte Presentation;**
**Reply to Opposition;**
**Application of EchoStar Communications Corporation,**
**General Motors Corporation and Hughes Electronics Corporation,**
**Transferor; and EchoStar Communications Corporation, Transferee,**
**For Authority to Transfer Control**
**CS Docket Number 01-348**

Dear Mr. Caton:

On behalf of our client, the National Rural Telecommunications Cooperative, the attached Ex Parte Reply is being submitted electronically in the above-captioned proceeding in accordance with 47 C.F.R. § 1.1206(b)(1) of the Commission's Rules.

Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,

Jack Richards

Jack Richards

Enclosure

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC**

| | | |
|---|---|---|
| **In The Matter Of** | ) | |
| **Application Of** | ) | |
| | ) | |
| **EchoStar Communications Corporation,** | ) | **CS Docket No. 01-348** |
| **General Motors Corporation, And Hughes** | ) | |
| **Electronics Corporation** | ) | |
| | ) | |
| **For Consent For A Proposed Transfer** | ) | |
| **Of Control** | ) | |
| | ) | |
| **To: The Commission** | ) | |

# EX PARTE
# REPLY TO OPPOSITION


**Steven T. Berman, Senior Vice President**
**Business Affairs and General Counsel**

**NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**
**2121 Cooperative Way, Suite 500**
**Herndon, VA 20171**

**Robert J. Rini**
**Stephen E. Coran**
**Stephen M. Ryan**
**Manatt, Phelps & Phillips, LLP**
**1501 M Street, NW, Suite 700**
**Washington, D.C. 20005-1700**
**(202) 463-4301**

**Jack Richards**
**Kevin G. Rupy**
**Keller and Heckman LLP**
**1001 G Street, NW**
**Washington, D.C. 20001**
**(202) 434-4210**


**April 4, 2002**

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| **Exhibit** | **Description** |
|---|---|
| **1** | **Declaration of Dr. Paul W. MacAvoy** |
| **2** | **Declaration of Walter Morgan** |

## SUMMARY

In an attempt to overcome the obvious anticompetitive impact of their merger to monopoly, EchoStar and DIRECTV (the "Applicants") make many promises. But in light of their many contradictory statements or "flip-flops" concerning issues central to the proposed Merger, the Commission should view skeptically their promises of future conduct.

One such promise is to set the same price for their service throughout the nation. If national pricing is to be an effective deterrent to monopolistic pricing in rural areas, the Applicants would need to demonstrate that they control not just the "national price," but every *component* of what makes up the price – including equipment, installation, programming packages and maintenance costs, to name just a few – at *all* points in the distribution chain. The Applicants not only have failed to show an ability and willingness to set the price in this manner, they have made it clear that they intend to vary the price locally. Moreover, they have ignored the public costs and administrative difficulties inherent in regulating these prices.

The Applicants have made many promises about the efficiencies they claim will flow from the Merger, including increased local television station carriage and more rapid broadband deployment. The Applicants ignore, however, that efficiencies almost never justify a merger to monopoly or near monopoly in highly concentrated industries.

To the extent that it is even appropriate to consider claimed efficiencies of the proposed Merger, the Applicants must demonstrate that the efficiencies are merger specific. The Applicants have not shown that they need to merge in order to carry more local television stations or to facilitate broadband deployment. To the contrary, NRTC and others have shown that carriage of all television stations in all markets can be accomplished by each company on its own or in cooperation with others, and that broadband deployment actually will suffer if the

merger is approved. Because these claimed efficiencies can be achieved through means less harmful to the public, they cannot be considered true benefits of the Merger.

Rather than leading to a multitude of benefits in the Multichannel Video Program Distribution (MVPD) and broadband markets, the proposed Merger in fact would create a monopoly in rural America with severe adverse consequences for tens of millions of rural Americans with no other choice in MVPD or broadband provider. In his analysis of Census Block data, distinguished economist Dr. Paul W. MacAvoy demonstrates that New EchoStar will be able to isolate for discriminatory treatment large clusters of homes not passed by cable at the local level. He shows that the consumer welfare loss from the Merger would be as much as $700 million each year, based solely on EchoStar's and DIRECTV's current Direct Broadcast Satellite (DBS) subscribers. Other expert economists reached similar conclusions regarding the substantial harms related to the merger.

While clinging to their story that the proposed Merger would not result in a monopoly in rural America because 97.1% of all television households in the United States have access to cable -- a figure that defies reality -- the Applicants also assert that the number of homes not passed by cable is merely a "red herring." This assertion is wrong, and it should not form the basis for dismissing the harmful impact this Merger would have on tens of millions of rural households.

The number of homes not passed by cable is critically important to the Commission's evaluation of the proposed Merger. It represents the universe of homes located in different markets throughout the country that rely solely on EchoStar and DIRECTV for competitive MVPD services. None of these homes has access to any other MVPD technologies that are comparable to DBS.

While representing to the FCC they are unable to compete against cable absent the proposed Merger, the Applicants are notably silent about their tremendous success as competitors. The record in this proceeding shows not only that facilities-based competition is succeeding in the DBS industry, but that EchoStar and DIRECTV are competing effectively against one another and against cable. Following the proposed Merger, this head-to-head competition -- which has benefited all consumers -- would be eliminated.

The Applicants have provided no evidence to support their claim that DBS will somehow "devolve" as a competitive force if the Merger is not approved. In fact, in the past few months, both companies have gone so far as to predict bright futures without the Merger.

The Applicants have fallen far short of satisfying their burden of proving that the Merger would enhance competition in the public interest. To the contrary, as demonstrated by NRTC and others, the proposed Merger would be harmful to the public and would lessen competition through the elimination of a facilities-based competitor in favor of a highly regulated monopoly.

Accordingly, the Application should be denied.

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC**

| | | |
|---|---|---|
| **In The Matter Of Application Of** | ) | |
| **EchoStar Communications Corporation, General Motors Corporation, And Hughes Electronics Corporation** | ) | **CS Docket No. 01-348** |
| **For Consent For A Proposed Transfer Of Control** | ) | |
| **To: The Commission** | ) | |

## EX PARTE
## REPLY TO OPPOSITION

The National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby submits this Reply to the Opposition submitted by EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (collectively, the Applicants)[1] in connection with the proposed transfer of control of their satellite, earth station and other related authorizations to New EchoStar (the Merger).[2]

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[1] Opposition to Petitions to Deny and Reply Comments of General Motors Corporation and Hughes Electronics Corporation and EchoStar Communications Corporation, CS Docket No. 01-348 (filed February 25, 2002) (*Opposition*).

[2] Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor; and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control, File Number 01-348 (filed December 3, 2001) (*Application*). On February 4, 2002, NRTC filed a Petition to Deny the *Application*. *See* Petition to Deny of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed February 4, 2002) (*NRTC Petition*). On February 25, 2002, NRTC filed a Response to certain of the petitions, comments and other filings submitted to the Commission. *See* Response of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed February 25, 2002) (*NRTC Response*). The *NRTC Response* demonstrated that conditions proposed by some parties for approval of the Merger would be ineffective or were otherwise intended for the private benefit of the proponents. In this Reply, NRTC discusses only those arguments presented in the Applicants' *Opposition*.

As discussed in this Reply, the Applicants ignore the basic competitive analysis required for mergers to monopoly or duopoly. They choose instead to focus on certain claimed efficiencies which are irrelevant to the analysis of the proposed Merger, and, in any event, are not merger specific. The Applicants have fallen far short of showing -- as they must -- that the proposed Merger would enhance competition and be consistent with the public interest. Accordingly, the *Application* must be denied.

## I. REPLY

1. In analyzing transfer applications, the Commission "must make an independent public interest determination that includes an evaluation of the merger's likely effect on future competition."[3] The Commission will assess not only whether the transaction will violate its rules or the Communications Act of 1934, as amended, but "whether the transaction [will] produce public interest benefits in furtherance of Communications Act policies."[4]

2. More specifically, the Commission has stated that "[a]mong the major policies and objectives that may be affected by significant mergers are preserving and enhancing competition in related markets, ensuring a diversity of voices, and providing advanced telecommunications services to all Americans as quickly as possible."[5] Thus, unlike the Department of Justice (DOJ) and Federal Trade Commission (FTC), which consider only whether a transaction will "substantially lessen" competition under Section 7 of the Clayton Act, the Commission must determine whether the proposed Merger actually will enhance competition.

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[3] *In re Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable landing License*, 15 FCC Rcd 14032, ¶23 (2000) (*GTE-Bell Atlantic Order*).

[4] *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., Transferees*, 23 CR 157, ¶4 (2001) (*AOL Time Warner Order*).

[5] *Id.*

3. EchoStar and DIRECTV have fallen far short of satisfying their burden of "proving by a preponderance of the evidence that, on balance, the proposed transaction serves the public interest."[6] Instead, they have embarked on a strategy designed to divert the Commission's attention by promising certain benefits that they claim will flow from the proposed Merger. As discussed below, however, their promises are illusory.

**A. The Applicants' Promises Of Future Conduct Should Be Viewed Skeptically.**

4. The many contradictory statements made by the Applicants concerning material issues related to the proposed Merger are simply astonishing. They cover a broad range of substantive issues, including competition in the Multichannel Video Program Distribution (MVPD) market, broadband deployment, the impact of the proposed Merger on rural consumers, and vertical integration. They were made at various times and to different audiences, including the media, investors, Congress and administrative agencies.

5. The Commission should not rest its assessment of the Merger on the Applicants' shifting promises. Matching the message with the moment is an old trick in law and public policy,[7] but in this particular case the flip-flops have occurred with such alarming regularity that NRTC has summarized some of them below:

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[6] *GTE Bell Atlantic Order*, ¶22. *See also AOL Time Warner Order*, ¶4 ("To gain approval, an applicant bears the burden of establishing that the potential for benefits to the public interest outweighs the potential for harms").

[7] *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, n. 18 (1978), where Chief Justice Burger felt compelled to quote from Lewis Carroll's Alice in Wonderland: "'When I use a word,' Humpty Dumpty said in a scornful tone, 'it means just what I choose it to mean, neither more nor less.'"

# ECHOSTAR/DIRECTV "FLIP-FLOP" CHART

**"We have a track record of doing exactly what we say we'll do."**[8]
-Charlie Ergen.

| Issue | Flip | Flop |
|---|---|---|
| **The Availability Of Cable For Rural Consumers** | "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." -*EchoStar Memorandum*, Nov. 6, 2000, p. 12.[9] | "First, nearly every household in America with a television is passed by cable: according to the FCC, 96.6 percent of TV households are passed by cable." -*Willig Declaration*, Dec. 3, 2001, p. 24.[11] |
| | "71% of DIRECTV customers live in areas able to receive cable television service." -*DIRECTV 2001 Cable Comments*, June 25, 2001, p. 13.[10] | "[P]robably almost nobody watching this tonight [via satellite] doesn't have the opportunity to subscribe to cable if they'd like to." -Charlie Ergen, *Charlie Chat*, Nov. 12, 2001.[12] |
| **Carriage Of All Local Stations** | "We will comply with must-carry on a single dish and carry all stations in all markets." -Charlie Ergen, *Judiciary Testimony*, March 6, 2002.[13] | "However, the merged entity does not intend to carry all channels in every market unless the decision below is upheld." -*SBCA Petition*, March 7, 2002.[14] |

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[8] *Ergen Makes His Case*, Satellite Business News, December 21, 2001, p.10.

[9] Memorandum of Law In Support of Request for Rule 56(f) Continuance to Respond to DIRECTV Defendants' Motion For Summary Judgment, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed Nov. 6, 2000) (*EchoStar Memorandum*).

[10] Comments of DIRECTV, submitted August 3, 2001, in response to Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-191 (released June 25, 2001) (*DIRECTV 2001 Cable Comments*).

[11] Declaration of Dr. Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, p. 24 (December 3, 2001) (Attachment A to the *Application*) (*Willig Declaration*).

[12] SEC Form 425, filed by EchoStar Communications, Inc., *Transcript of "Charlie Chat,"* November 12, 2001, p.6 (November 16, 2001) (*Charlie Chat*).

[13] Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002 (*Judiciary Testimony*).

[14] *SBCA, et al, v. FCC, et al.*, 275 F.3d 337 (4th Cir. 2001), Petition for A Writ of Certiorari, U.S. March 7, 2002, No. 01-__ , n. 2 (*SBCA Petition*).

| **Issue** | **Flip** | **Flop** |
| --- | --- | --- |
| **The Number of DMAs That Will Be Served** | "[With the merger] [w]e would commit to the top hundred markets."<br><br>-*Ergen House Judiciary Testimony*, Dec. 4, 2001.[15] | "And as the Applicants announce here for the first time, the merger will bring [DBS services to] *every one of the 210 television Designated Market Areas in the United States*."<br><br>-*Opposition*, Feb. 25, 2002, p. ii (emphasis in original). |
| **Competition Between EchoStar And DIRECTV** | "DIRECTV and EchoStar react primarily to each other when setting equipment and service prices."<br><br>-*EchoStar Memorandum*, Nov. 6, 2000, p. 12.<br><br>"EchoStar is DIRECTV's closest competition."<br><br>-*EchoStar Memorandum*, Nov. 6, 2000, p. 12. | "Executives at EchoStar and DIRECTV indicated that they monitor the pricing of the other firm, but that such pricing plays little (if any) role in their own pricing decisions."<br><br>-*Application*, Dec. 3, 2001, fn. 5.<br><br>"[T]he data show that the DBS services of the Applicants do not fiercely compete against each other, and the loss of existing competition from the merger is correspondingly limited.<br><br>-*Opposition*, Feb. 25, 2002, p. 41. |
| **DBS Customer Churn** | "Many, if not most, consumers who would switch away from EchoStar if it raised its prices relative to all other subscription programming services would turn to DIRECTV."<br><br>-*EchoStar Memorandum*, Nov. 6, 2000, p. 12. | "'[T]he objective of each firm is to gain market share by luring customers away from the leading cable providers,' not the customers of the other DBS firm."<br><br>-*Opposition*, Feb. 25, 2002, p. 43. |

[15] See *Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market, Oversight Hearing Before the House Committee on the Judiciary*, 107th Congress, Serial No. 50, p. 66 (December 4, 2001) (statement of Charles Ergen, President and CEO, EchoStar Communications Corporation) (*Ergen House Judiciary Testimony*).

| Issue | Flip | Flop |
|---|---|---|
| **Customers Abandoning the DBS Platform** | "Absent a merger, there is a profound risk that DBS will devolve from its current position in the MVPD market as a quality and innovations leader to a lesser alternative that will cause its customers to abandon the DBS platform."<br>-*Opposition*, Feb. 25, 2002, p. 38. | "DIRECTV in the U.S. expects to have a stellar year, by bringing over a million new subscribers."<br>-Jack Shaw, *Hughes Investment Call*, Jan. 17, 2002.[16]<br><br>"Based on the quarter-to-date performance of DIRECTV U.S., we expect to significantly exceed our guidance for net new subscriber additions in the first quarter [of 2002] . . ."<br>-Jack Shaw, *Hughes Press Release*, March 21, 2002.[17]<br><br>"Total revenue for the quarter was 1.15 billion, an increase of 13% over last quarter, and 43% better than the same period a year ago. Revenue for the year was 4 billion, an increase of 47% over 2000. Continued subscriber growth and higher revenue per subscriber were the key drivers behind this increase. We currently expect 2002 revenue to be approximately 20 to 25% higher than 2001 revenue."<br>-Michael McDonnell, CFO, EchoStar, *EchoStar Investor Call*, March 4, 2002. |
| **Competition Against Cable** | "In the unlikely event that the merger does not receive regulatory approval, I am absolutely convinced that HUGHES will be a very strong company, with many new strategic options available to increase value."<br>-Jack Shaw, *Hughes Investment Call*, Jan. 17, 2002. | "[T]he two firms must merge to stay competitive with … cable operators."<br>-*Opposition*, Feb. 25, 2002, p. 47. |

[16] SEC Form 425, filed by Hughes Electronics Corporation, *Transcript Of The Fourth-Quarter And Year-End Earnings Call* (January 15, 2002) (*Hughes Investment Call*).

[17] "DIRECTV U.S. to Substantially Exceed First Quarter 2002 Expectations With Over 325,000 Net New Customers," Press Release of Hughes Electronics Corporation, March 21, 2002 (*Hughes Press Release*).

| Issue | Flip | Flop |
|---|---|---|
| **The Meaning of National Pricing** | "We offer nationwide pricing today and we're willing to commit to this going forward so that rural areas will get the advantages of competitive prices occurring in urban areas."<br><br>-*Ergen House Judiciary Testimony*, Dec. 4, 2001 p. 13. | "The ability to offer local promotions for installation and equipment will not undermine the effectiveness of national pricing as a constraint."<br><br>-*Opposition*, Feb. 25, 2002, p. 69. |
| **Vertical Integration** | "Unlike most large cable operators, [EchoStar] has no ownership stake in any programming producer, and the Applicants do not intend to pursue a strategy of vertical integration with programmers post-Merger."<br><br>-*Application*, Dec. 3, 2001, p. 6. | "The Applicants hereby advise the Commission that on December 14, 2001, [EchoStar Communications Corporation] signed definitive agreements relating to a transaction with Vivendi Universal, S.A . . . Under the Agreement, Vivendi will make a $1.5 billion investment in [EchoStar Communications Corporation] . . . As part of the transaction [EchoStar Communications Corporation] has also agreed to carry 5 new Vivendi channels."<br><br>-*Vivendi Letter*, Dec. 18, 2001.[18]<br><br>"We're not opposed to taking a minority interest in a content provider on certain occasions."<br><br>-Charlie Ergen, *EchoStar Investment Call*, March 4, 2002. |
| **Favorable Programming Deals** | "Because of their relatively small market shares, EchoStar and DIRECTV have not enjoyed the market position necessary to obtain favorable programming deals available to cable."<br><br>-*Opposition*, Feb. 25, 2002, p. 125. | "[W]e have I think historically always been able to reach agreement with the particular programmers to something we think is fair for our consumers, and at a price that we think is fair."<br><br>-Charlie Ergen, *EchoStar Investment Call*, March 4, 2002. |
| **Entry Barriers to the DBS Market** | "There are significant entry barriers to the DBS and/or High Power DBS market."<br><br>-*EchoStar Memorandum*, Nov. 6, 2000, p. 12. | "[O]ther [satellite] companies have ample opportunity to use satellite spectrum and orbital locations . . . to introduce additional competition in the MVPD market."<br><br>-*Opposition*, Feb. 25, 2002, p. 49. |

[18] Ex Parte Notice, Submitted by Counsel for General Motors Corporation and Hughes Electronics Corporation and Counsel for EchoStar Communications Corporation, Docket No. 01-348, p. 2 (December 18, 2001) (*Vivendi Letter*).

| **Issue** | **Flip** | **Flop** |
|---|---|---|
| **Analog Cable Versus DBS** | "Old, analog, rotting miles of cable . . . Once you've experienced digital satellite, you're not rushing out to get cable." -Charlie Ergen, *Denver Post Interview*, Oct. 5, 1997.[19] | "Even analog cable operators historically have had tremendous advantages over DBS operators . . . " -*Opposition*, Feb. 25, 2002, p. 36. |
| **C-Band As Competition To DBS** | "Indeed, the size and cost of these dish antennas have rendered C-band technology largely obsolete." -*EchoStar Amended Complaint*, April 5, 2001, p. 10.[20] | "[C-band] products remain very attractive, particularly in areas where dish size is not important." -*Application*, Dec. 3, 2001, p. 40. |
| **The Cable Industry's Rollout of Digital Cable** | "Where [the cable industry] has come out in general [with digital cable], as they have done, and advertised in a market, they really raised the awareness about digital television in the marketplace. We have seen strong customer growth, and an increase in the total market. It increases for us." -Roxanne Austin, *Hughes Investment Call*, Jan. 17, 2002. | "If EchoStar and DIRECTV are to continue to succeed, they must match . . . the dire competitive threat posed by the [digital] upgrade of these incumbents' systems." -*Opposition*, Feb. 25, 2002, p. 38. |
| **The Cable Industry's Bounty Programs** | "[D]igital cable is profoundly threatening to DBS. Among other things, digital cable: . . . has led the large cable multiple system operators to target DBS much more aggressively than in the past, including with . . . "dish bounties," and other satellite specific promotions." -*Opposition*, Feb. 25, 2002, p. 37. | "The [bounty program] is a very poor economic model for them . . . I think it's a very poor financial model for them. We will probably watch that, and if we see somebody doing something stupid, we'll take advantage of it . . ." -Charlie Ergen, *EchoStar Investment Call*, March 4, 2002. |
| **The Product Market** | "DBS is in a separate product market from alternative sources of programming, including cable television." -*EchoStar Memorandum*, Nov. 6, 2000, p. 12. | "EchoStar and DIRECTV compete in the market for Multichannel Video Program Distribution (MVPD)." -*Opposition*, Feb. 25, 2002, p. 33. |

[19] *Ergen On The Edge*, Denver Post, October 5, 1997, J-1 (*Denver Post Interview*).

[20] Amended Complaint, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed April 5, 2001) (*EchoStar Amended Complaint*).

| Issue | Flip | Flop |
|---|---|---|
| **Competitive Broadband Offerings** | "[F]rom the Hughes standpoint, we truly believe that broadband is here. And we have competitive offerings, if you just go to the satellite-based offering that we have, a competitive offering." -Jack Shaw, *Hughes Investment Call*, Jan. 17, 2002. | "[T]he merger of EchoStar and Hughes will *create* for the first time a truly competitive broadband alternative to DSL and cable modem service . . . consumers today located in areas served by DSL or cable modems lack access to effective satellite broadband competition." -*Opposition*, Feb. 25, 2002, p. 80 (emphasis in original). |
| **Consumer Broadband Services** | "[U]sing Ka-band satellite systems, will satisfy growing consumer demand for broadband services, and will be a significant step towards bridging the digital divide between urban and rural areas." -*EchoStar/VisionStar Application*, Dec. 15, 2000, p. 9.[21] | "Nor could [EchoStar or DIRECTV] standing alone deploy on a timely basis an advanced residential broadband service of mass scale and appeal at an affordable price." -*Opposition*, Feb. 25, 2002, pp. 80-81. |
| **The Critical Mass For Broadband Deployment** | "The combination of EchoStar and VisionStar will help create the critical mass, scale efficiencies and realistic chances of commercial success that will help both companies to deploy Ka-band satellites as expeditiously as possible." -*EchoStar/VisionStar Application*, Dec. 15, 2000, p. 5. | "EchoStar currently does not have access to sufficient spectrum, orbital locations or capital resources to achieve (our) targets. All of these limitations, however, can be overcome by combining the resources of [Hughes and EchoStar] once the merger is approved." -*Opposition*, Feb. 25, 2002, p. 101 (discussing EchoStar's limited Ka-band development). |
| **The Use of Theoretical Analysis** | "[P]roper competition analysis is limited to alternatives that are 'practical in the business situation faced by the merging firms' and should not rely on alternatives that are 'merely theoretical.'" -*Opposition*, Feb. 25, 2002, p. 8. | "The Commission has reported that it is technically feasible for a new terrestrial service, which the Commission has dubbed Multichannel Video Distribution and Data Service (MVDDS) to share spectrum allocated to DBS in the 12.2 – 12.7 GHz band." -*Opposition*, Feb. 25, 2002, p. 53. |

[21] Application for Consent to Transfer of Control Over Authorization, File No. 200-SAT-P/LA-95 (filed December 15, 2000) (EchoStar/VisionStar Application).

| Issue | Flip | Flop |
|---|---|---|
| **Regulation vs. Competition** | "Regulation as a tool for facilitating broadband deployment . . . has historically led to market inefficiencies." -*Opposition*, Feb. 25, 2002, p. 115. | "New EchoStar will commit to a [regulated] 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." -*Opposition*, Feb. 25, 2002, p. 118. |
| **A Monopoly's Willingness To Provide Innovative Services** | "[T]he proposed merger offers the possibility of substantial efficiency improvements . . . which would directly benefit DBS consumers by providing an expanded array of services." -*Willig Declaration*, Dec. 3, 2001, p. 12. | "As is well documented in the literature of economics, monopolists do not invest the full amounts required for economic efficiency when they are provided with monopoly returns on their investments." -*Willig Letter*, Dec. 11, 2001.[22] |

6. This "Flip-Flop Chart" contains only a *partial* list of *some* of the contradictory statements made by the Applicants in connection with issues of material importance regarding the proposed Merger. The frequency and sheer number of these statements should give the Commission serious pause when it considers the Applicants' promises of future conduct following the proposed Merger.

### B. The Applicants' Promise Of National Pricing For MVPD And Broadband Services Is Empty, Unenforceable And Would Lead To Higher Prices.

#### 1. MVPD.

7. In its Opposition, the Applicants reiterate their "commitment" to charge a uniform price for DBS service throughout the country. That this is proffered by the Applicants as a solution to the problems created by the proposed Merger is an acknowledgment that New EchoStar would otherwise naturally engage in price discrimination as a monopolist. The Applicants fail, however, to show how national pricing would work, how it would be effective

[22] Letter from William J. Baumol, B. Douglas Bernheim, Robert E. Hall, William Lehr, John W. Mayo, Janusz A. Ordover, Frederick R. Warren-Bolton and Robert D. Willig to Hon. Donald L. Evans, Hon. Lawrence Lindsey, Hon. Paul H. O'Neill, Hon. R. Glenn Hubbard, Hon. Randall S. Kroszner and Hon. Mark B. McClellan, dated December 11, 2001, p. 3 (*Willig Letter*).

and how it would result in competitive prices. National pricing may have cosmetic appeal, but when properly scrutinized, it is illusory, unworkable and easily evaded.

8. In his Declaration accompanying the *NRTC Petition*, distinguished economist Dr. Paul W. MacAvoy demonstrated, based on economic analysis, that the national price would *exceed* the current competitive levels.[23] Dr. MacAvoy showed that following the Merger, prices would increase by an average of 50 percent in each of 14 illustrative rural "clusters" of homes not passed by cable.[24] In response, Dr. Robert D. Willig, the Applicants' economist, claims that Dr. MacAvoy underestimated demand elasticity as a result of two alleged flaws.[25] Dr. MacAvoy demonstrates in his attached response that Dr. Willig is wrong on both counts. Indeed, upon further review, Dr. MacAvoy concluded that the effects of the proposed Merger are actually worse than he initially anticipated.[26]

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[23] *See generally* Declaration of Dr. Paul W. MacAvoy, The Effects of the Proposed EchoStar – DIRECTV Merger on Competition in Direct Broadcast Satellite Rural Markets Where Cable Is Not Available (February 1, 2002) (Exhibit I to the *NRTC Petition*) (*MacAvoy Declaration*).

[24] *See generally MacAvoy Declaration*. This finding is grounded in Dr. MacAvoy's conclusion that demand elasticity for DBS services is –1.55, based on an observation of DIRECTV prices in 83 DMAs. In making this analysis, Dr. MacAvoy used 254 observations of average revenue per unit (ARPU) of DIRECTV in each of the 14 "clusters" during the December 15, 2001-January 13, 2002 period. ARPU ranged from $44.13 in the Upper Midwest Region to $57.06 in the Chesapeake Region. Such information was not available concerning EchoStar's average revenues. In a Rule 425 filing EchoStar made with the Securities and Exchange Commission on March 4, 2002, however, EchoStar reported ARPU of $49.69 during the final quarter of 2001 and $49.32 for calendar year 2002. While these figures do not show regional ARPU during the same one-month period Dr. MacAvoy observed, they are strikingly similar to the DIRECTV ARPU figures. Declaration of Paul W. MacAvoy, pp. 8-9 (March 26, 2002) attached hereto as Exhibit 1 (*MacAvoy Response*).

[25] Dr. Willig claims that (a) Dr. MacAvoy's analysis does not reflect that price is endogenous, *i.e.*, that price reflects shifts in the demand curve as well as movements along the demand curve; and (b) Dr. MacAvoy's analysis contains an error in a key variable, namely the use of only DIRECTV's revenue instead of the revenue of each company. *See Opposition*, Declaration of Robert D. Willig (*Willig Response*).

[26] *MacAvoy Response*. First, neither Dr. Willig nor the Applicants established that price is endogenous in light of the fact that price is established by retailers. Further, an endogenous price does not necessarily lead to an underestimation of demand elasticity. Dr. MacAvoy believes that "Dr. Willig's contention that I have underestimated demand elasticity is unsupported in theory." *MacAvoy Response*, p. 19. Second, Dr. MacAvoy conducted an experiment to address the alleged "error in variable." *MacAvoy Response*, pp. 20-21. This experiment assumes that the missing variable -- the price of EchoStar service -- is correlated with the price of DIRECTV's service. *See supra* n. 24. The result of the experiment shows demand elasticity of –1.25, higher than the demand elasticity he calculated with the alleged "error in variable." So, if Dr. MacAvoy's "error" is corrected to address Dr.

9. Rather than presenting some type of economic rebuttal to show that higher prices would not obtain, Dr. Willig merely claims that "the choice of New EchoStar's national price would put greater weight on the competitive conditions in those markets in which it sells more of its product."[27] This statement is remarkable for its alarming lack of support. As Dr. MacAvoy responds:

> The change in price that would take place according to his scheme after the proposed merger in fact depends not only on (1) demand elasticities, but also (2) the level of post-merger marginal costs and (3) the intensity of competition between one DBS provider and one cable provider in urban markets. The larger the estimate of the first determinant, the DBS price elasticities, and the larger the urban markets relative to rural markets, the lower the single national price. The larger the estimate of the second determinant, post-merger marginal costs as compared to pre-merger marginal costs, the higher the single national price. The less the intensity of cable/DBS competition, the third determinant, the higher the single national price. Dr. Willig, taking into account only demand elasticity, cannot predict that both rural and urban prices would be lower after the proposed merger. To propose the single price as a solution to eliminate adverse effects from a DBS monopoly, Dr. Willig would need to generate concrete estimates of demand elasticities, coefficients of conjectural variation and marginal costs for post-merger conditions. He cannot credibly assume, without any analysis whatsoever, that the single national price most profitable for New EchoStar is in the range of current prices in either rural or urban sets of markets.[28]

As the above demonstrates, Dr. Willig has not proven his point, and he cannot do so with unsupported, conclusory statements.

10. New EchoStar does not try to hide its desire for flexible pricing at the local level, stating that even with national pricing it will require "[t]he ability to offer local promotions for

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Willig's concern, the effects of the proposed Merger are actually worse than Dr. MacAvoy initially anticipated. *MacAvoy Response*, pp. 20-21.

[27] *Willig Response*, p. 32.

[28] *MacAvoy Response*, p. 12.

installation and equipment . . ."[29] In short, New EchoStar readily admits that notwithstanding its "commitment" to national pricing, it will price discriminate at the local level, as both EchoStar and DIRECTV have done in the past in a competitive environment.

11. To be effective, as documented by Dr. MacAvoy, a national price would need to control *every* component of pricing -- including equipment, installation, programming packages and maintenance costs -- at *all* points in the distribution chain. Without such an ironclad commitment, the monopoly will "deviate by stages so as not to forsake available opportunities in setting both lower (more competitive) prices in urban areas and higher (less competitive) prices in rural areas."[30] The Applicants' have made no showing that they would control any -- let alone all -- of these aspects of pricing as part of their national pricing plan. Further, as Dr. MacAvoy observes, "a firm can evade price caps or ceilings by reducing the quality of the product for which price is controlled."[31]

12. Dr. Willig claims that New EchoStar would not have the ability to price discriminate because it would be difficult for New EchoStar to determine which subscribers have access to cable and which do not. This claim, however, rings hollow. Dr. Willig has acknowledged that local variations exist in the sale of DBS programming, including free service and reduced price for equipment and installation, while New EchoStar has admitted that such practices would continue even under its national pricing plan. EchoStar also has demonstrated its ability to target certain localized areas by aggressively pursuing specific cable subscribers where, for instance,

[29] *Opposition*, p. 69.
[30] *MacAvoy Response*, p. 13.
[31] *MacAvoy Response*, p. 14. The Applicants are mistaken in focusing only on the price impact of the proposed Merger and ignoring service quality and consumer choice as issues that do not "matter." *Opposition*, p. 75.

the local operator is going bankrupt. [32] The detailed Census Block data provided by Warren Publishing, Inc., and used in the *MacAvoy Declaration*, also easily identify some of the larger, contiguous areas where cable is not available.

13. Though they have had ample opportunity, EchoStar and DIRECTV have provided no details as to how national pricing would be monitored and enforced. They have avoided answering basic questions critical to their plan: Who will enforce national pricing? What elements of pricing will be enforced? What will the enforcement agency require New EchoStar to do in order to ensure that national pricing will be maintained? What will New EchoStar need to show in order to increase prices? Will the national price be based on rate of return, cost of service or both? What penalty will be imposed if New EchoStar violates its national pricing commitment? The list goes on and on, yet nowhere have the Applicants shown how the public can be assured that prices will remain at a non-discriminatory, national level. This is just another example of the Applicants painting a rosy picture with a broad brush, yet leaving the ifs, ands and buts in the fine print.

14. In order for New EchoStar's national pricing commitment to have any meaning, it must be a commitment for regulation of both the cost of all relevant services and New EchoStar's profits. As Dr. MacAvoy states, this dual approach would require New EchoStar to accept utility-type regulation with revenues for all services limited to the cost of providing service inclusive of a fair return on invested capital.[33] However, it is unlikely that New EchoStar would agree to this plan, as it would limit its return on investment and subject its business to micro-

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[32] *See MacAvoy Response*, pp. 9-10. *See also* Petition to Deny of the American Cable Association, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed February 4, 2002).

[33] *MacAvoy Response*, p. 16.

management by federal regulatory authorities. Moreover, it is not difficult to imagine a time in the future when New EchoStar flip-flops yet again and seeks relief from such regulation based on "changed circumstances" or other reasons, leaving consumers with no protection from price discrimination.

15. New EchoStar's commitment to national pricing, in fact, is not a commitment at all. Rather, it is an invitation for the establishment of a labyrinthine regulatory structure that, at best, will be ineffective to protect consumers. To quote economist Alfred Kahn, "[p]rice really has no meaning except in terms of an assumed quality of service; price is a ratio, with money in the numerator and some physical unit of given or assumed quality in the denominator. Price regulation alone is meaningless."[34]

16. The Applicants have presented nothing in their Opposition to undercut Dr. MacAvoy's findings. According to Dr. MacAvoy, rural consumers in these areas will lose *$120 million each year*. And, if the preponderance of DBS subscribers are in rural areas -- as DIRECTV itself has indicated[35] -- the total losses to existing EchoStar and DIRECTV subscribers would be as much as *$700 million each year*.[36]

**2. Broadband.**

17. The Applicants' promise to set a national price for its *basic* broadband service also raises fundamental questions.[37] First, the Applicants do not define "basic" broadband -- it may mean the slowest speeds or a level of service that few would want, leaving the door wide open

[34] Alfred E. Kahn, (1988), *The Economics of Regulation*, MIT Press, p. 21, as quoted in the *MacAvoy Response*, p. 14.

[35] *See DIRECTV 2001 Cable Comments*, p. 13 (stating that only 71% of DIRECTV customers live in areas able to receive cable television service).

[36] *MacAvoy Declaration*, pp. 50-51.

[37] *Opposition*, p. 25.

for price discrimination for "non-basic" broadband service. Second, there are many unanswered questions about the implementation, governance and enforcement of a national broadband pricing plan. For example, the Applicants have submitted no evidence demonstrating that the national price for "basic" broadband would be less than the $70 price StarBand currently charges for Ku-band service. As a monopolist, New EchoStar would have every incentive to set a high national price for "basic" broadband; it would have a limited desire to compete against DSL and cable modem services in the areas where those services enjoy a huge head-start, and instead would have every incentive to overcharge rural Americans who have no other choices.

### C. The Applicants' Promises Of Alleged Efficiencies Do Not Justify A Merger To Monopoly.

18. The Applicants make many claims about efficiencies that would result if the Merger were approved. Much is made of the potential benefits of avoiding duplication of the transmission of programming services and the resulting spectrum efficiencies.[38] The Applicants also claim that efficiencies flowing from the Merger will enable deployment of a self-styled "true broadband" service.[39] The Applicants ignore, however, that in highly concentrated markets, "efficiencies almost never justify a merger to monopoly or near-monopoly."[40]

19. In 1997, the DOJ and FTC observed that "mergers have the potential to generate significant efficiencies by permitting better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction."[41] In mergers involving highly concentrated

[38] *Application*, pp. 28-29.
[39] *Id.*, pp. 43-49.
[40] U.S. Department of Justice and Federal Trade Commission, *Revisions to Horizontal Merger Guidelines* (1997), reprinted in 4 Trade Reg. Rep., § 4 (CCH) (1997) (*Merger Guidelines*).
[41] *Id.*

industries, such as DBS, a showing of "extraordinary efficiencies" is required.[42] Indeed, "no court has ever approved a merger to duopoly" in a highly concentrated market characterized by high barriers to entry, where the party seeking merger approval was not a failing firm.[43] So while mergers may promise to generate efficiencies, courts do not credit them in cases such as this one because there can be no guarantee that they will be realized, or if realized, passed on to consumers. Absent competition, the monopolist is motivated to retain any efficiencies for its own benefit.[44]

20. NRTC and others have established that the proposed Merger would be a merger to duopoly in many parts of the country and a merger to monopoly in all others. The Applicants ignore the anticompetitive impact of this Merger on rural consumers at the local level, arguing instead that the Merger should be evaluated in the context of alleged benefits to certain other consumers in the broader national market.[45] This request, however, flies in the face of well-established precedent.

21. Section 7 of the Clayton Act prohibits mergers "where in any line of commerce or in any activity affecting commerce *in any section of the country*, the effect of such acquisition may be to substantially lessen competition or to tend to create a monopoly."[46] Thus, Courts have held that efficiencies in one geographic area cannot overcome harms caused in other areas.[47] Merger law "rests on the theory that, where rivals are few, firms will be able to coordinate their behavior,

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[42] *FTC v. H.J. Heinz Co.*, 246 F. 3d 708, 720 (D.C. Cir. 2001) ("high market concentration levels require, in rebuttal, proof of extraordinary efficiencies").
[43] *Id.*, p. 717.
[44] *See NRTC Petition*, p. 31 (quoting a December 11, 2001 letter to which Dr. Willig himself was a signatory).
[45] *Opposition*, pp. 118-131.
[46] 15 U.S.C. § 18 (emphasis added).
[47] *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963).

either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.[48]

22. The Applicants argue that the proposed Merger is analogous to the Greyhound/Trailways merger that was approved by the Interstate Commerce Commission (ICC).[49] In that case, the ICC reasoned that competition from private automobiles, airlines and other modes of transportation subjected Greyhound and Trailways to competition in all areas. The instant case is not analogous, because rural Americans would be left with *no* choices following the Merger. Moreover, the *Greyhound/Trailways* case involved the merger of a failing company in a failing industry. As numerous parties have explained, EchoStar and DIRECTV -- and DBS as an industry -- are thriving.[50]

23. The Commission should resist the Applicants' attempt to justify the anticompetitive impact of the Merger on rural Americans with promises of benefits to the rest of America. The law does not permit it.

### 1. The Applicants' Recent Promise To Deliver Local Programming To All 210 Markets Is Illusory.

24. Only a few short months ago, EchoStar and DIRECTV doubted not only their ability to provide local television service to all of America, but their ability to do so separately.[51] NRTC did not. Now, in the face of widespread criticism, EchoStar and DIRECTV tout their ability to

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[48] *FTC v. PPG Industries*, 798 F.2d 1500, 1503 (D.C. Cir. 1986).

[49] *Opposition*, p. 55 (citing *GLI Acquisition Company Purchase Trailways Lines, Inc.*, ICC Decision No. MC-F-18505, at p. 6 (May 27, 1988)).

[50] *See NRTC Petition*, pp. 1-2; Petition to Deny of Pegasus Communications Corporation, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348, p. 9 (filed February 4, 2002) (*Pegasus Petition*); Petition to Deny of the National Association of Broadcasters, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348, pp. 9-13 (filed February 4, 2002) (*NAB Petition*).

[51] *Application*, p. 29.

deliver local television stations to all 210 Designated Market Areas (DMAs).[52] They claim, however, that they cannot make this benefit available unless the Merger is approved. Their "promise" is further diluted by statements that New EchoStar does *not* intend to carry all channels in all markets if the Satellite Home Viewer Improvement Act (SHVIA) is declared unconstitutional by the United States Supreme Court.[53]

**a. The Applicants Have Failed To Demonstrate That The Merger Is Necessary To Expand Local Television Service To Rural America.**

25. NRTC is pleased with EchoStar's and DIRECTV's decision to carry more local television stations using innovative satellite spot beam technology. This decision validates NRTC's faith in technology, a faith that led it and others -- including the National Association of Broadcasters -- to conclude that the provision of local service to all Americans is technically feasible for each company, without resorting to merger.[54]

26. The Applicants respond that NRTC and others have failed to consider whether their suggested approaches are technically feasible or commercially viable.[55] As the attached Declaration of Walter L. Morgan demonstrates, however, the Applicants' claims are contradicted by their own FCC filings.[56] Further, the Applicants mischaracterize the nature of Mr. Morgan's

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[52] "Merged EchoStar and Hughes Will Deliver Local Broadcast Channels to All 210 U.S. Television Markets," Press Release of EchoStar Communications Corporation and Hughes Electronics Corporation, February 26, 2002.

[53] *See SBCA Petition*.

[54] The NAB, for example, relying on the Applicants' own assumptions contained in the Joint Engineering Statement, demonstrated that each Applicant could separately use 46 (for DIRECTV) or 50 (for EchoStar) CONUS frequencies to carry all of the eligible local stations in all 210 DMAs, and also carry all of its existing national programming, with ample room to offer still more. *NAB Petition*, pp. 80-82. *See Application*, Joint Engineering Statement in Support of Transfer of Control Application, Attachment B, p. 6 (*Joint Engineering Statement*). Pegasus showed that, by using spot beam technology, either entity on its own could serve all 210 DMAs. *Pegasus Petition*, p. 42. NRTC also demonstrated that technological means exist to facilitate carriage of all stations in all markets by each company. *NRTC Petition*, pp. 58-59.

[55] *Opposition*, p. 6.

[56] *See* Declaration of Walter Morgan (March 27, 2002), attached hereto as Exhibit 2 (*Morgan Response*).

analysis and misstate important facts. As documented by Mr. Morgan, his suggested approaches are both technically feasible and economically viable.[57]

27. In fact, as Dr. MacAvoy made clear, if the proposed Merger is not consummated and the breakup fee is paid, DIRECTV will receive enough cash from EchoStar to pay for two spot beam satellites, capable of serving all 210 DMAs by itself.[58] As in any competitive situation it faces with DIRECTV, EchoStar would be required to find a way to respond in kind.[59]

28. The extension of local television service to rural America, as NRTC and others pointed out, also could be achieved through cooperation between EchoStar and DIRECTV or by working together with third parties -- not just through a merger. EchoStar and DIRECTV apparently discussed the terms of such a joint venture, but their discussions failed because the parties could not decide how to allocate costs associated with sharing capacity.[60] In light of the benefits the Applicants claim will result from the elimination of the duplicative transmission of broadcast and other channels, a competitive environment is a powerful incentive to drive EchoStar and DIRECTV to return to discussions on how to realize those benefits and allocate those costs.

29. The Applicants' decision at this particular point to promise to carry more local broadcast channels comes as no great surprise. The simple fact is that carriage of local broadcast stations is good business. Local broadcast channels are extremely popular with consumers. In a

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[57] *Id.*
[58] *MacAvoy Response*, p. 24.
[59] *Id.*
[60] *See* Andy Pasztor, *Past Meetings Could Snarl Merger of Hughes, EchoStar; FCC Justice Department Seek Information on Once-Secret Talks and Why They Ended*, The Wall Street Journal (February 4, 2002).

competitive market, both EchoStar and DIRECTV will have a strong incentive to deliver what consumers want most.[61]

#### b. EchoStar's Promise To Provide Local Service Is Unenforceable.

30. Commenting on New EchoStar's recent announcement that it plans to carry all local broadcast channels, Bob Scherman, the editor of a leading trade publication covering the satellite industry, observed that this proposal is "a very shrewd political Hail Mary, with no downside because it is unenforceable."[62] NRTC believes this analysis is correct.

31. First, the Applicants' promise to carry all stations in all markets is not a binding legal obligation. EchoStar has historically shown a willingness to skirt even legal obligations relating to carriage of local stations, so this empty promise should be given no credit.[63]

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[61] In an attempt to discredit NRTC's current views regarding the feasibility of local-into-local service, the Applicants highlight statements made by NRTC two years ago during the Commission's SHVIA proceeding. *See Opposition*, p. 16. NRTC readily admits that its view regarding carriage of local stations has evolved over the past few years along with developments in law, technology and the marketplace. With the passage of the SHVIA, the provision of local broadcast channels in local markets has become extremely popular. For example, the Satellite Broadcasting and Communications Association (SBCA) found that in 13 markets where local-into-local service was introduced via DBS, there was a 43% increase in subscribers. *See* SBCA Comments, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, p. 8 (filed July 2000). On several occasions, the Commission has concluded that the significant recent increase in DBS subscribership can be attributed to the authority in the SHVIA for DBS carriers to retransmit local broadcast signals. *See* Seventh Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 CR 1414, FCC 01-1, ¶13 (*Seventh Video Competition Report*). *See also* Eighth Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-389, ¶8 (*Eighth Video Competition Report*). In fact, DIRECTV informed the Commission that its overall subscriber levels increased by 20 percent due to the provision of local television service. *Eighth Video Competition Report*, ¶59. Since NRTC filed its Comments in July 2000, the Applicants also have demonstrated the economic viability of serving local broadcast markets through the launch -- or planned launch -- of four additional spot-beam satellites (DIRECTV 4S and EchoStar VII were launched on November 27, 2001 and November 21, 2002, respectively; while EchoStar VIII and DIRECTV 7S are pending launch dates). Finally, as discussed by Walter Morgan, compression ratios for DBS satellites are now 12:1 and will likely increase over time as technologies further develop and additional capacity becomes available for the retransmission of local signals. *See* Declaration of Walter Morgan, p. 23 (Exhibit O to the *NRTC Petition*).

[62] Gregory MacDonald, "Opinion: Broadcasters Oppose Satellite-Dish Merger," *Helena Independent Record*, March 17, 2002.

[63] *See e.g.* Petition to Deny or Conditionally Grant of Paxson Communications, Inc., *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348, pp. 6-9 (filed February 4, 2002).

32. Indeed, only ten days after representing to the FCC that it would comply with SHVIA and carry all stations in all markets on a single dish, EchoStar beat a hasty retreat.[64] On March 7, 2002, in a brief filed with the U.S. Supreme Court seeking to overturn SHVIA, EchoStar stated that "the merged entity does not intend to carry all channels in every market unless the decision below [upholding the constitutionality of the carry one, carry all provision of SHVIA] is upheld."[65]

33. On March 15, 2002, in response to an effort by the NAB to point out the hypocrisy of EchoStar's position, EchoStar confirmed the company's unwillingness to carry all local stations in all markets, stating that:

> If must carry is upheld, we will obviously fully comply with the law. If must carry is overturned, we fully intend to carry all local stations *with meaningful local content* in all 210 local broadcast markets.[66]

This response shows, once again, that EchoStar's bold public statements are rendered far less meaningful after careful review of the details, qualifications and nuances. Stripped of its rhetoric, New EchoStar plans to selectively carry only those stations that broadcast the type of content New EchoStar unilaterally deems meaningful. Since consumers in rural markets will no longer have a choice in providers, they will be required to accept New EchoStar's sole judgment about the "meaningfulness" of local content to be made available to them.

34. Second, it is unclear when New EchoStar actually would carry local stations in all markets. It offers only to provide such service ". . . as soon as 24 months" after approval.[67] This

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[64] *Opposition*, p. 4. *See also Judiciary Testimony*.

[65] *SBCA Petition*, n. 2.

[66] Letter from Karen Watson of EchoStar, to U.S. Senators, dated March 15, 2002 (emphasis added).

[67] *Opposition*, p. 4.

open-ended promise means rural Americans may never receive local service from the monopoly created by this Merger. Given its track record of hiding devils in details, it is not difficult to anticipate pleas of "changed circumstances" and other excuses to justify the failure to live up to this vague promise.[68]

35. Absent competition, the only way to ensure that local service is extended to all Americans is to establish an extensive and costly regulatory scheme to strictly enforce the Applicants' promise. Yet, time and time again, the FCC has recognized that competition is far preferable to regulation.[69]

36. As NRTC and others have demonstrated, the provision of local service has been driven by competitive reactions of one Applicant to the other. It is for this reason that the Applicants each serve substantially the same markets.[70] The temptation to sacrifice this functioning competitive market for a regulated monopoly should be avoided.[71] As the Commission is well aware, innovations that benefit consumers, such as the provision of local television service in all markets to all Americans, are best driven by competition.

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[68] EchoStar also leads the FCC to believe that it will provide these local services with "one consumer friendly mini-dish," *Opposition*, p. 4, yet it urges the FCC to ". . . reject attempts to impose a special condition on the combined company that it carry all its must carry stations so they are received on the same dish." *Id.*, p. 140.

[69] *See* Memorandum Opinion and Order, *In the Matter of Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, 14 FCC Rcd 3160, ¶14 (1999); *AOL Time Warner Order*, ¶15. *See also* "Connecting the Globe: A Regulator's Guide to Building a Global Information Community;" Press Statement of Chairman William E. Kennard on "Wireless Day." *See also* Press Conference of Chairman Michael K. Powell, "Digital Broadband Migration," October 23, 2001. Similarly, Commissioner Kevin Martin also spoke to the need for greater facilities-based competition, saying: "I believe the government – particularly the Commission – should place a higher priority on facilities-based deployment and competition. The goal of the Telecommunications Act was to establish a competitive and deregulated environment. But to get to true deregulation, we need facilities-based competition." Remarks of Commissioner Kevin J. Martin at the National Summit on Broadband Deployment, October 26, 2001.

[70] *NRTC Petition*, Exhibit M: DMAs Served by DIRECTV and EchoStar.

[71] There are also public safety benefits in having multiple facilities-based competitors providing services via satellite.

### 2. Broadband Deployment Will Suffer If The Merger Is Approved.

37. If there is one thing on which both the Applicants and NRTC agree, it is that rural Americans are underserved by broadband. How this digital divide is best bridged, however, remains a point of sharp contention. In their *Application*, the Applicants argue that only the proposed Merger will permit broadband services to evolve in rural America. NRTC and others have shown, however, that the Merger is not necessary to promote broadband deployment in rural areas. EchoStar and Hughes each can provide broadband service to a "critical mass" of subscribers. Further, the Merger would effectively discourage new entrants from providing competing services.

#### a. Broadband Competition Should Not Be Sacrificed In Rural America.

38. The Applicants argue that "the merger of EchoStar and Hughes will *create* for the first time a truly competitive broadband alternative to DSL and cable modem service."[72] However, competition among DSL, cable modem and satellite services exists only in areas of the country where such services are available. In rural America, satellite is often the only broadband technology available.

39. The Applicants complain that their Ku-band service offerings are subject to constraints on transmission speeds, capacity and overall cost.[73] While this may or may not be true, the Merger is not the right vehicle to correct these purported shortcomings. Rather, improvements on transmission speeds are best accomplished through the competitive forces that drive innovations in technology.[74] The capacity constraints they complain about are nothing

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[72] *Opposition*, p. 80 (emphasis in original).

[73] *See Opposition*, p. 90.

[74] *See In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to*

more than a function of the choices that EchoStar and Hughes have made, for example, to use certain capacity for pay-per-view programming rather than for broadband; they could certainly make more Ku-band spectrum available for broadband services if they chose to do so, particularly in unserved rural areas.[75]

40. Regarding the Ka-band, as NRTC observed in its Petition, New EchoStar would have a total of six full-CONUS slots, providing it with market power in the rural broadband market that would effectively bar any additional entry.[76] The Applicants, relying on selective "simple arithmetic,"[77] note that there would be eleven other entities with full-CONUS coverage ability. They fail to acknowledge that no single remaining entity would have more than two slots. With three times as many slots, at least twice as much spectrum as their "competitors," and the ability to bundle video and other services, New EchoStar's simple arithmetic is nothing more than fuzzy math.[78] Clearly, EchoStar and DIRECTV individually stand a far greater chance of success in providing Ka-band broadband service than any other single Ka-band licensee.

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*Section 706 of the Telecommunications Act of 1996*, FCC 99-5, CC Docket No. 98-146, 14 F.C.C.R. 2398, ¶1 (1999) ("One of the fundamental goals of the Telecommunications Act of 1996 (the 1996 Act) is to promote innovation and investment by multiple market participants in order to stimulate competition for all services, including broadband, communications services.").

[75] The Applicants misinterpret NRTC's evidence showing that ILECs charge monopoly prices where they do not face competition. *See Opposition*, p. 95. The point of this argument is that the combined New EchoStar would, as a rural broadband monopoly, follow the same path of increasing prices, as there would be no competitor to constrain prices in such areas.

[76] *NRTC Petition*, p. 46.

[77] *Opposition*, pp. 109-110.

[78] NRTC did not state, as the Applicants incorrectly claim, that SPACEWAY has access to three full-CONUS slots and EchoStar has access to five full-CONUS slots. To set the record straight, NRTC stated that Hughes and PanAmSat together controlled three full-CONUS slots and EchoStar controlled three full-CONUS slots. *See NRTC Petition*, p. 46.

### b. The Merger Would Give New EchoStar Unrivaled Satellite Broadband Market Power.

41. The Applicants' claims about the competitiveness of other broadband distribution systems are without merit:

- The public announcements of Sprint, WorldCom and Nucentrix to scale back and delay conversion of MMDS systems to two-way data distribution suggest that it could be several years before MMDS spectrum is deployed for two-way fixed wireless service, if ever.[79]

- That three Ka-band licensees recently notified the FCC that they had commenced construction of their satellite systems hardly means competition is imminent. The milestone does not in any way suggest that actual construction has begun, and certainly cannot be construed to mean that a satellite will actually be placed in operation.[80]

- Assuming the truth of the statistics the Applicants cite concerning unlicensed terrestrial use, service to parts or all of 503 counties -- out of a total of 3,141 counties -- hardly constitutes significant competition. Such unlicensed operations do not enjoy interference protection from other systems or even household devices using 802.11b and related technologies. The range of these systems, relative to satellite, is also extremely restricted.

For these reasons, the extent to which these technologies are likely to become viable competitors is entirely speculative. Potential technologies that may be developed in the future are, for purposes of this Merger review, entirely beyond the scope of this proceeding.[81]

42. For rural America, New EchoStar would enjoy a broadband monopoly. Despite the Applicants' claims that the existing StarBand and DIRECWAY Ku-band services are inferior,

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[79] The Applicants address this fact only with irrelevant statistics on the expected coverage area and analysts' projections on potential commercial viability. *Opposition*, pp. 111-112.

[80] In order to meet the "commence construction" milestone, Ka-band licensees need only enter into a "non-contingent" satellite construction contract. *See* Order and Authorization, *Application of VisionStar, Incorporated, Licensee, Shant Hovnanian, Transferor And Echostar Visionstar Corporation, Transferee*; 24 CR 1326, ¶22 (2001). *See also Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299, ¶9 (1997); *AMSC Subsidiary Corp.*, 8 FCC Rcd 4040, ¶14, n. 27 (1993).

[81] In addition to the possible development of MMDS and other satellite broadband systems, the Applicants cite the prospect of new DSL standards. Such speculation about future technologies cannot be properly injected into a public interest, competition analysis. *See infra* ¶57.

this argument has marginal appeal only with respect to the ability of EchoStar and Hughes to compete against DSL and cable modem services in areas where those services are available. It has nothing to do with the situation in rural America, where StarBand and DIRECWAY are often the only alternatives and where the prices of those services are much higher than in those local markets where DSL and cable modem services compete.[82]

### 3. The Applicants Have Failed To Demonstrate That The Alleged Efficiencies Are Merger Specific.

43. According to the Commission, 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."[83] As the Commission recently held, "[e]fficiencies that are vague, speculative, and unverifiable will not be considered in evaluating the competitive effects of the proposed transaction."[84] The *Merger Guidelines* also make clear that the Applicants are required to demonstrate that the efficiencies it claims are merger specific.[85]

44. The Applicants' alleged efficiencies are not specific to the proposed Merger. For instance, NRTC and others demonstrated in their Petitions that there are several means by which EchoStar and DIRECTV each could deliver all local broadcast channels to all markets.[86] This

[82] *NRTC Petition*, pp. 50-51.

[83] *GTE-Bell Atlantic Order*, ¶240.

[84] *See In the Matter of the Application of Air Virginia, Inc. (Assignor) and Clear Channel Radio Licensee, Inc. (Assignee) For Consent to the Assignment of the License of WUMX (FM), Charlottesville, VA*, MM Docket No. 02-38, FCC 02-53, ¶30 (*Air Virginia*).

[85] *Merger Guidelines* at § 4.

[86] *NRTC Petition*, pp. 63-65; *NAB Petition*, pp. 89-91.

could be accomplished through a joint venture between the parties or with a third party. It also could be accomplished separately, through more efficient use of existing spectrum.[87]

45. The Applicants "anticipate" that the Merger will facilitate the standardization of functionally superior equipment.[88] But they fail to explain how this anticipated efficiency is a benefit, or how it is remotely related to the Merger. In fact, equipment can be standardized without resorting to a merger to monopoly.

46. The Applicants' prediction that their increased subscriber base will decrease programming costs which "may be" the basis for new programming is also not an efficiency created by the Merger. Rather, it is the exercise of market power by a monopolist able to leverage its dominance in distribution to advantage itself in negotiations with program suppliers.

47. In the *Air Virginia* case, the Commission recently designated for hearing a broadcast application that would result in two entities controlling more than 94 percent of the Charlottesville, Virginia radio advertising market.[89] The applicants claimed various efficiencies and benefits that would lower advertising rates and increase format choices. This evidence was disputed by a petitioner that contended that advertising rates had not been proven to be lower and that the format changes would result in less diversity. The Commission held that there was not enough information in the record to show that the efficiencies would be realized and thus designated the assignment application for hearing.

48. NRTC does not believe that a hearing is necessary in the proposed Merger, for two reasons. First, unlike *Air Virginia*, this case involves a merger to monopoly. Second, there are

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[87] *NRTC Petition*, pp. 57-69; *Pegasus Petition*, pp. 38-44.
[88] *Opposition*, p. 26.
[89] *Air Virginia*, ¶8.

no material facts at issue. It is clear from the pleadings that the claimed efficiencies are, on their face, illusory, non-existent or unrelated to the Merger. Assuming that it is even appropriate to consider efficiencies in a merger to monopoly, given EchoStar's failure to meet its burden of proof in establishing the nexus between the claimed efficiencies and the Merger, there is an insufficient basis to conclude that the benefits of this Merger outweigh the obvious competitive harm.

### D. The Anti-Competitive Effects Of The Merger Are Indisputable.

49. The Applicants have not shown -- nor can they -- that the proposed Merger will enhance competition.[90] To the contrary, the Merger would have severe anti-competitive effects. Following the Merger, tens of millions of consumers will have no choice in MVPD provider. The head-to-head competition between EchoStar and DIRECTV, which has benefited all consumers, would be eliminated.

#### 1. Other Technologies Are Not Comparable To DBS.

50. To address the obvious loss of consumer choice resulting from the proposed Merger, the Applicants argue that MMDS, SMATV and C-band are reasonable substitutes for DBS in areas not served by cable. Recent Commission reports, however, show that these technologies have suffered from dramatic losses in subscribership and are available, if at all, in only small pockets of the country.[91]

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[90] As Commissioner Copps recently stated in the context of the *Air Virginia* case, "For a robust marketplace of ideas to survive, *each community* must have a diversity of sources of information available to its members -- not just a *variety* of formats, but *diversity* of formats and of ownership. *See Air Virginia*, Statement of Commissioner Copps. Obviously, the instant Merger, with 100% ownership concentration for the delivery of MVPD programming throughout vast portions of the country, raises far more serious concerns regarding media concentration than a 94.2% consolidation between two entities in a single, small radio market.

[91] *See NRTC Petition*, pp. 23-28.

51. The notion, for instance, that MMDS operators will be able to bundle MVPD and broadband services across the allocated spectrum ignores realities related to the unavailability of equipment, the need to address inter-system interference and the rights of educators and commercial licensees as lessors of the spectrum.[92] More fundamentally, no MMDS operator has announced plans to provide bundled services using the MMDS spectrum.

52. Similarly, the Applicants cannot truly believe that C-band is competitive with DBS in rural America. Subscribership continues to decline dramatically and there are no indications that consumers are willing to continue purchasing large dish antennas.[93]

53. The Applicants' claim that New EchoStar will be subject to effective competition from C-band, MMDS and SMATV also directly contravenes EchoStar's previous statements in its lawsuit against DIRECTV. In that proceeding, EchoStar clearly admitted in response to Requests for Admissions that it did not compete with C-band; it did not compete with MMDS; and it did not compete with SMATV.[94]

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[92] While arguing that the "competitiveness of MMDS video offerings will likely be enhanced" by their roll-out of broadband services, *Opposition*, p. 52, the Applicants ignore that the FCC itself already has concluded that "most MMDS licenses will not be used in the future to compete in the MVPD market." *NRTC Petition*, p. 26, citing *Seventh Video Competition Report*, ¶88. Furthermore, DIRECTV itself recently removed any doubt as the viability of MMDS to provide MVPD services: within the last week or so, Nucentrix, a leading MMDS provider, entered into agreements with DIRECTV and Pegasus to convert the majority of its pay-TV subscriber base to satellite. Under the new agreements with DIRECTV and Pegasus, Nucentrix will promote DIRECTV as a replacement for its MMDS services. *Wireless Cable Op Sending Subs to DBS,* SKYREPORT, March 21, 2002.

[93] *See Seventh Video Competition Report*, ¶83; *See also Eighth Video Competition Report*, ¶67 (the number of subscribers abandoning the C-band service increased from 840 per day to more than 1,300 per day between the *Seventh Video Competition Report* and the *Eighth Video Competition Report*). The Applicants find it "odd" that as "one of the four major distributors of C-band programming," NRTC characterized C-band as a "fringe technology." There is nothing odd about it. Along with the rest of the C-band industry, NRTC's C-band subscribership has dropped dramatically in recent years and is currently less than 20,000. With this limited subscriber base, the Applicants inexplicably characterize NRTC as a "major" distributor of C-band service. *Opposition*, p. 51.

[94] Reply In Support Of DIRECTV's And Hughes' Motion To Determine Sufficiency Of Plaintiff's Response To Request For Admission No. 2, Civil Action No. 00-K-212 (U.S.D.C., Dist. of Colorado), Nov. 30, 2000. *See also* Plaintiffs' Response to DIRECTV's and Hughes' First Set of Requests For Admissions, Civil Action No. 00-K-212 (U.S.D.C., Dist. of Colorado), Sept. 8, 2000.

54. Regarding future competition from NRTC, the Applicants argue that "…NRTC's *exclusive* rights are limited and will expire in the future."[95] From this, they conclude (without explanation) that "[a]s a consequence, New EchoStar will be able to compete fully with NRTC/Pegasus throughout those areas where NRTC and Pegasus have distribution rights under their contracts."[96] To say the least, it is unclear how the expiration of NRTC's exclusive distribution rights will somehow allow NRTC and Pegasus to "compete fully" with New EchoStar. As explained in detail in the *NRTC Petition*, following the Merger NRTC would not be positioned to compete effectively with New EchoStar under any circumstances.[97]

55. The Applicants repeated assertion that NRTC "overcharges" rural consumers by $3.00 a month is wrong.[98] NRTC's members are free to price their services at the local level. However, they typically follow DIRECTV's recommended national price. They do not, as a matter of course, increase the recommended national price by $3.00 as the Applicants claim, although some members and Pegasus may not follow DIRECTV's recommendations in all cases.[99]

56. Even more specious -- and hypocritical -- is the Applicants' argument that future technologies not yet developed or deployed will offer competition to the merged entity. On one hand, the Applicants quote the *Merger Guidelines* for the proposition that "proper competition analysis is limited to alternatives that are 'practical in the business situation faced by the merging

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[95] *Opposition*, p. 51 (emphasis in original).
[96] *Id.*
[97] *NRTC Petition*, pp. 28-30.
[98] *See e.g., Opposition*, p. v.
[99] Pegasus is an affiliate, not a member, of NRTC.

firms' and should not rely on alternatives that are 'merely theoretical.'"[100] Then, in discussing competitive MVPD alternatives, the Applicants point to competition that may emerge from foreign DBS satellites,[101] MVDDS[102] and electric utilities.[103] None of these technologies, under any stretch of the imagination, is poised to offer significant competition to New EchoStar.

57. The Applicants cannot have it both ways. The *Merger Guidelines* were deliberately drafted to prevent consideration of possible competitors that may never enter the market, especially where, as here, there are substantial barriers created by the very high fixed costs required to enter the market.

### 2. The Number Of Households Unpassed By Cable Is Much Larger Than The Applicants Claim.

58. While clinging to their discredited story that 97.1% of all television households in the United States have access to cable -- a figure that defies reality[104] -- the Applicants also assert that the number of homes passed by cable is merely a "red herring."[105] They claim that the number is not "decisionally significant," because New EchoStar will be unable to isolate such homes for

[100] *Opposition*, p. 8.

[101] No foreign DBS satellite currently serves the U.S. market, and future service from foreign slots is theoretical at best. Also hollow is the Applicants' claim that "other companies have ample opportunity to use satellite spectrum and orbital locations … in an attempt to introduce additional competition in the MVPD market," and their related claim that "ample FSS spectrum remains available for medium-power and high-power satellite DTH initiatives. *Opposition*, pp. 49, 50.

[102] The MVDDS applications cited by the Applicants as yet another competitor to DBS, are not even granted by the Commission, let alone operational or feasible in rural America. *See NRTC Petition*, pp. 23, 27-28.

[103] The electric and gas utilities that the Applicants claim "appear to hold great promise for competition in rural areas" are undefined. *Opposition*, p.53. There are no specifics provided by the Applicants as to the identity of these theoretical competitors, the scope or nature of their services, or how their terrestrially-based business plans would somehow hold "great promise" or make commercial sense for rural America.

[104] *See NRTC Petition*, pp. 6-16, for a discussion of how New EchoStar has relied on flawed data to create the false impression that cable services are available throughout virtually the entire country.

[105] *Opposition*, p. 66.

anticompetitive pricing and behavior.[106] In any event, they respond that "national pricing" will protect from discrimination any homes not passed by cable.[107]

59. Contrary to the Applicants' claims, the number of homes not passed by cable is critically important to the Commission's evaluation of the proposed Merger. It represents the universe of homes located in different markets throughout the country that currently rely solely on EchoStar and DIRECTV to receive MVPD services.

60. The Applicants take exception to NRTC's reliance on data and observations by the National Telecommunications and Information Administration (NTIA) and the Rural Utilities Service (RUS). They argue that the availability of cable to unoccupied housing units and occupied households without a television is "indisputably irrelevant."[108] As NTIA and RUS pointed out, however, the cable industry's methodology for calculating the percentage of Homes Passed *includes* unoccupied housing units and occupied households without television sets -- and thereby creates an artificially high number of Homes Passed.[109] If homes are counted as passed by cable regardless of whether they are occupied, and regardless of whether they have a television set, then the resulting number should be divided into *all Housing Units* (which include

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[106] *Id.*

[107] *Id.*, pp. 60, 65-66. Indeed, price discrimination is not the only problem created by a monopoly. In all households not passed by cable, consumers will have no choice in MVPD provider. They will be required to take service on the terms and conditions established by New EchoStar, or they will have to do without MVPD service altogether.

[108] *Opposition*, p. 60.

[109] This conclusion was not "entirely unsupported," as the Applicants erroneously claim. *Opposition*, p. 61. In addition to pointing out obvious deficiencies in the cable industry's methodology described above, NRTC attached to its Petition a copy of the actual Questionnaire sent to cable operators by Kagan. *NRTC Petition*, p. 10; Exhibit E. It makes abundantly clear that cable operators are not asked to -- and do not -- count only occupied housing units and "TV Households" in determining the number of homes passed by their systems. While the Applicants claim that cable operators have "every incentive to determine [the correct homes passed] figure because it defines their potential local customer base," in fact they have every incentive to *inflate* this number for that very reason (*e.g.,* increased advertising revenues). *Opposition*, p. 61.

all homes, regardless of whether they are occupied or have television sets), not TV Households (which include only occupied Housing Units with television sets).

61. It is this false and misleading number -- 97.1% -- that the Applicants point to as proof that few homes ("only" 3,000,000[110]) will be left without an MVPD alternative if the Merger is approved. When calculated correctly, however, as NTIA and RUS show, the percentage of Homes Passed is closer to 81% (leaving 23,000,000 households without access to cable).[111] This disparity clearly is *not* "indisputably irrelevant," as the Applicants' claim.[112] It shows the devastatingly harmful impact of the proposed Merger on consumers located in specific markets across the country where there is no access to a cable alternative.[113]

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[110] DIRECTV's own internal surveys show that *more than three million households are not passed by cable just among DIRECTV's own 10.7 million subscribers. DIRECTV 2001 Cable Comments*, p. 13 (stating that only 71% of DIRECTV customers live in areas able to receive cable television service). If extrapolated nationwide, as pointed out in the *NRTC Petition*, DIRECTV's own surveys lead to the conclusion that some 35,000,000 homes may not be passed by cable. *See NRTC Petition*, p. 15. *See also NAB Petition*, p. 47; *Pegasus Petition*, pp. 17-18. New EchoStar's assertion that the 3,000,000 figure may actually be *too high* is an astonishing piece of advocacy. In six states, cable operators report more Homes Passed than the Census Bureau even reports as Households. *NRTC Petition*, pp. 11-12. New EchoStar's claim that a cable pass rate of *more than 100%* is somehow unduly conservative does not warrant further response. *Opposition*, pp. 61-62.

[111] If homes are counted as passed by cable regardless of whether they are occupied, and regardless of whether they have a television set, then the resulting number should be divided into *all Housing Units* (which include all homes, regardless of whether they are occupied or have television sets), not TV Households (which include only occupied Housing Units with television sets). By performing the math correctly, the percentage of Homes Passed by cable *decreases* from 97% to 81%, while the number of homes *not* passed by cable *increases* from approximately 3,000,000 to 25,000,000. *See NRTC Petition*, pp. 5-16. *See also* National Telecommunications and Information Administration and Rural Utilities Service, *Advanced Telecommunications In Rural America: The Challenge of Bringing Broadband Service to All Americans*, April, 2000, n. 62.

[112] The Applicants attempt to quibble with NRTC's reliance in some instances on Warren data and in others on Kagan data. *Opposition*, p. 62-63. First, as well recognized by the Commission, Warren data is historically *more conservative* than Kagan data in regard to the number of Homes Passed by cable. *Seventh Video Competition Report*, ¶18, fn. 23. NRTC's demonstration that Warren data is defective in some cases, therefore, certainly undercuts the more optimistic Kagan data. Secondly, any dispute between the merits of Warren vs. Kagan data is completely unrelated to the deficiencies in the cable industry's *methodology* of calculating the number of Homes Passed. Likewise, the Applicants' complaint that NRTC compared Kagan data unfavorably to U.S. Census Bureau data should be quickly discounted by the Commission. *Id*. The FCC may comfortably rely upon the U.S. Census Bureau for data relative to occupied households in the U.S.

[113] Dr. Willig compounds the error in his selection of data regarding houses unpassed by cable by assuming the existence of a national cable market in which all cable companies can be aggregated into a single cable "market share." If it is assumed that a national market exists, then all cable companies are treated as if they are one. In his own publication on mergers, Dr. Willig opines that where products are relatively homogeneous, as with cable and

62. More importantly, while the Applicants dispute the number of homes not passed by cable at the *national* level, they fail to provide any information at all regarding the dearth of competition resulting from the Merger *at the local level* -- which has always been the focus of the Commission's competitive analysis.[114] Instead, they attack Dr. MacAvoy's detailed and methodical assessment of post-Merger competition at the local level. But in doing so, they misapply the data used by Dr. MacAvoy.

63. The Applicants argue that some homes in areas targeted by Dr. MacAvoy as "not passed by cable" are in fact "passed by cable."[115] To support their attack, the Applicant analyzed DIRECTV churn data to determine whether any customers who lived in *zip codes* relied upon by Dr. MacAvoy had churned from DIRECTV to cable.[116] Further, the Applicants' consultant conducted a survey (the parameters of which are undefined) by contacting residents in particular

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DBS, the HHI should be calculated based on market shares reflecting capacity, not sales. In the context of the proposed Merger, this means that HHI should be calculated based on coverage, not subscribership. This approach to calculating market shares leads to the conclusion that the proposed Merger changes this national market from one in which there are three competitors with equal coverage (cable, EchoStar and DIRECTV) to one in which there are only two, New EchoStar and cable. The HHI for such a market increases from approximately 3267 to 5000, for an increase of 1733. To the extent that homes are *unpassed* by cable in this hypothetical national market, then the DBS companies, with their ability to serve *all* households, actually have a larger nationwide market share than cable and the presumed harmful effects of the Merger are further exacerbated. *See* Robert D. Willig, "Merger Analysis, Industrial Organization Theory, and Merger Guidelines," Brookings Papers: Microeconomics, 1991, pp. 281, 285.

[114] As discussed in detail in the *NRTC Petition* -- and ignored by the Applicants in their *Opposition* -- in evaluating DBS spectrum aggregation cases, the Commission has always emphasized that the relevant consideration is the state of MVPD competition at the *local* level. In approving some mergers, the Commission looked at the national Homes Passed rate and relied on the safety net created at the local level by the existence of two competing DBS providers in all areas not passed by cable. With the proposed Merger of the only two DBS providers, however, that policy rationale disappears along with the safety net. *See NRTC Petition*, pp. 16-20. *See also* Order and Authorization, *MCI Telecommunications Corporation, Assignor and EchoStar 110 Corporation, Assignee*, 15 CR 1038, ¶10 (1999); Order and Authorization, *United States Broadcasting Co. Transferor and DIRECTV Enterprises, Inc. Transferee*, 15 CR 645, ¶13 (1999); Order And Authorization, *Tempo Satellite, Inc., Assignor and DIRECTV Enterprises, Inc., Assignee; Application for Consent to Assign Authorization to Construct, Launch and Operate a Direct Broadcast Satellite System Using 11 Frequencies at the 119° W.L. Orbital Location*, 16 CR 27, ¶11 (1999).

[115] *Opposition*, pp. 63-65

[116] *Id.*, p. 64.

*zip codes*. Apparently, some respondents answered that cable was available. From this secret survey, the Applicants conclude that Dr. MacAvoy's analysis is defective.[117]

64. As described in the MacAvoy Response, however, Dr. MacAvoy did not examine zip codes in conducting his analysis of the impact of the proposed Merger at the local level. Rather, he based his analysis strictly on Census Blocks, which are far more localized. On average, there are more than 190 Census Blocks contained in a single zip code.[118] As a result, the Applicants' churn data and informal survey results prove nothing more than that the individuals churning from DIRECTV or contacted by DIRECTV's consultant apparently were located in those areas of the zip codes where cable was available -- but were outside the Census Blocks relied on by Dr. MacAvoy.[119] Dr. Willig's critique of Dr. MacAvoy's findings is premised on his misunderstanding of Dr. MacAvoy's methodology.

### 3. The Applicants Ignore That The DBS Industry Is Thriving And That EchoStar And DIRECTV Are Competing Successfully Against Each Other.

65. The Applicants paint a bleak picture of their ability to compete against cable absent the proposed Merger.[120] They are notably silent, however, as to their tremendous successes as independent companies -- *without* the Merger.

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[117] *Id.*

[118] As of 1999, there were 42,193 Zip Codes in the United States compared to 8 million Census Blocks identified for Census 2000, creating a ratio of approximately 190 Census Blocks per zip code. *See U.S. Census Bureau, 1999 Zip Codes* (visited March 26, 2002) <http://www.census.gov/geo/www/tiger/zip1999.html> (containing a data file of 42,193 zip codes); *See also Glossary* (visited March 26, 2002) <http://www.census.gov/dmd/www/glossary/glossary_c.html>.

[119] *See MacAvoy Response*, pp. 10-11. Notably, Dr. Willig has not provided the full results of his survey. There may, in fact, be deep flaws in the analysis, or the summary information he did provide may be misleading. As one obvious example, the Applicants have not disclosed how many of those persons contacted live in areas where cable is *not* available. Presumably, the survey results will be made available for review pursuant to the Commission's Information Request dated February 4, 2002. *See* Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (February 4, 2002).

[120] *See, e.g.*, *Opposition*, pp. 38, 47.

66. The DBS industry, represented collectively by EchoStar and DIRECTV, is flourishing as a competitive force. More than two out of every three new MVPD subscribers choose DBS over cable.[121] Every day, DBS gains more than 8,500 subscribers.[122] In 2001 alone, EchoStar and DIRECTV reported a combined 24% increase in subscribership and a 37.5% increase in revenues totaling $12.1 billion.[123] Today, there are more DBS subscribers (17.5 million) than digital cable subscribers (14.4 million).[124]

67. The Applicants claim -- with a straight corporate face -- that these glowing statistics create a deceptively "false, rosy" picture about the state of DBS competition.[125] However, their recent public statements and Earnings Reports confirm their phenomenal success as stand-alone companies competing with each other and with cable.[126]

68. For example, at the same time the Applicants were warning the Commission that their customers were poised to "abandon the DBS platform" if the Merger is not approved, EchoStar advised investors that it had acquired 400,000 net new subscribers in the last quarter of 2001, for a total of 1,570,000 net new subscribers for 2001 alone.[127] EchoStar pointed out to investors that it intends to add at least 1,170,000 net new subscribers in calendar year 2002, finishing the year

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[121] The DBS industry's current subscriber growth rate is nearly two and a half times cable's. *Eighth Video Competition Report*, ¶8.

[122] *Id.*, ¶58.

[123] *See NRTC Response*, p. 4; National *Rural Electric Cooperative Association Comments*, submitted February 4, 2002, pp. 5-6; *Petition to Deny of the Communications Workers of America*, submitted February 4, 2002, pp. 3-4; *Petition to Deny of the American Cable Association*, submitted February 4, 2002, p. 12; *Pegasus Petition*, p. 9. See also *Eighth Video Competition Report*, ¶57, Appendix C, Table C-1.

[124] *See Kagan Broadband*, February 28, 2002, p. 1.

[125] *Opposition*, pp. 66-67.

[126] *See EchoStar Investment Call*; *See also Hughes Investment Call*. *See also "EchoStar Ends 2001 On Positive Note*," Satellite Business News, March 13, 2002, p.1.

[127] *EchoStar Investment Call* (statement of Michael McDonnell, Chief Financial Officer, EchoStar.).

with more than 8,000,000 subscribers. These subscriber additions, as noted by EchoStar, will reflect a growth rate in the "high teens."[128]

69. Similarly, in January 2002, Hughes reported a 13% increase in subscribers and stated that it expected to add 1,200,000 net new subscribers during calendar year 2002, including 200,000 to 250,000 during the first quarter.[129] This accomplishment, in their words, will constitute a "stellar year."[130] Even so, on March 21, 2002, Hughes raised its first quarter guidance. Based on quarter-to-date performance, DIRECTV increased its subscriber projections by 62.5%, to 325,000 net new subscribers for the first quarter alone.[131]

70. The Applicants' revenue numbers are even more extraordinary. While cautioning the Commission about their "degraded ability to compete with cable" absent the proposed Merger, EchoStar reported a 47% increase in revenues over the previous year, and projected revenues for 2002 to be 20 to 25% *higher*.[132] Not to be outdone, Hughes reported the "largest quarterly revenues in [its] history," noting that the increase was due primarily to the "continued strong demand for DIRECTV services in both the United States and Latin America."[133]

71. Charles Ergen, EchoStar's CEO, recently trumpeted his company's ability to compete (notably, without the Merger):

> EBITDA for the fourth quarter was 171 million, our best ever, as we continue to lever the economies of scale inherent in the DBS platform… We posted significant positive EBITDA in all four quarters in 2001, and currently

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[128] *EchoStar Investment Call*.

[129] *Hughes Investment Call*, p. 5.

[130] *Id*. at p. 2 (statement of Jack Shaw, President and CEO of Hughes, noting DIRECTV in the U.S. expects to have a stellar year, by bringing over a million new subscribers).

[131] *See Hughes Press Release*.

[132] *EchoStar Investment Call*.

[133] SEC Form 8K, filed by Hughes Electronics, Inc., January 15, 2002, p. 1.

> expect 2002 EBITDA to be approximately 80 to 100% higher than 2001 EBITDA.[134]

72. These are not the signs of struggling or failing competitors that need to merge in order to compete successfully against the entrenched cable industry, as the Applicants would have the Commission believe. Rather, these statistics demonstrate that facilities-based DBS competition is succeeding and producing tangible public interest benefits, without the unwarranted Merger of the nation's only high power, full-CONUS DBS providers.

73. Not only is DBS thriving, but EchoStar and DIRECTV are competing vigorously, one against the other. In his original Declaration, Dr. Willig took the position that EchoStar and DIRECTV did not compete against one another.[135] In their Opposition, EchoStar and DIRECTV finally concede that they do compete "to an extent," but they attempt to minimize their competition by producing "churn data" showing that "only nine percent of DIRECTV's current subscribers were previously EchoStar subscribers."[136] They then leap to the conclusion that no substantial competition exists between the two and that their subscriber acquisition efforts are devoted almost exclusively to "luring" subscribers away from cable.[137]

74. On its face, the Applicants' intra-DBS churn data shows that almost 1 out of 10 DIRECTV subscribers was "taken" from EchoStar. Presumably, a similar percentage of EchoStar's subscribers was "taken" from DIRECTV. This hardly presents a compelling case that the two companies do not compete for each others' subscribers. Instead, it shows significant

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[134] *EchoStar Investment Call*.
[135] *Willig Declaration*, n. 5, n. 25.
[136] *Opposition*, pp. 42-43.
[137] *Id.*, p. 43.

intra-DBS competition -- especially considering the expense and inconvenience for existing DBS subscribers to convert to new reception systems.

75. More importantly, the Applicants' intra-DBS churn data do not address at all the competition between EchoStar and DIRECTV for other types of new subscribers (*i.e.,* those who do not happen to be current subscribers of the other DBS provider). In particular, as described in the *MacAvoy Response*, the Applicants' churn data ignore competition between EchoStar and DIRECTV for potential subscribers from the pool of existing cable subscribers. Moreover, the data ignore potential new subscribers from the pool of those who currently subscribe to *no* MVPD services, especially in rural areas where the two DBS providers are the only sources of MVPD service.[138]

76. NRTC and others have shown beyond doubt that competition between EchoStar and DIRECTV -- not just for the other's current subscribers, but for *any* new subscribers, including cable and non-current-DBS subscribers -- is a virtual "ping pong" match.[139] Repeatedly, one offers a special deal only to be followed shortly thereafter by a similar offering from the other. These consumer benefits would be eliminated if the Merger were approved.

77. The Applicants' attempt to discredit what everyone knows to be a fact is unavailing. Even DIRECTV Chairman Eddy Hartenstein recently conceded that "when we first announced the merger *we were two separate companies, competing companies in the same [market]*

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[138] *MacAvoy Response*, pp. 6-8. Dr. MacAvoy demonstrates, for instance, that the only two sellers of a nearly identical product have vigorously contested the acquisition of new subscribers by undertaking what EchoStar calls SAC or "subscriber acquisition costs." To initiate a larger percentage gain in new subscribers, Dr. MacAvoy shows that they offer discounts on equipment and installation that increase SAC. *Id.*, p. 8.

[139] *NRTC Petition*, pp. 33-34.

*space*."[140] Despite the Applicants' denials, there can be no doubt that EchoStar and DIRECTV are in fact vigorous competitors with one another.

78. The documented success of EchoStar and DIRECTV clearly undercuts their claim that "[a]bsent a merger, there is a profound risk that DBS will devolve from its current position in the MVPD market as a quality and innovations leader to a lesser alternative that will cause its customers to abandon the DBS platform."[141] Indeed, the record in this proceeding is devoid of *any* evidence to support the Applicants' claim. Their claim is a smokescreen, pure and simple. It provides no basis for the Commission to act favorably on the Merger.

## II. CONCLUSION.

EchoStar and DIRECTV have fallen far short of satisfying their burden of proving by a preponderance of the evidence that the proposed Merger would serve the public interest. The proposed Merger is clearly inconsistent with the Commission's long established goals of promoting facilities-based competition and consumer choice in the delivery of both multichannel video programming and broadband services. Approval of the Merger would result in the ultimate flip-flop -- from a thriving, facilities-based competitive marketplace to a highly regulated one controlled by a monopolist.

The *Application* should be denied.

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[140] Jeffrey Williams, "*EchoStar, DirecTV Leap into Local-into-Local Politics*," Satellite Business News, March 13, 2002, p. 1.
[141] *Opposition*, p. 38

**Steven T. Berman, Senior Vice President**
**Business Affairs and General Counsel**

**NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**
**2121 Cooperative Way, Suite 500**
**Herndon, VA 20171**

Robert J. Rini

**Robert J. Rini**
**Stephen E. Coran**
**Stephen M. Ryan**
**Manatt, Phelps & Phillips, LLP**
**1501 M Street, NW, Suite 700**
**Washington, D.C. 20005-1700**
**(202) 463-4301**

Jack Richards

**Jack Richards**
**Kevin G. Rupy**
**Keller and Heckman LLP**
**1001 G Street, NW**
**Washington, D.C. 20001**
**(202) 434-4210**

**April 4, 2002**

**Certificate of Service**

I HEREBY CERTIFY that on this 4th day of April, 2002, a true and correct copy of the foregoing Ex Parte Reply to Opposition of the National Rural Telecommunications Cooperative in the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (CS Docket No. 01-348), was submitted electronically to the Federal Communications Commission and served via courier, electronic mail or First Class Mail upon the following:

**Served via courier:**

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-B201
Washington, D.C. 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-B115
Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-A302
Washington, D.C. 20554

The Honorable Kevin J. Martin
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-A302
Washington, D.C. 20554

William F. Caton
Acting Secretary
445 Twelfth Street, S.W., Room TW-B204
Washington, D.C. 20554

Peter A. Tenhula
Senior Legal Advisor to Chairman Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Susan Eid
Legal Advisor to Chairman Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Senior Legal Advisor to Commissioner Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Suzanna Zwerling
Media and Consumer Protection
Legal Advisor to Commissioner Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Paul Margie
Spectrum and International Legal Advisor to Commissioner Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Bryan Tramont
Senior Legal Advisor to Commissioner Abernathy
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Sam Feder
Senior Legal Advisor to Commissioner Martin
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Catherine Crutcher Bohigian
Legal Advisor on Cable and Mass Media Issues
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Donald Abelson
Chief, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Anna M. Gomez
Deputy Bureau Chief, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

William H. Johnson
Deputy Chief, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Tom Tycz
Chief
Satellite and Radiocommunications Division, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A624
Washington, D.C. 20554

Cassandra Thomas
Deputy Chief
Satellite and Radiocommunications Division, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A624
Washington, D.C. 20554

Rosalee Chiara
Satellite and Radiocommunications Division, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A624
Washington, D.C. 20554

Fern Jarmulnek
Satellite & Radiocommunication Division
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A767
Washington, D.C. 20554

Jennifer Gilsenan
Chief
Satellite Policy Branch
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A767
Washington, D.C. 20554

Jonathan Levy
Office of Plans and Policy
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Gary M. Epstein
James H. Barker
Arthur S. Landerholm
Latham & Watkins
555 11th Street, N.W.
Suite 1100
Washington, D.C. 20004
*Counsel for General Motors Corporation and Hughes Electronics Corporation*

Pantelis Michalopoulos
Philip L. Malet
Rhonda M. Bolton
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
*Counsel for EchoStar Communications Corporation*

**Served via electronic mail:**
W. Kenneth Ferree
Chief, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

James Bird
Office of General Counsel
445 12 Street, S.W.
Room 8-C824
Washington, D.C. 20554

Barbara Esbin
Cable Service Bureau
445 12 Street, S.W.
Room 3-C458
Washington, D.C. 20554

Marcia Glauberman
Media Bureau
445 12th Street, S.W.
Room 3-A738
Washington, D.C 20554

Julius Knapp
Office of Engineering and Technology
445 12th Street, S.W.
Room 7-B133
Washington, D.C. 20554

JoAnn Lucanik
International Bureau
445 12th Street, S.W.
Room 6-C416
Washington, D.C. 20554

David Sappington
Office of Plans and Policy
445 12th Street, S.W.
Room 7-C452
Washington, D.C. 20554

Royce Sherlock
Media Bureau
445 12th Street, S.W.
Room 3-A729
Washington, D.C. 20554

Douglas W. Webbink
Chief Economist
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor West
Washington, D.C. 20554

Qualex International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

**Served via First Class mail:**
Barry D. Wood
Stuart W. Nolan, Jr.
Wood, Maines & Brown, LLC
1827 Jefferson Place, N.W.
Washington, D.C. 20036
*Counsel for Eagle III Broadcasting, LLC*

Barry D. Wood
Paul H. Brown
Wood, Maines & Brown, LLC
1827 Jefferson Place, N.W.
Washington, D.C. 20036
*Counsel for Brunson Communications, Inc.*

Edward P. Henneberry
Dylan M. Carson
Pradeep Victor
Howrey Simon Arnold & White, LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
*Counsel for National Association of Broadcasters*

Thomas P. Olson
Nicole Telecki
Maya Alexandri
C. Colin Rushing
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
*Counsel for National Association of Broadcasters*

Henry L. Baumann
Benjamin F. P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
*Counsel for National Association of Broadcasters*

Scott R. Flick
Paul A Cicelski
Michael W. Richards
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
*Counsel for Univision Communications, Inc.*

Mark A. Balkin
Joseph C. Chautin, III
Hardy, Carey & Chautin, LLP
110 Veterans Blvd., Suite 300
Metaire, LA 70005
*Counsel for Carolina Christian Television, Inc. and LeSea Broadcasting Corporation*

Patrick J. Grant
Robert M. Cooper
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
*Counsel for Pegasus Communications Corporation*

Ted S. Lodge
President & Chief Operating Officer
Pegasus Communications Corporation
225 City Line Avenue
Suite 200
Bala Cynwyd, PA 19004

Deborah A. Lathen
Lathen Consulting
1650 Tysons Boulevard, Suite 1150
McLean, VA 22102
*Counsel for Northpoint Technology, Ltd.*

Christopher C. Cinnamon
Emily A. Denney
Nicole E. Paolini
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, IL 60601
*Counsel for American Cable Assocation*

Matthew W. Polka
President
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, PA 15220

John R. Feore, Jr.
Kevin P. Latek
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
*Counsel for Paxson Communications Corporation*

William D. Silva
Law Offices of William D. Silva
5335 Wisconsin Avenue, N.W.
Suite 400
Washington, D.C. 20015-2003
*Counsel for The Word Network*

Arthur V. Belendiuk
Anthony M. Alessi
Smithwick & Belendiuk, PC
5028 Wisconsin Avenue, Suite 301
Washington, D.C. 20016
*Counsel for Johnson Broadcasting, Inc.*

David P. McClure
President & CEO
US Internet Industry Association
815 Connecticut Avenue, N.W.
Suite 620
Washington, D.C. 20006

Tom Davidson
Phil Marchesiello
Akin, Gump, Strauss, Hauer & Feld, LLP
1676 International Drive
Penthouse
McLean, VA 22102
*Counsel for Vivendi Universal, S.A.*

John B. Schwartz
President
Public Communicators, Inc.
P.O. Box 6060
Boulder, CO 80306

Jeffrey A. Eisenach
President
The Progress & Freedom Foundation
1301 K Street, N.W.
Suite 550E
Washington, D.C. 20005

Dr. Mark Cooper
Consumer Federation of America
1424 16th Street, N.W.
Suite 604
Washington, D.C. 20036

Jonathan D. Blake
Amy L. Levine
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington D.C. 20004
*Counsel for Association of Public Television Stations and the Public Broadcasting Service*

Marilyn Mohrman-Gillis
Lonna D. Thompson
Andrew D. Coltar
Association of Public Television Stations
666 11th Street, N.W.
Suite 1100
Washington, D.C. 20006

Paul Greco
Public Broadcasting Service
1320 Bradock Place
Alexandria, VA 22314

Debbie Goldman
George Kohl
Communications Workers of America
501 Third Street, N.W.
Washington D.C. 20001

Alan McCollough
W. Stephen Cannon
Circuit City Stores, Inc.
9950 Maryland Drive
Richmond, VA 23233

Gene Kimmelman
Christopher Murray
Consumers Union
1666 Connecticut Avenue, N.W.
Suite 310
Washington, D.C. 20006

Cheryl Leanza
Media Access Project
1625 K Street, N.W.
Washington, D.C. 20006

Charles B. Slocum
Writers Guild of America
7000 West Third Street
Los Angeles, CA 90048

Robert S. Schwartz
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
*Counsel for Circuit City, Inc.*

Peter C. Pappas
Executive Vice President
Pappas Telecasting Companies
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, D.C. 20004

Andrew Z. Schwartz
Richard W. Benka
Richard M. Brunell
Foley, Hoag & Elliot, LLP
One Post Office Sqare
Boston, MA 02109
*Counsel for PrimeTtime 24 Joint Venture*

Jared Aburzzese
World Satellite Network
11044 Research Boulevard
Suite C-500
Austin, TX 78759

James V. DeLong
Competitive Enterprise Institute
1001 Connecticut Avenue, N.W.
Suite 1250
Washington, D.C. 20036

Wallace F. Tillman
Tracey B. Steiner
National Rural Electric Cooperative Association
4301 Wilson Boulevard
Arlington, VA 22203

G. Nanette Thompson
Regulatory Commission of Alaska
701 West 8th Avenue
Suite 300
Anchorage, Alaska 99501

Gary L. Stooksbury
President & CEO
Aiken Electric Satellite TV, Inc.
2790 Wagener Rd
Aiken, SC 29801

Alan C. Campbell
Peter Tannenwald
Kevin M. Walsh
Irvin, Campbell & Tannenwald, PC
1730 Rhode Island Avenue, N.W.
Suite 200
Washington, D.C. 20036
*Counsel for Family Stations, Inc. North Pacific International Television, Inc.*

National Consumers League
1701 K Street, N.W.
Suite 1200
Washington, D.C. 20006
Attn: General Counsel's Office

National Farmers Union
400 North Capitol Street, N.W.
Suite 790
Washington, D.C. 20001
Attn: General Counsel's Office

The National Grange of the Order of Patrons
of Husbandry
1616 H Street, N.W.
Washington, D.C. 20006
Attn: General Counsel's Office

Tammy Hines

Tammy Hines