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February 1, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
236 Massachusetts Ave., NE, suite 110
Washington, D.C. 20002-4913

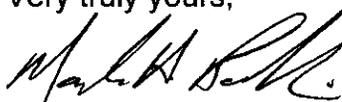
Re: *Petition to Deny Application for Transfer of Control
Hughes Electronics/GM to EchoStar
CS Docket No. 01-348*

Dear Ms. Salas:

Enclosed please find an original and four copies of a Petition to Deny in the above referenced matter for filing on behalf of Carolina Christian Television, Inc., licensee of WGGG-TV, Greenville, South Carolina and LeSea Broadcasting Corporation licensee of KWHD-TV, Castle Rock, Colorado and WHMB-TV, Indianapolis, Indiana.

I would greatly appreciate it if a copy of any correspondence regarding this matter would be directed to my attention. If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,



Mark A. Balkin

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Enclosures

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re:)
)
EchoStar Communications Corporation,)
General Motors Corporation, and Hughes)
Electronics Corporation Application for)
Authority to Transfer Control)
)
Joint Petition to Deny of)
)
Carolina Christian Television, Inc., licensee)
of WGGS-TV, Greenville, South Carolina and)
)
LeSea Broadcasting Corporation licensee of)
KWHD-TV, Castle Rock, Colorado and)
WHMB-TV, Indianapolis, Indiana)
)

CS Docket No. 01-348

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FEB 04 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Date: February 4, 2002

JOINT PETITION TO DENY

Carolina Christian Television, Inc., licensee of WGGS-TV, Greenville, South Carolina and LeSea Broadcasting Corporation licensee of KWHD-TV, Castle Rock, Colorado and WHMB-TV, Indianapolis, Indiana (“Petitioners”), pursuant to Section 1.939 of the FCC’s rules and the FCC’s December 21, 2001 Public Notice requesting Petitions or Comments related to the Application for Authority to Transfer Control of various space station, earth station, wireless and experimental licenses and Section 214 authorizations filed by EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (“Application”)¹, submit this Petition to Deny.

I. Interest of the Petitioners

The Petitioners are both licensees of at least one (1) full power television broadcast station that sought carriage on the Direct Broadcast Satellite systems (“DBS”) owned by EchoStar Communication Corporation (“EchoStar”) and General Motors Corporations/Hughes Electronics Corporation (“GM/Hughes”) (“EchoStar and GM/Hughes are together referred to as “Applicants”) pursuant to the must-carry provisions of the Satellite Home Viewer Improvement Act (“SHVIA”) and the FCC rules.

EchoStar’s initial refusal of the Petitioners’ must-carry election in clear disregard of the rules and its subsequent “carriage” of Petitioners’ stations on satellites requiring subscribers to obtain and

¹ See *Public Notice, EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent For A Proposed Transfer of Control*, CS Docket No. 01-348.

install an additional dish to actually view the stations (further explained herein) shows that Petitioners are parties in interest to this application.

II. Grant of the Application Would Be Inconsistent with the Public Interest, Convenience and Necessity.

Applicants state generally that the transfer of control of the licenses and authorizations will serve the public interest. Petitioners take issue with four specific assertions made by Applicants in support their public interest argument: That the transfer of control (1) will not impair any statutory objectives;² (2) will promote competition with cable;³ (3) will provide “more local channels to more areas;”⁴ and (4) will allow “more ethnic, foreign language and niche programming.”⁵

If the transfers are approved, the entity controlling the licenses and authorizations will be the current owners and management of EchoStar.⁶ The actions of EchoStar related to implementation of the must-carry provisions of the SHVIA show, without a doubt, that combining two of the three competitive multichannel video programming distributors (“MVPDs”) in most areas of the country (in many rural areas, combining the only two MVPDs), will impair the statutory objectives of the SHVIA and, while arguably allowing more areas to receive local into local programming, will keep viewers from receiving **local** ethnic, foreign language and niche programming.

² *Application*, p. 22.

³ *Application*, p. 22.

⁴ *Application*, p. 28.

⁵ *Application*, p. 33.

⁶ The new company formed by the merger of Hughes (a wholly owned subsidiary of GM) and EchoStar will result in control being held by the current EchoStar owners and management. See *Application*, pp.16-19.

A. The Transfer of Control is Not Necessary to Retain a Competitor to Cable. Rather, it Will Create an MVPD Monopoly in Many Rural Areas and A Duopoly In Most Other Areas.

DBS operators, especially Applicants, are competing very well with cable television companies and do not need to merge their operations in order to remain a viable competitor to cable. The Commission has already reached this conclusion in its Eighth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming (hereinafter “Eighth Annual Report”).⁷

While there are currently four companies licensed by the Commission to provide DBS service, the Applicants are the only licensees fully operating.⁸ Applicants are the largest competitors to cable – indeed, they are the third and sixth largest MVPDs. In the year preceding June 1, 2001, the Applicants increased their customer base by some 3,000,000 people, over 19%. EchoStar itself increased its customer base by 40% in that year. Further, it is expected that the customer base for DBS will grow by over 60% by 2005 and 75% by 2010.⁹ The numbers speak for themselves. Without a merger of operations, the Applicants are credible and significant competitors to cable television.

With the merger, MVPD competition will be either destroyed or severely impaired. Rural areas without cable television that currently have a choice between the Applicants for service will

⁷ See *CS Docket 01-129*, Adopted December 27, 2001, ¶¶ 55-67

⁸ Only three companies, including Applicants, are currently providing any service. One of those three, Dominion Video Satellite, Inc. has a very limited number of subscribers as it does not own its own satellites and currently only offers 19 video channels. See *Eighth Annual Report* ¶¶ 55,57.

⁹ *Eighth Annual Report* ¶¶ 55-57.

now lose that choice. Further, the areas that currently have a choice of cable as well as both Applicants will lose that extra choice and fall into the duopoly – where both cable and EchoStar will, in reality, have monopoly power over MVPD.

B. Approval of the Transfer of Control Will Impair the Statutory Objectives of the SHVIA by Limiting the Local Ethnic, Foreign Language and Niche Programming Channels Subscribers Can Receive.

Petitioners respect EchoStar’s right to challenge the must-carry provisions of the SHVIA. However, EchoStar’s actions after the Appellate Court upheld the SHVIA¹⁰ show EchoStar’s clear intention to avoid the burdens and costs associated with its implementation. EchoStar’s scheme for avoiding these costs and burdens comes at the expense of local ethnic, foreign language and niche broadcasters and thus, the public interest.

Congress adopted the SHVIA because “absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals.”¹¹ “Congress understood that the threat to over-the-air viewers was not the loss of broadcasting as a medium, but the loss of the independent stations needed to provide those viewers with a rich mix of broadcast programming from multiple sources.”¹²

Congress also recognized the potential negative impact that “cherry-picking” of favored stations by satellite carriers would have on the continued viability of independent stations and the

¹⁰ See *Satellite Broadcasting and Communications Association v. Federal Communications Commission*, ___ F.3d ___, 2001 WL 1557809 (4th Cir. 2001) (hereinafter “*SCBA v. FCC*”)

¹¹ SHVIA Conf. Rep. at 101.

¹² *SCBA v. FCC*, 2001 WL 1557809 *15.

diversity of voices. To prevent this practice, Congress adopted a market-by-market “carry one/carry all” statutory copyright license. Importantly, Congress’ based its decision in part on a “plausible and widely shared empirical assumption -- satellite subscribers who are able to receive local network signals via satellite will be unlikely to obtain or maintain antennas in order to receive independent local broadcast stations.”¹³ Congress clearly wanted complete carriage parity for independent stations so that they, like network stations, could reach all satellite subscribers unimpeded by subscriber reception obstacles.

By January 1, 2002, the date the DBS mandatory carriage rules took effect, EchoStar gave major networks (ABC, CBS, FOX, NBC, and UPN and/or WB) and other select local stations immediate access to every satellite subscriber in every market in which it is carrying local stations. However, the vast majority of independent and niche network stations have been “locked out” and have no real access to EchoStar subscribers. Due to professed satellite capacity constraints, EchoStar placed virtually every one of these independent and niche stations that had to be carried (but not major network stations) on a second satellite,¹⁴ for which a second, uninstalled, dish is needed. Though EchoStar has asserted that it provides the second dish and installation free of

¹³ See *SHVIA Conf. Rep.* at 102, as cited in *SCBA v. FCC*, 2001 WL 1557809 *26 n.8 (4th Cir. Dec. 7, 2001).

¹⁴ The term “second satellite” describes a satellite positioned at an orbital location other than that used by Echostar to provide the bulk of its programming to regular subscribers, and for which a second receive dish and/or other equipment is required.

charge,¹⁵ it has failed to widely advise its customers and the public of this. Further, it is difficult to actually obtain the free dish and installation when it is actually requested.

The Commission is already fully aware of the actions EchoStar took in response to virtually all must-carry election letters sent by independent and niche networks. EchoStar issued letters of denial without any basis, claiming that the election letters did not include the stations' community of license (when they clearly did), and that the election letters did not provide proof of a proper signal, even for stations whose transmitters were located only a few miles away like LeSea's WHMB. The Commission specifically rejected denials based upon the failure to provide proof of a proper signal in its Order on Reconsideration issued after informal complaints were made regarding EchoStar's denial letters.¹⁶

Even after rejection of this unfair tactic, EchoStar continued its attempts to prevent carriage of independent and niche network stations. EchoStar issued letters purporting to rescind, as a reason for rejection of carriage, the failure to prove the ability to deliver a good quality signal. The rescissions however, were conditional – “assuming no other grounds for rejecting your signal arise.” Further, though stating that carriage would be provided, the letters left in place EchoStar's denial of carriage for “Failure to Provide Community of License.” Both Petitioners received these letters which were clearly intended to lull the stations into believing that carriage would be provided.

¹⁵ See EchoStar's *Opposition to Petition for Modification or Clarification*, dated January 23, 2002, CS Docket No. 00-96.

¹⁶ *Order on Reconsideration*, adopted September 4, 2001, CS Docket No. 00-96.

Indeed, Petitioners are convinced that had they not filed (and then settled) carriage complaints¹⁷ they would not have obtained even the virtually worthless “carriage” they currently are receiving.

The “second dish required” status had been afforded exclusively to independent and niche network stations. No major network stations require a second dish.¹⁸ Additionally, in many markets, including Dallas, Orlando, Phoenix and Seattle, obtaining a second dish would allow the subscriber to see only one additional channel. In Greenville, North Carolina and Indianapolis, Indiana where Petitioners have stations, a second dish would permit a subscriber to receive two stations, the Petitioners’ and a duplicative PBS station.¹⁹

EchoStar’s choice of which stations to place on “second dish” status appears calculated to save the company money. Using EchoStar’s reported 6.1 million subscribers as of June 1, 2001,²⁰ and a conservatively estimated average cost to EchoStar of \$50.00 each, even if only half of them sought out the free second dish, it would have cost EchoStar over \$150 million in equipment costs alone. EchoStar, for its own self-serving economic reasons, put only a few independent and niche network stations on the second dish so they would incur the least amount of financial burden possible. To save money, EchoStar knowingly thwarted Congress’ intent to protect the very stations the mandatory carriage rules were designed to benefit.

EchoStar’s web site does not even make a general announcement about the availability of the stations on the second dish. It simply lists those stations for which a second dish is required.

¹⁷ See CSR-5757-M, CSR-5755-M and CSR-5754-M.

¹⁸ See Attachment A, printouts from EchoStar’s website.

¹⁹ *Id.*

²⁰ *Eighth Annual Report*, ¶57.

No instruction is given on how to go about getting the second dish. No announcement is made that the second dish is free.

In fact, even a letter to subscribers dated January 1, 2002 fails to make these announcements. Terry Riley, a two-year EchoStar subscriber and an employee of KWHD-TV, licensed to Petitioner LeSea Broadcasting Corp., received the attached January 1st letter on or about January 8th.²¹ In a paragraph sub-titled “New Local Channels At No Extra Charge,” EchoStar declares:

NEW channels were added January 1st to your local package including UPN, WB, PBS (normally sold separately) plus many others depending on the city*. The price of this package, when it includes PBS, continues to be \$5.99 a month. In order to accommodate the added channels to this local package, we have moved the local channels to the 8000 range on your On-Screen Guide. Enter 8-0-0-0 with your remote to see what is available with your receiver. If you currently receive one of our distant networks, you may see changes in your Distant Network package.

*Channels vary by market. Some channels may require the installation of additional hardware; installation available at no cost until 3/31/02.

EchoStar’s letter discriminates against independent stations on its face. Independents or niche network stations are not mentioned at all. Only WB, UPN and PBS , stations that require no additional dish for reception, are mentioned. EchoStar’s footnote referring to these and other additional stations available by market states that “some” channels (but clearly not WB, UPN and PBS) “may require the installation of additional hardware.” EchoStar never tells the consumer that this hardware will be free. In fact, it says only that *installation* of the equipment will be free, and then only until March 31st! The language and design of the letter are specifically meant to avoid

²¹ See Attachment B, January 1, 2002 Letter from DishNetwork to Denise & Terry Riley.

announcing to subscribers that other independent local stations are available or that equipment and installation to receive those stations is free.

EchoStar's behavior is beyond being suspect – it is deliberate. Another portion of their January 1st letter announces a free pay-per-view movie coupon in appreciation for subscribers' continued business. Unlike the never announced free offer for reception of local independents, this free offer from EchoStar most assuredly creates income rather than a liability for the company. To announce this offer, EchoStar capitalizes and bolds the word "FREE" two times. The economic model is clear -- if it benefits the company, put it in bold; if it creates a potential liability, do not tell anyone.

Grouping independent and niche network stations on the "second dish," limiting that group to one or two stations in most instances, refusing to mix widely viewed network and independent stations on second dish status, hiding the availability of the independent stations, and refusing to promote the availability of these stations via "free" installation all combine to discriminate against and disenfranchise independent stations on EchoStar's system. This discrimination is not by pure happenstance – it is deliberate, intentional and insidious.

The Application asserts that the transfer of control will allow more local channels to more areas and more ethnic, foreign language and niche programming. The explanation of those assertions however ignore locally broadcast ethnic, foreign language and niche programming. Nowhere does the Application state that the transfer will allow all local stations to be received by subscribers without discrimination. The transfer of control may allow EchoStar to expand the number of cities where it will provide carriage and reception of local network affiliates, but just as in the cities it now provides local into local service, such expansion will be discriminatory to local

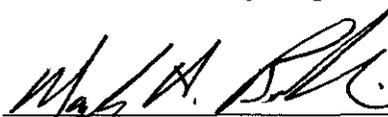
independent and niche network stations, making it that much more difficult for them to obtain viewers.

III. Conclusion.

EchoStar has already shown that it has no intention of properly complying with the SHVIA and rules. To extend this disdain for the law to DirecTV subscribers and create a single monopoly MVPD in many rural areas and eliminate one half of cable's MVPD competition in other areas will impair the statutory objectives of the SHVIA and will not promote competition with cable, provide "more local channels to more areas" or allow "more ethnic, foreign language and niche programming." The transfer of control of the GM/Hughes licenses and authorizations to EchoStar is not in the public interest and should be denied.

Respectfully Submitted,

Carolina Christian Television, Inc. and
LeSea Broadcasting Corporation



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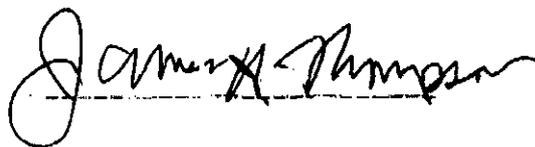
FROM HARDY,CAREY&LAUTIN 504 830 4059

01-31-02 05:27PM TO

10042440344X2309010 #79 P.14/14

DECLARATION UNDER PENALTY OF PERJURY

I, James Thompson, President of Carolina Christian Television, Inc. do hereby declare under penalty of perjury that I have read the foregoing and the attached exhibits and that the facts contained therein (as opposed to any legal conclusions derived therefrom) are true and accurate to the best of my knowledge, information and belief.

A handwritten signature in black ink, appearing to read "James Thompson", is written over a horizontal dashed line.

DECLARATION UNDER PENALTY OF PERJURY

I, Peter Sumrall, Vice President of LeSea Broadcasting Corporation, do hereby declare under penalty of perjury that I have read the foregoing and the attached exhibits and that the facts contained therein (as opposed to any legal conclusions derived therefrom) are true and accurate to the best of my knowledge, information and belief.



CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing PETITION TO DENY has been served

upon:

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by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this

4th day of February, 2002 and upon:

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A handwritten signature in black ink, appearing to read "Mark A. Bell", is written over a horizontal line.

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