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

RESPONSE OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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SUMMARY

Numerous parties representing broad segments of America are united in their opposition to the Merger. Unlike the brief Comments filed in support of the Merger, which simply repeat the Applicants' unfounded claims, the National Rural Telecommunications Cooperative (NRTC), National Association of Broadcasters (NAB) and Pegasus Communications Corporation (Pegasus) submitted detailed legal, engineering and economic analyses demonstrating the profound anticompetitive effects of the Merger -- particularly in rural America, where there will be no other comparable multichannel or broadband services available.

Even those in favor of the Merger recognize its shortcomings and admit that numerous conditions would be necessary to protect the public from its adverse effects. Using different analytical approaches, however, NRTC, NAB and Pegasus each showed that, even with conditions, the Merger will not generate any specific efficiencies: for example, it will *not* lead to lower prices; it will *not* ensure that local television service will be extended to rural areas; and it will *not* lead to more spectrum efficient technologies or other innovations.

In particular, even with "national pricing," NRTC, NAB and Pegasus showed through independent economic analyses that the national price would be higher than the existing competitive price. Moreover, national pricing can be easily gamed and would never deliver the benefits of facilities-based competition: greater consumer choices, lower prices, better service and more innovation.

Engineering analyses also showed that competition between EchoStar and DIRECTV will lead to carriage of more local stations than will a monopoly subject to various conditions of carriage. Without merging, EchoStar and DIRECTV each can transmit all local television

stations in the United States using engineering techniques that already have been successfully deployed.

The proposed conditions would make the Commission's rate regulation of the cable industry (which required hundreds of new staff positions and appropriate budget increases) pale by comparison. Attempts to enforce the conditions would dramatically increase the FCC's administrative burdens, without generating any of the public benefits that otherwise would result from facilities-based competition.

The Commission should not replace a fully functioning market -- where consumers can choose from among competing providers based on service and price -- with a highly regulated monopoly based on unenforceable and inadequate conditions. As many of the Commenters pointed out, EchoStar and DIRECTV reported *a combined 24 percent increase in subscribership and a 37.5% increase in revenues totaling $12.1 billion in 2001 alone.* These are not the signs of two failing competitors that need to merge in order to survive, as the Applicants and their supporters would have the Commission believe. Rather, these statistics demonstrate conclusively that facilities-based DBS competition is succeeding and producing tangible public benefits. The Merger would stop that progress in its tracks.

As the Petitions and Comments make clear, the proposed Merger will eliminate consumer choice and result in higher prices, less innovation and lower quality service. These consequences will be especially profound in rural America, where approximately 25,000,000 households will be forced to accept New EchoStar's offerings or do without multichannel video and broadband services.

The Application should be denied.

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NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

The National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby submits this Response to the Petitions and Comments filed in connection with the application of EchoStar Communications Corporation (EchoStar), General Motors Corporation (GM) and Hughes Electronics Corporation (Hughes), a subsidiary of GM (collectively, the Applicants), to transfer control of their satellite, earth station and other related authorizations to New EchoStar (the Merger).[1]

NRTC commends the Cable Services Bureau for its recent letter to the Applicants requesting detailed information needed to evaluate the Merger.[2] NRTC urges the Commission to demand full and complete answers from the Applicants and to ensure that all responsive

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[1] 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) (the Application). *See also* Cable Service Bureau Action, EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control, CS Docket No. 01-348, DA 01-3005 (released December 21, 2001).

[2] *See* Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, Federal Communications Commission, to the Applicants (February 4, 2002).

information is made available for review and comment in accordance with the Protective Order.[3] The Commission also should explore, along with the Department of Justice's Antitrust Division, all circumstances surrounding the private negotiations between EchoStar and Hughes that concluded last year regarding opportunities for the two companies to cooperate in delivering local broadcast channels without the necessity of merging.[4]

The numerous parties opposing the Merger represent broad segments of America: broadcasters, satellite companies, consumer groups and unions, to name a few.[5] Despite their diverse interests, they all sounded the common theme that the proposed Merger would be contrary to the public interest. Virtually all agreed with NRTC that the Merger would create an unacceptable monopoly in rural America, resulting in fewer if any choices in providers, higher prices and lower quality MVPD and broadband services.[6] These consequences will be especially profound in rural America, where approximately 25,000,000 households will be forced to accept

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[3] *See* Order Adopting Protective Order, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348, DA 02-27 (released January 9, 2002).

[4] *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).

[5] Petitions to Deny were filed by NRTC (*NRTC Petition*), the National Association of Broadcasters (*NAB Petition*), Pegasus Communications Corporation (*Pegasus Petition*), the American Cable Association (*ACA Petition*), Paxson Communications (*Paxson Petition*), Univision Communications Inc. (*Univision Petition*), Carolina Christian TV, Inc. and LeSea Broadcasting Corporation (*Carolina Petition*), Johnson Broadcasting, Inc., the Word Network, the Communications Workers of America (*CWA Petition*), Eagle III Broadcasting, LLC, Family Stations, Inc., Northpoint Technology, Ltd. (*Northpoint Petition*), the American Cable Association (*ACA Petition*), and the National Consumers League, National Farmers Union and National Grange (*Consumers League Petition*). In addition, Comments opposing the merger were filed by the National Rural Electric Cooperative Association (*NRECA Comments*), Primetime 24 Joint Venture (*Primetime 24 Comments*), Pappas Telecasting Companies (*Pappas Comments*), the American Antitrust Institute (*AAI Comments*) and approximately 40 others.

[6] *See Primetime 24 Comments*, pp. 4-5 (EchoStar would have a virtual monopoly on MVPD services in areas not served by cable); *NAB Petition*, pp. 5-6, 44-49; *Consumers League Petition*, pp. 1-3 (the merger would "create a single national provider of MVPD service, reduce competition from two companies to one"); *Pegasus Petition*, pp. 15-21 (in rural and other areas where digital cable is not available, EchoStar's acquisition of DIRECTV is a merger to monopoly); *NRECA Comments*, pp. 1-9 (the loss of MVPD competition will particularly disadvantage rural Americans); *AAI Comments*, p. 2; *Pappas Comments*, pp. 15-16; Comments of Aiken Electric Satellite TV, Inc. pp. 1-2; *Consumers League Petition,* pp. 1-3. *See also* Letter from Senator Max Baucus, Montana, to Michael Powell, Chairman, Federal Communications Commission (December 26, 2001) (noting that 30 million Americans and 130,000 Montana residents lack access to cable).

New EchoStar's offerings -- or do without multichannel video program distribution (MVPD) and broadband services altogether.

I. RESPONSE

A. The Petitions And Comments Express Widespread Opposition To The Proposed Merger And Demonstrate A Particular Concern With Its Impact On Rural Americans.

1. The brief Comments filed in support of the Merger reiterate the erroneous "evidence" and flawed reasoning contained in the Application.[7] They do not independently analyze the Applicants' claims, but merely repeat them. On the other hand, three parties (NRTC, NAB, Pegasus) submitted detailed legal, engineering and economic analyses, demonstrating the profound anticompetitive effects of the proposed Merger.[8] They showed not only that it would result in fewer choices, higher prices and lower quality service, but that it would *not* generate any specific efficiencies. In particular, it would *not* result in more local television service; it would *not* lead to more HDTV or ITV services; and it would *not* lead to more spectrum efficient technologies or other innovations.[9] Only facilities-based competition can produce these benefits.

2. Supporters of the Merger argue that EchoStar and DIRECTV do not compete against one another, that they are feeble competitors against cable, and that they may not remain

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[7] Many of the Comments in support of the Merger contained nothing more than bare opinions. *See e.g.*, Comments of the Competitive Enterprise Institute, p. 2 ("it is impossible to think of a serious argument against the merger") (*CEI Comments*); Comments of the National Center for Public Policy Research, p. 1 ("the merger would hold down costs and improve service . . . the post merger company will add significantly to the free market options for obtaining broadband services"); Comments of the Frontiers of Freedom, p. 1 (the combined broadcast spectrum and financial assets of the merged entity "would enable them to carry local stations in more than double the number of markets each one of them carries those stations in today").

[8] *See NRTC Petition,* 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, pp. 52-53 (February 1, 2002) (included as Exhibit I to the *NRTC Petition*) (*MacAvoy Declaration*) (estimating consumer welfare losses of $700 million per year in rural areas alone)*; NAB Petition,* Declaration of J. Gregory Sidak, pp. 28-30 (included as Appendix B to the *NAB Petition*) (concluding that the loss of consumer welfare as a result of the Merger would be more than $3 billion over five years) (*Sidak Declaration*); *Pegasus Petition,* Affidavit of Daniel L. Rubinfeld, pp. 14-15, n. 59 (included as Attachment A to the *Pegasus Petition*) (predicting consumer losses in the neighborhood of $600 million for new subscribers alone) (*Rubinfeld Declaration*).

[9] *See e.g., NRTC Petition*, pp. 56-68; *NAB Petition*, pp. 70-90; *Pegasus Petition*, pp. 37-61.

"viable" without the Merger.[10] However, opponents showed what the Applicants already have conceded: that EchoStar and DIRECTV are actually vigorous competitors against one another and against cable.[11] Both in fact are experiencing tremendous growth.[12] NRTC and others pointed out that according to the Commission, EchoStar and DIRECTV reported *a combined 24 percent increase in subscribership and a 37.5% increase in revenues totaling $12.1 billion in 2001 alone*.[13] These are not the signs of two failing competitors that need to merge in order to survive, as the Applicants and their supporters would have the Commission believe. Rather, these statistics demonstrate conclusively that facilities-based DBS competition is succeeding and producing tangible public benefits.

3. The Applicants and their supporters argue that the merged entity will face heavy competition from the likes of C-band and other MVPD alternatives. The opponents to the Merger easily discounted these false claims, explaining that only digital cable is reasonably interchangeable with DBS.[14] The other so-called alternatives to DBS are either not reasonably interchangeable with DBS or are unavailable in rural America.[15]

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[10] *CEI Comments*, p. 1.

[11] *See CWA Petition*, pp. 3-4 (pointing to the combined 17 million DBS subscribers and growth rates "far surpassing those of the cable companies"); *NAB Petition*, pp. 15-32 (referring to the "bitter and direct rivalry" between DIRECTV and EchoStar on price, local-to-local offerings, programming, advanced services and distribution); *NRECA Comments*, pp. 5-7; *NRTC Petition*, pp. 31-35. *See Also* 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*) (Exhibit B to the *NRTC Petition*).

[12] *NRTC Petition,* pp. 31-35; *NAB Petition*, pp. 13-15; *Pegasus Petition*, pp. 37-38; *ACA Petition*, p. 12; *Carolina Petition*, pp. 3-4; *CWA Petition*, pp. 3-4; *NRECA Comments*, pp. 5-7. *See also* Eighth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-389, ¶¶ 55-58 (released January 14, 2002) (*Eighth Video Competition Report*).

[13] *See NRECA Comments*, pp. 5-6; *CWA Petition*, pp. 3-4; *ACA Petition*, p. 12; *Pegasus Petition*, p. 9. *See also Eighth Video Competition Report*, ¶57, Appendix C, Table C-1.

[14] For example, Primetime 24, a leading provider of C-band programming, made clear that C-band is "not an effective substitute for DBS." *Primetime 24 Comments*, p. 4.

[15] *See Consumers League Petition*, p. 1-2; Comments of the Consumers Union, the Consumer Federation of America, and the Media Access Project (*CU Comments)*, pp. 11-12 (calling DBS often the only MVPD option for

4. Supporters of the Merger accept without question the Applicants' position that anticompetitive concerns are irrelevant, because they erroneously assume that 97% of the country is passed by a cable alternative.[16] After the Merger, they say, almost all consumers in the country who do not wish to receive MVPD service from New EchoStar will be free to turn to their local cable operators for programming. NRTC and other opponents of the Merger, however, showed that New EchoStar and its supporters were relying on flawed data, and that tens of millions of rural households -- up to 25,000,000 or more -- actually have no cable alternative.[17] If these households wish to receive MVPD services after the Merger, they will be required to take whatever services and prices New EchoStar decides to provide -- or they will have to do without.

B. Even Supporters of the Merger Recognize Its Deficiencies By Proposing Various Conditions.

5. Many of the supporters of the Merger argue that various conditions are necessary to protect the public interest from the effects of the Merger. In so doing, they recognize that the proposed Merger on its face is inconsistent with the public interest and that some regulatory "fix" is necessary. The proposed conditions, however, are grossly inadequate substitutes for the thriving facilities-based competition -- and the resulting public benefits -- that exist today.

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rural consumers); *NRECA Comments*, pp. 3-5; Comments of Project 21, p. 1 (referring to satellite and cable as "the only real competition" in today's MVPD market) *Pegasus Petition*, pp. 18-21; Affidavit and Report of Report of Roger J. Rusch, pp. 14-15 (included as Attachment B to the *Pegasus Petition*) (*Rusch Declaration*).

[16] Only one party supporting the Merger actually addressed the homes passed issue, and he cavalierly dismissed rural markets as "not significant enough to warrant this level of concern." Comments of Joe Fiero, Third Millennium Communications and Electronics Co., LLC, p. 2 ("the fact that [rural households] are unpassed by cable is not discriminatory, but a function of their choice to live in a rural environment"). NRTC trusts that the Commission will not disregard the justifiable concerns of rural Americans so lightly.

[17] *See NRTC Petition,* pp. 6-16; *Pegasus Petition*, pp. 2-4, 15-18; *CWA Petition*, pp. 1-2; *Pappas Comments*, pp. 15-16; *NRECA Comments*, pp. 3-5.

1. The Extensive Conditions Proposed By Consumers Union Are Inadequate Substitutes For Facilities-Based Competition And Would Be Impossible To Enforce.

6. The *CU Comments* exemplify the problems associated with any conditional approval of the Merger. After pointing out that the MVPD marketplace is already highly concentrated -- and that the combination of the two largest satellite video distributors in the U.S would present "enormous dangers"-- CU nonetheless argues that the Merger would be in the public interest *if* accompanied by a host of conditions.[18] The conditions, however, are no substitute for the facilities-based competition existing today. Furthermore, they would be impossible to enforce, and would needlessly drain Commission resources for years to come.[19]

a. National Pricing Will Result In Higher Prices.

7. While confessing "fear" that New EchoStar will be free to eliminate equipment subsidies and raise prices for service in rural America, CU nonetheless urges the Commission to condition the Merger on a guarantee of national pricing.[20] The *CU Comments*, however, contain no economic analysis whatsoever. They rely on New EchoStar's illusory promise of "national pricing" as the sole means of protecting rural Americans from monopoly price increases.[21]

8. Opponents of the Merger, on the other hand, submitted detailed economic analyses

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[18] *CU Comments*, pp. 3-4, 24-25. CU's ambivalence regarding the proposed Merger is readily apparent. CU repeatedly recognizes the competitive dangers inherent in the merged monopoly, as well as the tenuous nature of New EchoStar's promised efficiencies. Throughout its Comments, CU refers only to the "alleged efficiencies" of the new entity, which "may potentially" allow it to be a stronger competitor to cable. *CU Comments*, pp. 12, 21. As NRTC pointed out in its Petition, however, any such efficiencies are not merger-specific and under established case law are not even appropriate for consideration in a merger to monopoly. *NRTC Petition*, p. 56.

[19] In the *Univision Petition*, Univision provided a litany of instances where EchoStar's compliance with rules and laws was less than complete, raising questions whether New EchoStar would comply with any conditions that would be imposed in approving the Merger.

[20] *CU Comments*, p. 4.

[21] As AAI pointed out, there are far more questions than answers raised by New EchoStar's national pricing scheme. Furthermore, the focus on pricing masks a fundamental flaw: "Even if the price is right, to whom is the rural customer supposed to turn when he believes the monopolist's service stinks?" *AAI Comments*, p. 3.

debunking New EchoStar's promise of national pricing. Experts for NRTC, NAB and Pegasus applied basic economic theory and demonstrated that the so-called national price would be higher than the existing competitive price.[22] Dr. MacAvoy, NRTC's expert, also pointed out that it is virtually impossible for the merged firm to price *every* component of its offering in an identical fashion to all retailers and then to all subscribers.[23]

9. There are also numerous ways in which national pricing could be "gamed" to benefit the monopoly by manipulating prices in rural America (*e.g.*, giving away or reducing the price of local programming available only in urban areas, increasing pricing on programming more popular with rural than urban subscribers, special promotions with stores more prevalent in urban than rural areas).[24] Furthermore, even if national pricing were workable as a regulatory mechanism (which it is not), it would never deliver the benefits of facilities-based competition: greater consumer choices, lower prices, better service and more innovation.

b. There Is No "Structural Solution" To The Proposed Monopoly.

10. Absent a guarantee of nondiscriminatory pricing, terms, and conditions, CU argues that the Commission should consider a structural solution, including divestiture of orbital slots, satellites or transponder capacity, to meet the needs of rural subscribers who will suffer from the loss of a competitive marketplace.[25] Left unexplained by CU is why the Commission should prefer an unproven and artificial structural solution over today's healthy, facilities-based competition.

11. The Applicants already have clarified that *any* conditions that impact the combined entity's synergies will not be acceptable. Specifically, divesture of any DBS orbital slots would

[22] *See MacAvoy Declaration*, pp. 52-53; *Rubinfeld Declaration*, pp. 14-17; *Sidak Declaration*, pp. 31-38.

[23] *Id.* at 53.

[24] *See NRTC Petition*, pp. 30-38.

"wreak tremendous havoc on the synergies of this transaction" and will not be accepted.[26] In other words, any significant structural solution would be unacceptable to the Applicants, because it would undercut the very purpose of the Merger itself: to gain a monopoly of all high powered Ku-band DBS orbital slots and associated facilities.[27]

12. The suggestion of a structural solution is also untenable to those, like NRTC, that favor the existing competitive environment over one that will pit a brand new DBS competitor against the entrenched New EchoStar behemoth based on a regulatory "guesstimate" of an appropriate structural solution. Any such structural solution will no doubt fall far short of what the marketplace will produce on its own without Commission involvement.

c. MVDDS Is No Substitute For DBS Competition In Rural America.

13. Grasping to create new competitors where none exists, CU urges the Commission to license *for free* the new Multichannel Video and Data Distribution Service (MVDDS).[28] As NRTC pointed out, however, MVDDS is not a viable MVPD competitor.[29] It is currently unavailable and would offer no near-term prospects as a competitive force in *any* part of the country. Additionally, MVDDS is completely impractical in sparsely populated parts of the country because of the high costs of building a fixed wireless infrastructure to serve relatively few rural households. As a result, MVDDS will *never* serve as an adequate substitute for DBS in rural America. In any event, it is highly unlikely that the FCC will -- or should -- dole out

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[25] *CU Comments*, p. 4.

[26] *DBS Merger Attorneys Discuss Efforts*, SkyReport, pp. 1-2 (February 12, 2002). *See also* Testimony of Charles W. Ergen, *Oversight Hearing on Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market*, The Judiciary Committee, U.S. House of Representatives, December 4, 2001.

[27] If the Commission intends to consider a structural solution as CU requests, NRTC urges the Commission to request separate public comment on the details of any proposed divesture before approving the Merger.

[28] *See CU Comments*, pp. 21-22.

[29] *See NRTC Petition*, pp. 27-28.

MVDDS licenses *for free*, as CU requests, rather than auctioning them to the highest bidder, as we believe is required by law.[30]

d. Open Access Is No Substitute For Facilities-Based Broadband Competition.

14. CU urges the Commission to require New EchoStar to provide open access for competitive Internet service providers to the extent required by the Commission in the AOL Time Warner proceeding.[31] In the same breath, however, CU concedes the shortcomings of open access by noting that "unfortunately, those who were confident that open access would win the day in the marketplace have so far been wrong."[32]

15. Chairman (then-Commissioner) Powell predicted as much in the AOL Time Warner merger proceeding, when he stated that:

> Given the experience of 'regulatorily-derived' terms and conditions (its plodding process, its high regulatory costs, its risk of distorting efficient development, its political compromise), rarely should we leap to regulatory approaches without compelling circumstances and strong confidence that the conditions are clearly absent for market resolution through competition, business negotiation and innovation. Moreover, it is hubris to believe that regulators can (better than businesses) craft the optimal terms and conditions to govern the fundamental rules for market operation, particularly where innovation is at a premium and new and novel technologies are at stake. The beauty of market mechanisms has always been that the give and take among competitors and consumers produces an optimal set of terms and conditions.[33]

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[30] These and other related issues are currently the subject of a separate Commission proceeding. *See In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, RM-9147, RM-9245; FCC 00-418, 66 FR 7607-7613 (January 24, 2001).

[31] *CU Comments*, pp. 23-24.

[32] *Id.*, p. 24.

[33] Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, p. 167, Statement of Commissioner Michael K. Powell, Concurring In Part and Dissenting In Part (2001).

16. As Chairman Powell noted more recently, open access is no substitute for facilities-based competition in the broadband market: "a regulatory regime that promotes facilities-based competition and encourages new entrants is the best way to achieve that widespread (broadband) deployment."[34]

17. As demonstrated by NRTC and others, the proposed Merger will neither promote facilities-based competition nor encourage new broadband entrants. Instead, it will eliminate all competition in the existing Ku-band satellite broadband market and crush new entrants in the nascent Ka-band market.[35]

18. Although CU readily concedes "the enormous dangers" of the EchoStar/DIRECTV merger,[36] it nevertheless concludes that open access and an extensive regulatory regime will act as an acceptable substitute for the existing competitive market.[37] While the conditions proposed by CU will dramatically increase the FCC's administrative burdens, however, by requiring extensive data collection, frequent monitoring and increased enforcement, they will never provide public benefits approaching facilities-based competition (*e.g*., more consumer choice, lower prices, better service and increases in innovation).

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[34] Letter from Michael K. Powell, Chairman, Federal Communications Commission, to Dr. David D. Clark, Chair, Computer Science and Telecommunications Board (February 11, 2002). The State of Alaska and the Regulatory Commission of Alaska expressed their view that if the Merger is approved, conditions should be imposed to ensure that broadband service is available throughout Alaska at prices, terms and conditions comparable to what is offered in the rest of the United States. As Chairman Powell noted, however, facilities-based competition -- not promises of comparable pricing and service -- will best deliver broadband to unserved areas.

[35] *NRTC Petition*, pp. 42-56; See *Pegasus Petition*, pp. 61-72; *NAB Petition*, pp. 99-106. The Progress & Freedom Foundation theorized that New EchoStar would "have a stronger capability to provide broadband services to rural and other underserved communities, which currently may have no high-speed access at all -- and in so doing, likely spawn competition for these customers as well." Comments of Progress & Freedom Foundation, pp. 3-4. NRTC demonstrated in its Petition, however, that cable modem, DSL and other satellite services would be incapable of providing competition to New EchoStar's monopoly broadband services for years to come. *NRTC Petition*, pp. 42-56.

[36] *CU Comments*, p. 24.

[37] Inasmuch as CU argues that DBS does not compete with cable, it apparently recognizes DBS as a separate product market subject to competition between EchoStar and DIRECTV. *CU Comments*, pp. 6-11.

19. The extreme regulatory regime proposed by CU will transform the FCC into an invasive monopoly watchdog and make the Commission's rate regulation of the cable industry (which required hundreds of new staff positions and appropriate budget increases) pale in comparison, all with no corresponding public benefits. Regardless of CU's best intentions, an artificial regulatory regime loaded with conditions can never act as a valid substitute for a viable, competitive marketplace.

2. Other Conditions Urged By Some Commenters Also Should Be Disregarded.

20. World Satellite Network, Inc. (WSN) argues that the proposed Merger should be approved -- *but only if WSN itself is provided with permanent access to one or more of New EchoStar's orbital satellite assets*.[38] As mentioned above, however, it is unnecessary for the Commission to attempt to recreate an artificial competitive market through divestiture when a real one exists today.[39] Additionally, given the high barriers to entry and time to market requirements, NRTC seriously doubts that WSN or any other entity benefiting from a forced divestiture could provide the same type of competition after the Merger as EchoStar and DIRECTV provide today without it. Moreover, counsel for the Applicants already have stated that a divestiture of orbital assets would undermine the "synergies" of the Merger and would be unacceptable.[40] The Commission should not give WSN's proposal serious consideration.

21. Satellite Receivers Limited (SRL), an MVDDS applicant, argues that any grant of approval must be coupled with the licensing of "qualified entities" to provide terrestrial MVPD

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[38] Comments of World Satellite Network, Inc., p. 13. This proceeding is not designed to be an opportunity for individual companies to obtain competitive advantage through government imposed conditions.

[39] *Supra*, pp. 7-8.

[40] S*upra,* n. 26.

services in the Ku-band.[41] As discussed previously, however, terrestrial services are wholly impractical in rural areas.[42] MVDDS in particular is an unproven business with no current licensees in rural America or elsewhere.[43] Neither SRL nor any other MVDDS applicant is ready, willing and able to compete with New EchoStar.

22. Northpoint Technology, Ltd. (Northpoint), another MVDDS applicant, argues that any approval of the Merger must be conditioned on the set-top box being open to receive signals delivered terrestrially (*e.g.*, by Northpoint) and by satellite. Access to the set-top box, however, will not magically solve the myriad competitive problems associated with the Merger. As NRTC pointed out in its Petition, terrestrially delivered services are impractical in rural America, due to the high infrastructure costs associated with serving large, sparsely populated areas of the country.[44] Terrestrial access to the set-top box will never act as a substitute for facilities-based competition in rural America.

3. Mandatory Conditions Regarding Local Signal Carriage Do Not Solve The Fundamental Flaws Of A Satellite Monopoly.

23. Several broadcasters argue that if the Merger is approved, special conditions should be established requiring New EchoStar's to expand local-into-local service into new markets.[45] Here again, however, an artificial regulatory regime filled with conditions cannot act as a valid substitute for existing marketplace forces that best stimulate innovation.

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[41] Opposition of Satellite Receivers Limited, p. 1.

[42] *Supra*, pp. 8-9.

[43] *Id.*

[44] *Supra,* n. 29.

[45] *See e.g*., *Paxson Petition*; Comments of Family Stations, Inc.; Comments of The Association of Public Television Stations and the Public Broadcasting Service (PBS). PBS also argued for conditions requiring carriage of local stations from full-CONUS slots (rather than the "wing" slots that cover only a portion of CONUS), and nondiscriminatory display of local channels on the electronic programming guide.

24. The NAB correctly detailed in its Petition to Deny how competition between EchoStar and DIRECTV would lead to carriage of local stations in *more* markets than would a New EchoStar monopoly.[46] Notably, as NAB pointed out, EchoStar and DIRECTV avoided disclosing how many markets they would serve individually without the Merger. NRTC and Pegasus demonstrated in different ways that, without the Merger, EchoStar and DIRECTV could use existing engineering techniques to transmit all local stations throughout the United States.[47] Following the Merger, however, New EchoStar would have no incentive to extend local service to as many rural markets as EchoStar and DIRECTV would serve individually if they continued to compete against one another.

II. CONCLUSION

EchoStar and DIRECTV are thriving and competing effectively with each other and with cable: they reported *a combined 24 percent increase in subscribership and a 37.5% increase in revenues totaling $12.1 billion in 2001 alone.* These are not the signs of two failing competitors that need to merge in order to survive, as the Applicants and their supporters would have the Commission believe. The Commission should not replace a fully functioning market -- where consumers can choose from among competing providers based on service and price -- with a highly regulated monopoly based on unenforceable and inadequate conditions.

The Application should be denied.

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[46] *NAB Petition*, pp. 75-92. *See also NRTC Petition*, pp. 56-63 and Exhibit H, showing DMAs Served by EchoStar and DIRECTV, including dates when each began to provide local service.

[47] *See NRTC Petition*, pp. 56-63, and Declaration of Walter L. Morgan (included as Exhibit O to the *NRTC Petition*); *Pegasus Petition*, pp. 38-45, and *Rusch Declaration*, p. 8.

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February 25, 2002

Certificate of Service

I HEREBY CERTIFY that on this 25th day of February, 2002, a true and correct copy of the foregoing Response 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 filed electronically with the Federal Communications Commission, and served via courier, First Class mail or electronic mail upon the following:

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