

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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Application of )  
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**ECHOSTAR COMMUNICATIONS CORPORATION,** )  
**GENERAL MOTORS CORPORATION,** )  
**HUGHES ELECTRONICS CORPORATION,** )  
 )  
Transferors, ) CS Docket No. 01-348  
 )  
and )  
 )  
**ECHOSTAR COMMUNICATIONS CORPORATION,** )  
 )  
Transferee, )  
 )  
For Authority to Transfer Control. )  

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To: The Commission

**OPPOSITION TO PETITIONS TO DENY AND REPLY COMMENTS**

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February 25, 2002

## OVERVIEW & SUMMARY

Now that the merger's opponents have aired their objections, the Commission may confidently conclude that New EchoStar will provide consumers with numerous benefits, including:

- giving *all* Americans access by satellite to their local broadcast stations;
- creating a true broadband alternative when in many areas of the country there is no true broadband service whatsoever; and
- doubling (or better) the programming choices each company provides today, including moving to 12 or more High Definition Television channels.

These benefits translate directly into effective competition to cable systems, which have continued to raise their prices unrestrained by either EchoStar or DIRECTV standing alone, all to the benefit of consumers. The merger's pro-competitive potential is recognized by the constituency with the most direct stake in matters of competition and consumer choice – the consumers themselves. Under the guise of promoting the public interest, the handful of powerful organizations opposing the merger are pursuing rather obvious agendas that have nothing to do with the public interest: seeking to improve bargains they have struck; trying to preserve their competitive position or ability to continue overcharging rural customers, as they do today; and airing other unrelated grievances.

Many of the merger benefits will flow from the massive increase in Direct Broadcast Satellite (“DBS”) capacity that will result from the elimination of duplicative

programming – a total of *more than 500 identical channels* – from the DIRECTV and EchoStar satellite systems once the companies merge. And as the Applicants announce here for the first time, the merger will bring consumers across the United States access to local broadcast channels via satellite with digital-quality television picture and CD-quality sound *in every one of the 210 television Designated Markets Areas in the United States*.

Subsequent to the announcement of the merger agreement on October 28, 2001, as part of the pre-merger transition process, EchoStar and DIRECTV have been analyzing the technical and economic feasibility of a “Local Channels, All Americans” plan by which every U.S. consumer can have access to satellite-delivered local television signals. Today, in an Application being filed contemporaneously with this Opposition, New EchoStar will make that plan a reality by applying for Commission authority to launch and operate a new spot-beam satellite that, when combined with other existing and under-construction EchoStar and DIRECTV satellites, will allow the merged company to serve all 210 Designated Market Areas (“DMAs”), equaling *all* Americans, with local television stations.

New EchoStar will deploy new set-top boxes and satellite dishes capable of receiving satellite signals from multiple orbital positions. The new receiving equipment will be made available, free of charge, to all existing EchoStar and DIRECTV subscribers who will require new equipment in order to receive their local channels. Consumers across the country will pay the same price for this DBS service, *i.e.*, one nation, one rate card, regardless of a subscriber’s location. This means that whether for a town of 5 people or a city of 5 million people, the New EchoStar will provide the same

service for the same rate. And implementation of the plan will begin immediately upon regulatory approval of the merger, becoming fully operational as soon as 24 months thereafter.

This “Local Channels, All Americans” service vision, however, is premised entirely upon the EchoStar-Hughes merger being successfully consummated. *Neither company standing alone could achieve the tremendous public interest benefit of being able to serve every television market in the country.* Certain Petitioners speculate that each company alone might be able to replicate the merger benefits by building satellites of the Petitioners’ own design. These proposals suffer from two fundamental defects: (i) they make invalid assumptions about *technical* feasibility, and (ii) they disregard entirely the question of *commercial* feasibility. Even if these super-satellites looked good on paper, no Petitioner has explained why no one in the world has deployed anything like them, or how it could be profitable for each company on a stand-alone basis. As Dr. Robert Willig explains in the attached Declaration, expansion of local channel service to every DMA would not be economically feasible absent the merger.

The merger will also create the first true broadband satellite alternative. For urban areas, this will translate into meaningful satellite-based competition to cable modem and DSL offerings. For tens of millions of other Americans, it will translate into their first affordable advanced service – a true move from zero to one provider. The “digital divide” in the United States is real: as many as 40 million households in the United States today do not have access to high-speed Internet and data services, in large part due to the high cost of delivering these services to homes in less densely populated

areas. New EchoStar will create a more robust satellite platform that will liberate these digital “have nots” by offering them a more affordable, viable broadband service.

Here too, the Petitioners are wrong that each company could achieve these benefits on its own. The two companies’ current broadband offerings are expensive “niche” products that are hampered by several constraints, do not even satisfy the Commission’s definition of an “advanced service,” and have attracted fewer than 150,000 subscribers combined. The merger will allow New EchoStar to integrate these products and achieve a more competitive price point. As for the future deployment of satellite service in the Ka-band, neither company standing alone would be able to achieve early and affordable service to consumers. The merger, on the other hand, will give New EchoStar the spectrum capacity, subscriber base and economies of scale needed to ensure that next-generation residential broadband service becomes a reality everywhere in the United States, rapidly and inexpensively enough to matter.

In addition to the consumers, many other parties have supported the EchoStar-Hughes merger. The most vociferous opposition comes from a handful of entities, including the National Rural Telecommunications Cooperative (“NRTC”), Pegasus Communications (“Pegasus”), the American Cable Association (“ACA”) and the National Association of Broadcasters (“NAB”).<sup>1</sup> The Commission should recognize the narrow self-interests of NRTC and Pegasus, who have been in active litigation against

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<sup>1</sup> In contrast, businesses with an interest in greater competition and output in the MVPD market, such as television equipment manufacturers and electronics retailers, strongly support the merger. *See* Comments of Circuit City Stores, Inc. and Thomson Multimedia.

DIRECTV for years in a contractual dispute over distribution rights. Equally important, while lamenting the future fate of rural consumers, NRTC and Pegasus do not explain why they overcharge rural consumers today: in reselling DIRECTV's service, they charge \$3.00 a month more than DIRECTV charges for the same service in other areas and than EchoStar charges for the equivalent package in the same areas. The sincerity of Pegasus's concerns about competition is further impeached by reported statements of a Pegasus executive to the press that a buy-out of Pegasus by EchoStar would make the most financial sense for both companies.<sup>2</sup> As for the American Cable Association, it expresses candidly its fear that the merger will result in price competition in rural areas.<sup>3</sup> This is the sort of harm to *competitors* that the Commission should not take into account in its analysis, except as a benefit to *competition* and consumers.

The "Local Channels, All Americans" plan also disposes completely of the concerns expressed by NRTC and NAB with respect to local service. NRTC has alleged that New EchoStar "does not contemplate expanding local television service to rural America in DMAs beyond the top 100," which the NRTC states "is no consolation to the millions of rural Americans who most need local service."<sup>4</sup> For its part, the NAB's principal stated concern is that competition between the nation's two DBS providers "has driven the expansion of local-into-local" and "will lead to more carriage of local

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<sup>2</sup> See Ted Hearn, "Pegasus: Contract Bars Post-Merger Competition," *Multichannel News* (Feb. 18, 2002).

<sup>3</sup> See ACA Petition at 14-16 ("EchoStar would have every incentive to [set its uniform national price] below small cable systems' costs of providing similar services...")

<sup>4</sup> NRTC Petition at 60.

stations.”<sup>5</sup> New EchoStar’s commitment to serve all 210 DMAs could not answer those complaints more dispositively, leaving the NAB with no principled basis for continuing its opposition.<sup>6</sup> The Applicants stand ready to achieve with one stroke what NAB’s members have not achieved in decades – extending the coverage of local broadcast stations to all areas of the country.

The “Local Channels, All Americans” plan will uniquely benefit rural subscribers, who without it might never enjoy digitally-delivered local channels via any distribution medium. And, because of New EchoStar’s one nation, one rate card plan, consumers in rural areas will reap an additional benefit – they will take advantage of the increased competition in the most populous areas of the country.<sup>7</sup> Contrary to the claims of some Petitioners, national pricing makes economic sense. It has been the Applicants’ past practice and it is a common practice for other national providers in network industries, such as Internet Service Providers and cellular telephone companies. Local promotions may continue to be a useful tool to the limited extent they have been in the past, and the Applicants are willing to commit to reasonable requirements in that regard.

New EchoStar has every incentive to set its national price at strongly competitive levels instead of extracting additional profits from its existing subscriber

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<sup>5</sup> NAB Petition at iii.

<sup>6</sup> *Id.* at 7 (opining that “if the merger is approved, it would still leave markets 101-210, in which 14 percent of the country’s population resides, with *no hope* of receiving local-to-local service.”) (emphasis added).

<sup>7</sup> Pegasus and NRTC vastly exaggerate the number of homes not served by cable operators, in a stilted effort to argue that the merger would harm rural consumers.

base as some parties allege. New EchoStar would be “leaving money on the table” if it restricted itself to existing subscribers. Instead, as Dr. Willig shows, New EchoStar will have to set the national price low to compete for new subscribers in the most densely populated and most heavily contested areas of the country. The one nation, one rate card plan will therefore be a more effective constraint on MVPD prices in rural areas than EchoStar is on NRTC’s and Pegasus’s prices today. Finally, the fears of collusion raised by Petitioners are equally unwarranted: this particular tango would require EchoStar to dance with 9 or 10 cable MSO partners at the same time or forego huge pools of potential subscribers. In the final analysis, the net benefits to consumers from the creation of New EchoStar far outweigh any anticompetitive concerns.

There are other miscellaneous attempts by certain parties to litigate particular disputes or raise parochial concerns that have little bearing on the Commission’s public interest inquiry here. The Applicants urge the Commission to restrict its analysis to merger-specific issues and remedies, to the extent applicable, and promptly approve the Application, so that New EchoStar may begin delivering on its promise of dramatic consumer and competitive benefits to all Americans, including the carriage of local broadcast channels in all 210 television markets and true broadband services to all Americans.

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To the Commission:

**OPPOSITION TO PETITIONS TO DENY AND REPLY COMMENTS**

EchoStar Communications Corporation (“EchoStar”), General Motors Corporation (“GM”) and Hughes Electronics Corporation (“Hughes”) (collectively, the “Applicants”) hereby submit this Opposition to Petitions to Deny and Reply Comments (“Opposition”) in response to the pleadings and comments filed in the above-captioned proceeding. For the reasons set for in their Application and this Opposition, the Applicants respectfully request that the Commission promptly approve the proposed merger.

**I. THE MERGER WILL PROMOTE MORE CHOICES FOR CONSUMERS AND MORE EFFECTIVE COMPETITION AGAINST CABLE BY CREATING EXTRAORDINARY EFFICIENCIES**

No party disputes that the merger will free up about half of the spectrum currently used by the two companies through the elimination of duplicative programming. Many commenters from consumer advocates to programming producers recognize the expansion of programming choices and increase in diversity that will result.<sup>8</sup> These parties recognize that expanded choices can in turn spur more effective competition with cable and help New EchoStar impose some true discipline on the ability of cable operators to continue to raise their prices.

Indeed, as explained in more detail in Section A below, as a direct result of the merger consumers across the United States will have access to local broadcast channels with digital-quality television picture and CD-quality sound *in every one of the 210 television markets in the United States*. The merger will also permit greatly expanded high-definition television (“HDTV”) programming, pay-per-view and video-on-demand (“VOD”) services, educational, specialty, and foreign language programming and interactive services.

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<sup>8</sup> *See e.g.*, Comments of Consumers Union, The Consumer Federation of America, and the Media Access Project (“Consumer Groups”) at 13-14 (“The combination of EchoStar and DirecTV would add substantial satellite capacity and would avoid the redundancy of two competitors having to offer the same local signals in the same markets. As a result, these two competitors will be able to offer substantially more local programming as a combined entity than either of them would be able to do alone.”); *see also* Comments of the National Taxpayers Union at 1; Comments of the League of United Latin American Citizens at 1; Comments of Frontiers of Freedom at 1; Comments of Vivendi at ii.

Unable to attack these benefits directly, some Petitioners set up “straw-men” by arguing that each company could achieve these benefits on its own, without need for the merger.<sup>9</sup> The Applicants show below that each of these specific arguments must fail. At a general level too, no Petitioner can deny three straightforward truths about this issue. *First*, thanks to the freed-up spectrum, the combined entity can provide roughly twice as many choices as each company standing alone. *Second*, while Petitioners make many unrealistic claims about each party’s stand-alone capacity, neither company has had any reason to hold back and not make the fullest feasible use of the resources to which it has had access. *Third*, no matter what each party’s stand-alone capacity is, it is the merger and only the merger which will achieve the end result of providing all local stations to all Americans and reclaiming scarce spectrum to increase available capacity.

**A. New EchoStar Will Expand DBS-Offered Local Channel Service To Every Television Market in the United States**

Subsequent to the announcement of the merger agreement on October 28, 2001, as part of the pre-merger transition process, EchoStar and DIRECTV analyzed the technical and economic feasibility of a “Local Channels, All Americans” plan by which every U.S. consumer can have access to satellite-delivered local television signals. Today, in a satellite application being filed contemporaneously with this Opposition, New EchoStar will make that plan a reality by applying for Commission authority to

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<sup>9</sup> See *e.g.*, NAB Petition at 75-92; NRTC Petition at 56-65; Pegasus Petition at 38-49.

launch and operate a new spot-beam satellite that, together with the two companies' operational and proposed satellites, will provide local channel service to all 210 Designated Market Areas ("DMAs"), equaling *all* Americans, and comply fully with mandatory carriage requirements.<sup>10</sup> DIRECTV and EchoStar engineers have designed a system that enables the receipt of local channels, other entertainment services and high-speed Internet access using one consumer-friendly mini-dish. That 18 x 22-inch satellite will be capable of receiving satellite signals from the merged company's multiple orbital positions. New EchoStar will deploy new set-top boxes and satellite dishes that will be made available, free of charge, to all existing EchoStar and DIRECTV subscribers who will require new equipment in order to receive their local channels.<sup>11</sup> Consumers across the country will pay the same price for this DBS service, *i.e.*, one nation, one rate card, regardless of a subscriber's location. And implementation of the plan will begin immediately upon regulatory approval of the merger, and the rollout can be completed as soon as 24 months thereafter.

The "Local Channels, All Americans" plan will feature the new satellite operating in conjunction with DIRECTV 4S, DIRECTV 7S, EchoStar 7 and EchoStar 8 satellites, for a total of 28 spot-beam frequencies, to collectively provide local programming of approximately 1,500 TV channels to the 210 DMAs, with necessary

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<sup>10</sup> The proposal will require use of a minimum of four uplink facilities, including DIRECTV's California uplink center and EchoStar's Wyoming facility.

<sup>11</sup> This aspect of the "Local Channels, All Americans" plan should obviate the concern of commenter Steven C. Shapiro that subscribers would be required to bear the cost of equipment replacements occasioned by the merger. *See* Comments of Steven C. Shapiro at 2-3.

back-up and service expansion capabilities. This “Local Channels, All Americans” service vision, however, is premised entirely upon the EchoStar-Hughes merger being successfully consummated. Contrary to the claims of some of the parties that have opposed the creation of New EchoStar, the tremendous public interest benefit of being able to serve every television market in the country is *not achievable by either company standing alone*.

Specifically, Pegasus, the NRTC and the NAB each acknowledge the tremendous public interest benefit of providing more local channels to consumers in additional markets, but they seek to attack the merger-specificity of this benefit, and question New EchoStar’s commitment actually to provide more local markets with local channel service. Each of these parties has retained an engineering consultant to hypothesize ways in which either EchoStar or DIRECTV on its own might spend hundreds of millions of dollars to expand its system capacity, even to the point of building new “greenfield” super-systems, in order to offer local channel service in every local television market in the country.<sup>12</sup> The merger, these consultants argue, is simply not necessary to achieve this result.

These arguments are without merit for a variety of reasons: *first*, they are based on flawed technical assumptions and require unacceptable quality sacrifices; *second*, and most important, they disregard completely the commercial feasibility of the

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<sup>12</sup> See NAB Petition, Exhibit C, Declaration of Richard G. Gould (“Gould Declaration”); NRTC Petition, Exhibit O, Declaration of Walter Morgan (“Morgan Declaration”); Pegasus Petition, Attachment B, Affidavit and Report of Roger J. Rusch (“Rusch Declaration”).

various proposed satellite projects. To take on the expense and risk of constructing and launching such a satellite under the current structure of fragmented DBS spectrum simply to serve smaller markets does not make economic sense. Thus, the Petitioners' speculation about each company's stand-alone capability is incorrect from a technical and commercial feasibility perspective. Neither party individually has either sufficient spectrum or could make the business case to adopt this plan alone. No one anywhere in the world has deployed a commercial satellite with anything near the capability of such super-satellites. Indeed, if Mr. Rusch's theories had true practical applicability, there would be no reason why Pegasus could not implement its expert engineer's plan and provide the entire nation with local video service from a "super-satellite" located at one of its licensed Ka-band slots. The simple truth is that nothing short of the proposed merger can enable all Americans to receive all of their local stations by satellites. Neither company alone has sufficient capacity to dedicate a tremendous portion of its scarce spectrum to the expansion of local channel services, and neither company alone could afford to do it.

**1. The Petitioners' Technical Arguments Are Based on Flawed Technical Assumptions and Would Require Quality Sacrifices**

As explained in more detail in the attached Technical Annex authored by Dr. Richard Barnett of Telecomm Strategies, NRTC, Pegasus and NAB engineering consultants make a variety of incorrect, unwarranted or unproven assumptions about the technical feasibility of their proposals to improve the capacity of the DIRECTV and EchoStar satellite systems. These include:

- assuming compression ratios that either are not presently achievable or that would result in much poorer video quality;<sup>13</sup>
- proposing the use of MPEG-4 video coding in place of MPEG-2, which demonstrates a complete misconception about the role and applicability of MPEG-4 to broadcast-quality video transmissions;<sup>14</sup>
- proposing the use of a new modulation scheme for DBS that is significantly more susceptible to interference, and compounds antenna design issues;<sup>15</sup>
- proposing “super-satellites” that would push beyond the mass and power limits of commercial satellite technology, and that would require a super-sized antenna as well as significant advances in antenna design and deployment;<sup>16</sup> and
- proposing systems that pose significant risks of failures and poor service quality due in part to erroneous assumptions and misunderstandings concerning satellite spot-beam coverage.<sup>17</sup>

The flawed end result of these theoretical exercises is summed up by Dr. Barnett. The capacity calculations of the merger opponents rely on improvements in technology that “are either (a) not yet available and unlikely to become available in the

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<sup>13</sup> Gould Declaration (NAB) at 5-11, 14; Rusch Declaration (Pegasus) at 11.

<sup>14</sup> Gould Declaration (NAB) at 14; Rusch Declaration (Pegasus) at 11.

<sup>15</sup> Gould Declaration (NAB) at 12-14; Rusch Declaration (Pegasus) at 10-11.

<sup>16</sup> Morgan Declaration (NRTC) at 23.

<sup>17</sup> Morgan Declaration (NRTC) at 24-36; Rusch Declaration (Pegasus) at 4-9.

near future, or (b) impractical from a business perspective,” while the new satellites proposed are “superficial concept designs only and have not been rigorously developed to establish their feasibility, cost, schedule or performance.”<sup>18</sup> Thus, Dr. Barnett concludes that “[a] predictions of capacity achieved and spectrum used” by the new satellite designs of the petitioners are “seriously in error.”<sup>19</sup>

## **2. None of the Postulated Super-Satellites Is Commercially Feasible**

Even if the technical flaws in these analyses are ignored, the submissions by the engineering consultants of Pegasus, NRTC and NAB in essence merely restate the truism that, with enough time and enough money, almost anything is possible on paper. They *disregard entirely* the question of whether the measures and systems they advocate are *commercially* feasible and thus able to be deployed in the foreseeable future under real-world conditions.

As such, these submissions are of no utility to the Commission’s analysis here. As recognized in the Department of Justice Merger Guidelines, proper 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.”<sup>20</sup> And

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<sup>18</sup> Declaration of Dr. Richard J. Barnett on Behalf of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Exhibit B, at 1 (“Barnett Declaration”).

<sup>19</sup> *Id.*

<sup>20</sup> Horizontal Merger Guidelines, § 4.

this principle is embedded in Commission satellite precedent, as well. The Commission has specifically acknowledged that satellite system design is “necessarily innovative” and involves “a variety of business judgments.”<sup>21</sup> Thus, the Commission historically has granted substantial deference to a satellite company’s business judgment in this complex area. For example, the Commission has declined to conduct comparative hearings to evaluate the system designs of Applicants for mobile satellite spectrum because “[s]ystem design decisions involve a complex set of trade-offs among engineering, marketing and financial considerations.”<sup>22</sup> The Commission stated it preferred “not to involve itself in business judgments of this nature.”<sup>23</sup> Instead, the Commission found that a cost-benefit analysis of a “gold-plated” system as opposed to a “no-frills” system was “a determination better left to the marketplace.”<sup>24</sup> Similarly, with respect to geographic service requirements, even where DBS service is technically feasible from a

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<sup>21</sup> *In the Matter of Amendment of Parts 2, 22 and 25 of the Commission’s Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, 2 FCC Rcd. 485, 488 ¶ 25 (1987) (“*MSS Spectrum Allocation*”).

<sup>22</sup> *Id.* at 487 ¶ 15.

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

<sup>24</sup> *Id.* In deferring to the business judgments entwined in a mobile satellite company’s system design, the Commission followed its precedent of avoiding comparative hearings on system design among Applicants for cellular licenses. *See In the Matter of Amendment of the Commission’s Rules To Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearing*, 98 FCC 2d 175, 186 ¶ 19 (1984) (“*Cellular Lottery Decision*”) (stating “[c]ellular design involves a complex set of trade-offs among engineering, marketing and financial decisions” that are “essentially business judgments a cellular company must make in response to the demands of its customers”).

particular orbital location, the Commission does not require services from that location to be offered if such service “would require so many compromises in satellite design and operation as to make it economically unreasonable.”<sup>25</sup>

In this case, the capacity expansion “solutions” proposed by Pegasus, NRTC and the NAB all ignore economics and business judgment because they focus on one type of programming service – local broadcast channels – to the virtual exclusion of national programming that DBS providers must continue to provide in order to be competitive. For instance, as Dr. Barnett observes, this preoccupation with local channel service in satellite design ignores, for example, the need to plan for the evolution of HDTV into “an essential national programming product with vast audience appeal.” Dr. Barnett explains it is not possible today to

accommodate one HDTV channel in each 24 MHz satellite transponder, although it is possible that this could increase to two HDTV channels per transponder with further technical innovations.<sup>26</sup>

Dr. Barnett further testifies, the increased requirement for transponder capacity capable of carrying national programming is not limited to HDTV. Other areas

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<sup>25</sup> *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd. 9712, 9762 ¶ 128 (1995); see *MCI Telecommunications Corp., Assignor and EchoStar 110 Corp., Assignee; For Consent to Assignment of Authorization to Construct, Launch, and Operate a Direct Broadcast Satellite System Using 28 Frequency Channels at the 110° W.L. Orbital Location*; *American Sky Broadcasting, LLC, Assignor and EchoStar North America Corp., Assignee; For Consent to Assignment of Transmit-Receive Earth Station Authorizations*, 16 FCC Rcd. 21608, 21649 ¶ 42 (1999).

<sup>26</sup> Barnett Declaration at ¶¶ 4-6.

of growth in programming include new national networks and additional pay-per-view, VOD, interactive and educational channels. Therefore, EchoStar and DIRECTV must plan for growth in requirements for transponders with the ability to provide national programming. The more of the scarce orbit-spectrum resource is used up for local programming the less is available to cater for this growth in national requirements.<sup>27</sup> The simple but all-important point, of course, is that DBS providers must prioritize different types of programming, and must strike a balance in allocating their scarce capacity among different types of services. Thus, the fact that Pegasus expert Roger Rusch, for example, has designed on paper a theoretical spot-beam satellite operating from a single orbital location that would maximize the goal of carrying every local broadcast television station in the country<sup>28</sup> is an academic (but flawed) exercise wholly irrelevant to the question of whether either company could or could not do what he theorizes, or more broadly, whether the creation of New EchoStar is in the public interest. Mr. Rusch has ignored completely the different real-world business considerations involved in balancing capacity demands for local channels with the need to add new and additional national programming, such as HDTV, pay-per-view, VOD, interactive, educational and foreign-language channels. Simply put, without the greatly enhanced capacity, scale and combined subscriber base of New EchoStar, neither company alone would strike a balance that would utilize one-third of its full-CONUS DBS frequencies to provide local broadcast carriage in the manner Rusch suggests.

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<sup>27</sup> *Id.* at 6.

<sup>28</sup> Rusch Declaration (Pegasus) at 7-9.

### **3. Neither Company's Stand-Alone Capabilities Allow Local Service to All Americans**

As noted above, the Petitioners' extrapolation of universal local channel service from each company's current and planned capabilities suffers from technical flaws and a blatant disregard for commercial feasibility. The decision by a DBS operator to serve a local market involves questions of both technical and economic feasibility. In assessing each DBS operator's standalone ability to offer local channel service to subscribers, rather than deal with fanciful proposals and speculative projections, the Commission must deal with the facts and economics.

#### **a. Current Capabilities**

The current capabilities of existing and planned EchoStar and DIRECTV satellites are as follows:

- EchoStar currently provides local channel service in 36 DMAs utilizing full-CONUS satellite beams from the 110° W.L. and 119° W.L. orbital positions, as well as satellites at its 61.5° W.L. and 148° W.L. orbital positions;
- EchoStar recently launched its EchoStar 7 spot-beam satellite into the 119° W.L. orbital position, and plans to launch EchoStar 8, a second spot-beam satellite, into the 110° W.L. orbital position later this year;
- With these spot-beam satellites in place, New EchoStar expects to be able to provide local broadcast signals in approximately 50 DMAs using ten of its fifty licensed full-CONUS DBS frequencies;
- DIRECTV currently serves 41 markets with its DIRECTV 4S satellite, which has 6 frequencies dedicated to spot-beam use, and is located at 101° W.L.;
- DIRECTV plans to allocate several more frequencies' worth of CONUS capacity on an interim basis (pending the launch of another spot-beam satellite) at the 119° W.L. orbital position in order to achieve coverage of ten more local channel markets this year, for a total of 51;

- DIRECTV also plans to launch another spot-beam satellite, DIRECTV 7S, into the 119° W.L. orbital location in 2003, which could have up to four frequencies allocated for spot-beam use.

In sum, EchoStar will have the capability of offering local channel service in approximately 50 DMAs from its spot-beam satellite, in light of its satellite architecture, economic feasibility considerations and estimated redundancy needs. In this regard, NRTC expert Walter Morgan is incorrect that EchoStar on its own can provide all local stations to 80 DMAs by using EchoStar 7 and 8.<sup>29</sup> Although the spot-beams on EchoStar 7 and 8 would have the physical capability of viewing additional DMAs (meaning all or a large portion of each DMA), that capability is meaningless: because of must carry obligations, even under EchoStar's current must carry implementation plan, EchoStar 7 and 8 will be only able to serve a fraction of these DMAs.

For its part, DIRECTV will have the capability of offering local channel service in 51 DMAs without dramatically reducing the carriage of other national programming using CONUS capacity. Assuming that DIRECTV 7S: (i) suffers no technical complications during construction and is not delayed; (ii) is launched successfully; and (iii) is not required to be used for backup capacity in the event that DIRECTV 4S malfunctions, then DIRECTV will have the *technical* capability with its combined fleet to serve 103 DMAs in late 2003 or early 2004. However, the merger opponents' attempt to emphasize this point<sup>30</sup> misses the mark. DIRECTV simply cannot

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<sup>29</sup> See Morgan Declaration (NRTC) at 22.

<sup>30</sup> See NRTC Petition at 58 (stating – erroneously – that DIRECTV can serve 110 DMAs using satellites already in orbit or currently on order).

serve 103 DMAs because, once again, the issue of technical capability is not meaningful unless it is considered in tandem with the economic realities of providing local channel service. As set forth in more detail below, at most, the DIRECTV 4S and DIRECTV 7S satellites will serve approximately 29 additional DMAs, or approximately 70 DMAs total, and it may likely serve less.

**b. The Economics of Providing Local Channel Service**

As Dr. Willig observes, in assessing the question of how many DMAs each DBS firm is capable of serving, the merger opponents “have only focused on technical feasibility, while ignoring the crucial issue of economic costs and benefits.”<sup>31</sup> In particular, when the DBS firms are determining the DMAs in which local channels should be added, there are at least three major factors which influence that determination. *First*, an attempt is made to calculate the expected return from adding local channels in that DMA,<sup>32</sup> and as Dr. Willig notes, “a key factor in determining the expected return from adding local channels is the size of the DMA: According to both DBS firms, larger DMAs, all else being equal, are associated with larger expected revenue – primarily because the expected increase in total new subscribers are greater in larger DMAs.”<sup>33</sup>

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<sup>31</sup> Declaration of Dr. Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Exhibit A, at ¶ 9.

<sup>32</sup> *Id.* at ¶ 10.

<sup>33</sup> *Id.* Population growth by DMA is also factored into the analysis.

*Second*, another important factor in the process of selecting DMAs has been the penetration that the firm has in that DMA, since a significant share of existing subscribers will “take” local channels.<sup>34</sup> DIRECTV, for example, has been very concerned about losing its installed subscriber base in a DMA to the incumbent cable provider, so DIRECTV has been more likely to introduce local channels in DMAs in which it has a high penetration rate.<sup>35</sup>

*Third*, the costs of providing local service are also taken into account. In this regard, much of the cost associated with providing local channel service is “fixed” – that is, it does not vary with the number of subscribers.<sup>36</sup> As explained by Dr. Willig in more detail, the cost factors evaluated by the companies in determining markets in which to provide local channel service include backhaul costs, number of local channels that must be carried, and opportunity costs – the competitive impact of reduced national programming or other services.<sup>37</sup>

In summary then, EchoStar and DIRECTV each evaluate “the net present value of adding local channels, and only decide to expand local channel coverage that will bring them a sufficient return.” As the size of DMAs decreases, it is less likely that

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<sup>34</sup> *Id.* As Dr. Willig notes further, DIRECTV has used a high DBS penetration rate as a “signal” of other factors that could make the introduction of local service more profitable. For example, a high DBS penetration rate may indicate that the local cable provider offers an inferior product. A high DBS penetration rate may also be a signal that the area is conducive to DBS service – that is, many households can “see” the southern sky where the DBS satellites orbit the earth. *Id.* at n.4.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at ¶ 11.

<sup>37</sup> *See id.*

the return from adding local stations in these areas makes financial sense from either company's individual perspective – “the increased revenue potential decreases as the size of the DMA decreases, but the backhaul and opportunity costs stay relatively constant.”<sup>38</sup>

Notwithstanding its posture here that each DBS firm could serve every television market in the country, the NRTC understands these economics. During the Commission's SHVIA implementation proceedings, the NRTC observed that “[e]ven assuming that DIRECTV and EchoStar were to expand their local service to cover 50% more of the DMAs than they have announced, which is highly unlikely, their local service offerings would still cease to exist at Market # 65” due to the facts that “[t]here is not enough satellite capacity available” to each provider, “nor is there a large enough subscriber base.”<sup>39</sup>

The NRTC had it right. Applying these economics to DIRECTV's case, for example, once the company launches its DIRECTV 7S satellite in late 2003, it will have the technical capacity to serve 103 DMAs. The economic reality, however, due to the factors discussed above, is that DIRECTV would not likely serve more than about 70 DMAs<sup>40</sup> (fairly close to the NRTC estimate) due to the opportunity costs and expected returns, and likely would serve less.

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<sup>38</sup> *Id.* at ¶ 13.

<sup>39</sup> Comments of the National Rural Telecommunications Cooperative, CS Docket No. 00-96 (July 14, 2000) at 4-5.

<sup>40</sup> DIRECTV expects that DIRECTV 7S could provide local channels to approximately 29 additional DMAs by utilizing state-of-the-art spot-beam technology and three of the 32 frequencies at 119° W.L.

**c. Serving 210 DMAs Makes No Economic Sense for Either EchoStar or DIRECTV As Individual Companies**

The economics that Petitioners have ignored in overestimating the number of DMAs that EchoStar and DIRECTV could feasibly serve with their existing and planned satellites also apply with even more force to the fanciful notion that each company would be able to justify building and launching additional satellites simply to provide local channel service to every DMA in the country with their existing scarce channel capacity. As Dr. Willig observes, there are two primary reasons that neither DIRECTV nor EchoStar could serve all 210 DMAs on their own. First, each firm would have to utilize a significantly greater number of additional DBS frequencies to offer local channels to all 210 DMAs, which translates to about 10 programming channels' for each frequency that could otherwise be used to provide national programming or expanded advanced video services.<sup>41</sup> The benefits from these national channels (or advanced video services) to each company are extremely significant, since consumers have indicated that the leading reason for switching to DBS has been the provision of "more channels." Dramatically reducing each company's spectrum capacity to provide more local channel service thus "would likely have a significant adverse effect on the DBS firms' competitiveness and profitability."<sup>42</sup>

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<sup>41</sup> Willig Declaration at ¶ 14.

<sup>42</sup> *Id.* DIRECTV, for example, has 37 full-CONUS frequencies available for national programming and advanced services. Reducing that number by nine frequencies would represent a more than 24-percent reduction in capacity to provide national programming or advanced services. *Id.* at n.9.

The second factor is cost. Neither EchoStar nor DIRECTV can provide service to more than a limited number of DMAs with their current and expected fleets of spot-beam satellites, and cannot hope to serve every market in the country with them. And even if 103 markets could feasibly be served, to contemplate the provision of local service to the remaining 107 DMAs would require the launch of another spot-beam satellite. As Dr. Willig observes:

Spot-beam satellites typically cost between \$220 million and \$300 million to construct, launch, and insure. The expected benefits of providing local service to these 107 DMAs would therefore have to be large enough to cover the opportunity costs of forgoing national programming (or advanced services) *and* the expected costs of providing the service including the cost of the new spot-beam satellite. Absent the merger, expanding local service to all 210 DMAs would not be profitable.<sup>43</sup>

These points highlight the error of the NRTC's suggestion that each DBS operator could provide local channel service in many more markets with the addition of "just one additional" spot-beam satellite beyond those on order.<sup>44</sup> These additional proposed satellites would cost each provider up to \$300 million to construct, launch and insure, with only limited economic benefits because of their local channel focus, and a reduction in capacity that would be otherwise used for the expansion of HDTV, VOD and other national program offerings. In addition, each company would separately incur backhaul and other costs, and the potential available subscriber base in each market

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<sup>43</sup> Willig Declaration at ¶ 15.

<sup>44</sup> NRTC Petition at 58 (citing Morgan Declaration).

would be reduced. In short, NRTC proffers a completely unrealistic proposition from a technical and economic perspective that neither provider would ever pursue.

By contrast, New EchoStar will have access to a tremendous amount of new DBS capacity freed up by the elimination of duplicative programming content, which directly translates into a sensible and efficient satellite design and configuration that is actually capable of being implemented. Once again, as Dr. Willig states:

Following the merger, however, the economics of providing local service to additional DMAs are altered. The combined current and potential subscriber base of the two DBS firms raises the returns on the investment in providing local service to smaller markets by spreading the fixed cost of providing local service over the larger expected revenue that would come from a larger subscriber base.<sup>45</sup> Furthermore, the opportunity costs of transferring a significant number of frequencies from use for national programming (or advanced services) to use for local services are sharply reduced.<sup>46</sup>

Moreover, as Dr. Willig observes, the combined current and potential subscriber base of the two DBS firms raises the returns on the investment in providing local service to smaller markets by spreading the fixed cost of providing local service over the larger expected revenue that would come from a larger subscriber base. As

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<sup>45</sup> Besides the revenue from potential new subscribers, the larger-than-expected revenues are generated by two factors: first, the ability to sell the local service to a larger existing subscriber base, and second, the ability to protect a larger subscriber base from switching to cable – as noted below in the text, carrying local channels is an important service to maintain extant subscribers.

<sup>46</sup> Willig Declaration at ¶ 16. (footnote omitted)

noted above, in the absence of the merger, the individual firms would not be able to serve these communities. Therefore, the merger is necessary to achieve this efficiency.<sup>47</sup>

NRTC has accused EchoStar and Hughes of failing to make “specific commitments” to serve many more local markets than the companies currently serve,<sup>48</sup> while the NAB challenges the extent to which the merger will result in a “net gain” in local channel service relative to the markets EchoStar and Hughes currently plan to serve.<sup>49</sup> Indeed, the NAB’s stated principal concern is that competition between the nation’s two DBS providers “has driven the expansion of local-into-local” and “will lead to more carriage of local stations.”<sup>50</sup> Now that merger planning has resulted in the “Local Channels, All Americans” plan, with a firm commitment by New EchoStar – and only New EchoStar – to bring it to reality, all such concerns are simply not valid.

**B. The Merger Will Increase National Programming Choices and Enhance the Quality of MVPD Service**

As set forth in the Application, the merger of Hughes and EchoStar will yield other tremendous benefits to consumers of multichannel video services, such as expanded and new programming choices that include: more national programming networks; greatly expanded HDTV offerings; new and expanded VOD and pay-per-view

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

<sup>48</sup> NAB Petition at 58

<sup>49</sup> *Id.* at 79-80.

<sup>50</sup> *Id.* at iii.

services; additional educational, specialty and foreign language offerings<sup>51</sup>; and new interactive services. In the process of providing these benefits to the consumer, New EchoStar will continue to drive the evolution of DBS technology as the incumbent cable operators' most formidable competitor, and will continue to erode these companies' undisputed dominance of the MVPD marketplace.

Indeed, a prime example of this phenomenon is HDTV. Because HDTV is so bandwidth intensive, neither company standing alone will be able to deploy more than a few channels of HDTV programming. By contrast, New EchoStar (in addition to being able to provide local channel service in 210 markets, equaling all Americans) will have the capacity to provide at least twelve HDTV channels, and possibly more. As Thomson Multimedia, one of the world's largest manufacturers of consumer products, observes, New EchoStar's plan "to expand the number of available high-definition programming channels on a combined satellite platform" is a move that "will invigorate other operators in the cable and terrestrial TV business to offer more HDTV programming to consumers."<sup>52</sup> Similarly, Circuit City Stores, Inc., one of the nation's largest retailers of consumer electronics products, observes that "the broader offer of HDTV content by a satellite MVPD provider will most certainly spur competition in this

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<sup>51</sup> The Application is supported by the League of United Latin American Citizens, the oldest and largest Hispanic civil rights group. "[The League] believes that the proposed merger . . . would provide improved communications services to the nation's Hispanic community . . . EchoStar & DTV have offered a great deal of programming for Spanish-dominant and bilingual households, but the potential exists for even more." Comments of the League of United Latin American Citizens at 1.

<sup>52</sup> Comments of Thomson Multimedia at 1.

area from cable operators and necessarily help speed the rollout of this technology nationally.”<sup>53-54</sup> As Sharp Electronics Corporation puts it in its letter supporting the merger, “[s]uch an increase in HDTV capacity will provide incentives for programmers to increase HDTV programming, consumers to buy more HDTV equipment, and competitors in the cable and broadcast industries to upgrade their HDTV capabilities, all resulting in better service for consumers and a timely return of analog broadcast spectrum to the public.”<sup>55</sup> In sum, as cable systems continue to “go digital” to compete with the competition that DBS operators have already brought to the MVPD marketplace, New EchoStar will continue to compete aggressively with the cable incumbents and drive them to improve their own products, pricing, and service quality.

The creation of New EchoStar also will not, as the NRTC asserts, result in a “loss of choice” for rural Americans.”<sup>56</sup> Indeed, not only is the NRTC’s view not

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<sup>53</sup> As Dr. Barnett observes, at present, it is only possible to accommodate 1 HDTV channel on each 24 MHz transponder. Barnett Declaration at ¶¶ 4-6.

<sup>54</sup> Comments of Circuit City Stores, Inc. at 5.

<sup>55</sup> Letter from Robert Scaglione, Vice President-Marketing, Consumers Electronics Group, Sharp Electronics Corporation, to Attorney General John Ashcroft, U.S. Department of Justice and Chairman Michael Powell, Federal Communications Commission (Feb. 4, 2002).

<sup>56</sup> NRTC Petition at 30. Nor is it true that the Applicants plan to consign all national programming to the 101° W.L. orbital location, as suggested by the State of Alaska. *See* Comments of the State of Alaska at 8-9 (expressing concern that an eastward shift of key national programming from 119° W.L. to 101°W.L. would eliminate or degrade service to parts of Alaska). The satellite Application filed today by Applicants makes clear that the merger will result in significantly more national programming from 119° W.L. than is currently available. Specifically, under the Applicants’ plan, 9 of the 32 DBS frequencies at 119° W.L. will be devoted to spot-beams (one of which will be directed to Alaska). The remaining 23 frequencies will, therefore, be available for national programming. This will likely result in a significant increase in the national programming transmitted from the westernmost full-CONUS slot. Alaska too will

(Continued ...)

shared by other rural constituencies,<sup>57</sup> the proposition itself falls on its face. First, the elimination of extensive programming duplication by EchoStar and DIRECTV will result in a significant increase in the number and types of national programming, including HDTV programming, made available to DBS subscribers. Subscribers in rural areas will enjoy all the benefits of this expanded programming, benefits that simply could not be made available to them due to spectrum constraints in the absence of a merger. Second, to the extent that NRTC (and its members and affiliates, including Pegasus) currently has the right to distribute DIRECTV programming in competition with EchoStar in rural areas, that contractual right will be recognized by New EchoStar. Accordingly, in those rural territories served by NRTC, there will be no reduction in the number of providers of DBS service.

In addition, as a direct result of New EchoStar's plan to serve every market, equaling all Americans, with local channel service, rural Americans will receive access to local channel service, with digital quality pictures and CD quality sound, that *they have never enjoyed before, and could not receive but for the merger*. Indeed, a significant portion of these subscribers may not even be able to receive quality over-the-air television broadcast signals, such that New EchoStar will actually increase the number

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certainly share in the huge benefits of doing away with duplication of national programming services between the two companies.

<sup>57</sup> See, e.g., Comments of the Louisiana Farm Bureau Federation at 1; Letter to Chairman Michael Powell from M.J. "Mike" Foster, Jr., Governor of Louisiana (Jan. 17, 2002) (merger will benefit rural residents of Louisiana); Comments of Jeff Hoffman, Champion Rural Economic Area Partnership Alliance Director at 1; Comments of Amy Pastor, Church Point (La.) Chamber of Commerce at 1.

of television households in rural areas. NRTC’s claim that New EchoStar’s “promised increase in local service ignores” rural consumers<sup>58</sup> is flatly incorrect.

Finally, the enhanced ability of New EchoStar to provide more programming choices necessarily means more carriage opportunities for independent programmers who historically have had trouble gaining carriage on cable systems. To maintain its competitive edge against cable operators, New EchoStar would have a clear incentive to differentiate itself through innovative independent programming sources.

**C. The Merger Will Make Broadband Service Available to All U.S. Homes**

As discussed in more detail in Section III below, the merger will provide New EchoStar with the spectrum capacity and economies of scale to *create* a true broadband “advanced service” alternative. In doing so, it will help cure the real problem, which the Petitioners assume away.<sup>59</sup> That problem is simply the unavailability of true broadband service to millions of rural Americans and the lack of effective broadband competition for all remaining consumers.

The high-speed Ku-band access services provided by the Applicants today do not cure this problem – they do not satisfy the Commission’s definition of an “advanced service.” Nor could either company standing alone deploy on a timely basis an advanced residential service of mass scale and appeal at an affordable price. Partly for

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<sup>58</sup> NRTC Petition at 60.

<sup>59</sup> See e.g., NRTC Petition at 42-51; NAB Petition at 99-102; Pappas Telecasting Companies Petition at 6.

these reasons, SPACEWAY has been developed with a focus on the larger commercial, or “enterprise,” customers, while EchoStar’s Ka-band program has remained modest in scope. Both of these Ka-band programs will need to be refocused and integrated with one another to achieve the required economic scale for ubiquitous residential true broadband service. Therefore, the effects of this transaction on the broadband market are more akin to an increase in the number of true broadband competitors from “zero to one” in many areas and “one-to-two” or “two-to-three” in other areas.

Ultimately, the question for the Commission is simple: will it try to tackle the limited availability of advanced services throughout America with a web of costly cross-subsidy and regulation? Or, will it allow a multi-billion dollar private capital initiative to create a true broadband competitor that will provide advanced services to virtually all American homes? The latter alternative clearly is the better one for the public interest.

Given that there are large portions of the country that will not be able to receive cable modem or DSL service any time soon, the roll out of a competitively priced satellite broadband service will result in large consumer benefits. As with the video service, there are incentives to price this service subject to a national pricing policy such that the price for basic broadband service will be set on the basis of competition with cable modem and DSL services, thereby ensuring that rural customers will receive the benefits of this new service.

**D. The Merger Will Allow New EchoStar to Achieve Extraordinary Efficiencies**

In addition to the spectrum efficiencies discussed above, the merger will allow New EchoStar to substantially improve existing equipment and services to consumers at a lower cost.

First, New EchoStar will provide a unified DBS firm with a stable and better utilized satellite fleet. In addition to enabling innovative merger-specific efficiencies such as the “Local Channels, All Americans” plan, the merger will provide much greater flexibility to provide economical in-orbit backups. Over time, New EchoStar will also be able to rationalize its satellite fleet to the licensed frequencies of the combined company. For example, today, DIRECTV is using an entire DBS satellite at the 110° W.L. orbital location to utilize only 3 frequencies of licensed bandwidth at that orbital position. New EchoStar will be able to match its satellites much more efficiently to spectrum that is no longer fragmented between the companies.

The Applicants also anticipate that the standardized equipment and services of New EchoStar will be functionally superior to either company’s existing equipment. Moreover, because of the economy of scale resulting from the combined customer base, the Applicants anticipate a tremendous savings in operational and manufacturing costs in providing these improved equipment and services. Finally, the increased customer base will also allow New EchoStar to decrease programming costs and may be the basis for creating a new programming platform. Together, these synergies will create a dynamic company that will be able to vigorously compete with

cable by offering consumers a more robust service at cost lower than either party could achieve alone.

The combination of EchoStar and Hughes will allow the companies to use the best equipment, technology, practices, and services of each to offer a better and less expensive product to consumers. The Petitioners intend to standardize the equipment used by its customers by combining the best elements of the technology of EchoStar and Hughes. The next generation of DBS and broadband equipment will offer a level of service currently unavailable. One aspect of this will be the “Local Channels, All Americans” plan described above, but Petitioners anticipate many other efficiencies as well. Functionalities available to EchoStar customers that are not currently available to Hughes customers or vice versa will be incorporated into the standardized equipment thereby improving services to all customers and potential subscribers.

Standardization of components will also create an economy of scale that will reduce costs. For example, New EchoStar will be using a standardized set top box. By increasing the volume of units ordered, New EchoStar anticipates substantial manufacturing cost savings that could be used to reduce charges to customers. The increased potential customer base would also make more economically attractive opportunities to integrate New EchoStar equipment with other services and devices. By increasing the size of the market, companies such as television or computer manufactures may be more interested in creating products that integrate DBS and broadband abilities directly into their products.

Consumers will also benefit from the consolidation of the service departments of EchoStar and Hughes such as customer service and billing operations.

New EchoStar would take advantage of the most efficient aspects of both companies to raise the level of service it would provide to customers. In addition, because of the economies of scale, it is anticipated that the cost of providing this improved service will decrease on a per customer basis. Similarly, the merger will allow the companies to eliminate duplicative operational practices. For example, the cost and time of programming backhaul and uplink would halved because New EchoStar would only need to perform these functions once where today each company must perform these operations separately.

New EchoStar will also gain tremendous efficiencies as a result of the combination of the EchoStar and Hughes customer bases. By having a greater number of viewers, New EchoStar will be in a stronger position to negotiate with programmers for more programming options at a lower per customer cost. Moreover, the increased number of customers may make the creation of an independent programming platform economically viable where it is currently impractical for either company alone.<sup>60</sup> With a large enough audience, New EchoStar will be in a position to produce and offer new and alternative programming choices to consumers. Finally, the greater number of viewers will make advertising on New EchoStar more valuable. Thus, by leveraging the size of its customer base, New EchoStar will be able to increase the programming options for its customers while decreasing costs.

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<sup>60</sup> See Section IV.A, *infra*.

As a whole, the efficiencies of the merger will result in better, more competitive services that will offer consumers greater programming and broadband options in a more cost effective manner.

Nor is it possible, as the NAB suggests, for these efficiencies to be realized through some type of spectrum-sharing joint venture.<sup>61</sup> Such a venture is inherently unworkable outside of a merger scenario, primarily because it would require each company to cede control over a significant part of its “crown jewels” – its core satellite and spectrum resources. No court or agency has ever agreed that a transaction short of merger is a palatable alternative when it requires contribution of each firm’s core assets. In fact, in this case there is unusually tangible proof that a joint venture would not work: the parties tried to negotiate one and failed because it was unworkable.

There are only three options for control in an arrangement like the one the NAB proposes – control by DIRECTV, control by EchoStar, or shared control with the potential for deadlock. Absent a merger, neither EchoStar nor DIRECTV would cede the essential satellite assets of their businesses to its competitor to control, or to a separate entity that itself would be subject to instability and deadlock. Because spectrum sharing would require numerous decisions that would significantly disadvantage one firm or the other, these control questions are ruinous.

Considering how the transition issues would be addressed in such a joint venture drives home the problem. Spectrum sharing would likely require the replacement of one firm’s consumer equipment. The firm that had to replace its equipment would be

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<sup>61</sup> NAB Petition at 90-92.

put at a significant disadvantage, even if the costs were shared, because consumers and retailers would stop buying that firm's equipment as soon as the decision was announced. Similarly, the decision on how to use each firm's satellite assets could significantly and adversely affect one firm or another in the event the agreement was terminated. Issues such as potential satellite failures and back-up plans would also be extremely difficult to address with separately owned diverse fleets of satellites. Finally, the general instability of such an arrangement would make the undertaking prohibitively risky, and would discourage investment in research and development needed to move the platform forward. Only the merger can provide the stability and decision making process to overcome these obstacles.<sup>62</sup>

**E. The Commission Has a Unique Competence to Recognize the Extraordinary Spectrum Efficiencies Flowing from the Merger**

The Commission is uniquely positioned to evaluate the extraordinary merger-specific efficiency of eliminating redundant spectrum use. In fact, the Communications Act requires the Commission to ensure the efficient use of the spectrum.<sup>63</sup> The Commission recently summed up the importance of spectrum efficiency and its role in achieving it:

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<sup>62</sup> In addition to the control issues, a joint venture would require unwieldy procedural entanglements. The firewalls necessary to avoid sharing of competitive information would massively complicate the relationship of the firms with a stand-alone joint venture entity, exacerbating the control and stability issues.

<sup>63</sup> See 47 U.S.C. § 303(g) (requiring the Commission to “[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.”); see also 47 U.S.C. § 309(j)(3)(D) (Continued ...)

The growing demand for spectrum by new services and the continuing development of radio communications technologies make spectrum management a unique challenge. Spectrum is a valuable and finite public resource that must be allocated and assigned in a manner that will provide the greatest possible benefit to the American public. At the same time, it is important to encourage the development and deployment of new, more efficient technologies that will increase the amount of information that can be transmitted in a given amount of bandwidth.<sup>64</sup>

Within that policy, across a host of telecommunications sectors, the Commission has consistently treated duplicative use of the spectrum with skepticism.<sup>65</sup>

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(in designing competitive bidding methodologies, the Commission shall seek to promote the “efficient and intensive use of the electromagnetic spectrum.”).

<sup>64</sup> *In the Matter of Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, 14 FCC Rcd. 19868, 19870 ¶ 7 (1999); *see also In the Matter of Principles for Promoting Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, 22 Comm. Reg. 791 (2000).

<sup>65</sup> For example, in denying a request for the use of INTELSAT facilities to provide an identical telecommunications service already in existence on domestic satellite facilities, the Commission stated: “[g]iven the finite nature of the geostationary orbital locations for communications satellites... and transponder capacity on those satellites, the use of two transponders (one domestic and one INTELSAT) for identical service clearly is not an efficient use of this limited resource.” *Transborder Satellite Video Services*, 8 FCC 2d 258, 281 n.30 (1981). *See also In re Revision of Radio Rules and Policies*, 7 FCC Rcd. 2755, 2783 ¶ 57 (1992) (In the radio broadcasting context, reasoning that it saw “no benefit to the public [by] permitting commonly owned same-service stations in the same market to substantially duplicate programming,” the Commission limited simulcasting by such stations to 25 percent of the broadcast schedule.); *In re Application of State of Idaho for a Waiver of the Rules to Allow Federal Government Agencies to be Provided Service in the Private Operational Fixed Microwave Radio Service*, 3 FCC Rcd. 5910 (1988) (In ruling favorably upon a requested waiver of the Commission’s rules by the State of Idaho to enable it to share several Private Operational-Fixed Microwave Radio Service facilities with the United States Forest Service and a federal energy body, the Commission reasoned that “the proposed sharing w[ould] conserve public funds and

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Notwithstanding the Commission’s pro-efficiency policies, the NAB argues that the Application should be denied because the “Commission has never agreed to allow a single firm to control 100 percent of an entire spectrum [sic] . . . .”<sup>66</sup> This argument is both inapplicable here and incorrect.

*First* of all, the merger would not give New EchoStar such control. To arrive at its “100% control” idea, the NAB offers a gerrymandered definition of the relevant universe of spectrum – in its view, it is “all CONUS high-power Ku-band spectrum.”<sup>67</sup> This definition excludes the DBS licenses held by R/L DBS and Dominion. Even under its own definition, moreover, the NAB ignores the licenses available for high-power Ku-band FSS satellites for the full-CONUS DBS slots allotted by the ITU to Mexico, Argentina, Canada and other countries. In fact, two Applications are pending before the FCC to allow service to the United States from two orbital locations allotted to Canada.<sup>68</sup>

*Second*, the Commission’s competition analysis is not based on a “band-by band” market definition. The inquiry is based on the competition available in the entire market, not only users of a particular spectrum band. As noted in Section II.A, below, the product market is multichannel video programming distribution, not three

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spectrum space by avoiding expensive and unnecessary duplication of facilities and service [and that] the public interest clearly favors this result.”)

<sup>66</sup> NAB Petition at 106.

<sup>67</sup> *Id.*

<sup>68</sup> *See* Digital Broadband Applications Corp., File No. SES-LIC-20020109-0023; WSNET Holding, Inc., File No. SES-LIC-200111121-02185.

DBS slots, not even satellites only. The comparison drawn by the NAB from the DARS licensing proceeding is inapposite for a similar reason. The DARS licensees were then, and are now, the only providers of unbundled nationwide subscription radio. DBS providers, by contrast, have to compete against much larger, entrenched incumbents that do not use the “high-power Ku-band spectrum” at all. Finally, the Commission has, in fact, sanctioned the use of the spectrum allocated to a particular service by one licensee.<sup>69</sup>

## **II. THE MERGER WILL HAVE PRO-COMPETITIVE EFFECTS, AND NO ANTI-COMPETITIVE EFFECTS, IN THE MVPD MARKET**

### **A. EchoStar and DIRECTV Compete Primarily Against Cable Operators in the MVPD Market**

EchoStar and DIRECTV compete in the market for Multichannel Video Program Distribution (“MVPD”). This market (and not a DBS-specific one) has been identified by both the Department of Justice<sup>70</sup> and the FCC<sup>71</sup> as the relevant market for

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<sup>69</sup> When the Commission first established the Mobile Satellite Service (“MSS”) in the L-band, it received competing Applications from 12 companies, invited all the Applicants to form one consortium, American Mobile Satellite Corporation, and gave one license to that entity. The Commission purposefully elected to license one large consortium as opposed to multiple smaller entities because, among other things: a larger amount of bandwidth would permit a greater variety of services to be provided by an MSS system, and a larger customer base to be served; the high cost of an MSS system and the amount of spectrum available for MSS warranted the licensing of one initial MSS system using the entire allocated spectrum; and joint ownership of an MSS system would best permit a variety of competitive mobile satellite services to be made expeditiously available to the public. These same considerations would justify to a much greater extent here the creation of New EchoStar even if there were not ample other spectrum in the same band available for other competing providers.

<sup>70</sup> In 1998, the Department of Justice (“DOJ”) sued to enjoin Primestar, a joint venture of large cable companies, from acquiring rights to an orbital slot for nationwide DBS service that were held jointly by News Corp. and MCI Telecommunications Corp. In the suit, DOJ alleged that allowing cable operators through Primestar to control those DBS assets would eliminate the possibility that those assets could be used to compete

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purposes of evaluating transactions such as the EchoStar-Hughes merger.<sup>72</sup> Although the MVPD market encompasses a number of different distribution technologies, there can be no doubt that this market continues to be dominated by incumbent cable operators, which continue to hold an approximately 78% share according to the most recent FCC analysis.<sup>73</sup>

The principal merger opponents and their economists do not take serious issue with the notion that the relevant product market is MVPD, but they quibble around its edges and attempt to distort a number of facts and marketplace developments in order to construct a case that the merger will lessen rather than promote MVPD competition. Specifically, these parties have adopted a four-pronged strategy that seeks to: (i) minimize the degree to which cable operators dominate the MVPD marketplace; (ii) overstate dramatically the degree to which DIRECTV and EchoStar are competitively

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against cable. DOJ also alleged that the MVPD market was the relevant product market for the purpose of evaluating Primestar's proposed purchase of the DBS assets. *See United States v. Primestar, Inc.*, Civ. No. 1:98CV01193 (JLG) (D.D.C. May 12, 1998).

<sup>71</sup> *In re Application of MCI Telecommunications Corp.*, 15 Communications Reg. (P&F) 1038 (1999), at para. 9 & n.29 (finding that the MVPD market was the relevant market for purposes of analyzing this DBS transfer of control application, and moreover, that "DOJ concurs with the Commission's analysis that the relevant product market is the provision of MVPD services.")

<sup>72</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd. 7442, 7474 ¶ 62 (1994) ("First MVPD Competition Report") (from the outset, the FCC recognized that DBS would "readily compete with cable")

<sup>73</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389 (rel. Jan. 14, 2002) at Table C-1 ("Eighth MVPD Competition Report").

focused on one another, rather than on dominant cable incumbents; (iii) marginalize the extent of any other existing or potential competition from other MVPD market sources; and (iv) attempt to taunt the merger Applicants with statements lifted from a private lawsuit that never came close to being adjudicated to a conclusion, and that is of little relevance here. Each of these prongs is discussed in more detail below, and when examined, illustrates the degree to which the merger opponents have misrepresented the state of the MVPD market, as well as the competitive effects of the proposed merger.

### **1. Cable Dominates the MVPD Market**

To read the pleadings of the NRTC, Pegasus and the NAB, in particular, one would believe that DBS, and not cable television, was the dominant multichannel video programming distribution technology in the United States. To the contrary, the Commission has recognized that cable is “the dominant technology for delivery of video programming to consumers in the MVPD marketplace.”<sup>74</sup> Nationwide, cable controls more than three quarters – 78 percent – of the MVPD market.<sup>75</sup> The vast majority of U.S. households is passed by cable, and most households subscribe: 64 percent – almost two thirds – of all households owning a television subscribe to cable television.<sup>76</sup> Nor is

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<sup>74</sup> Eighth MVPD Competition Report ¶ 5.

<sup>75</sup> *Id.* at ¶¶ 6-7.

<sup>76</sup> *Id.* at ¶ 18.

cable subscribership falling. Indeed, cable penetration rose by over a million subscribers last year, an increase of almost two percent.<sup>77</sup>

Plainly, this is a market in which the cable companies continue to hold a dominant market position. And to the extent that DBS has emerged as “the principal subscription competitor to cable television service,”<sup>78</sup> cable’s huge installed subscriber base of 70 million households is by far the greatest source of potential growth for the DBS service, and will remain the primary focus of competitive activity by DBS providers, in the future.

As stated in the Application, however, the key determinant to the continued emergence of DBS as a strong MVPD competitor will be the degree to which the service can keep pace with the technological enhancement of incumbent cable television systems. Even analog cable operators historically have had tremendous advantages over DBS operators in terms of system incumbency, consumer resistance to satellite dish installation, and extremely low consumer equipment costs relative to DBS providers. To the extent that DBS has been able to distinguish itself in the marketplace as having certain quality advantages over analog cable systems, such as a diverse number of programming channels offered with a digital quality picture and sound, the rollout of digital cable systems is reducing or eliminating this competitive advantage.<sup>79</sup>

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<sup>77</sup> *Id.* at ¶ 18.

<sup>78</sup> *Id.* at ¶ 57.

<sup>79</sup> *See e.g.* NRTC Petition at 20, 22; *see also* NRTC’s Appendix, Exhibit I, Declaration of Paul W. MacAvoy at 6 (“MacAvoy Declaration”).

Indeed, as noted in the Application, digital cable is profoundly threatening to DBS. Among other things, digital cable:

- erases DBS firms' historical quality and channel advantages;
- allows cable firms to offer a video/cable-modem bundle that DBS providers cannot begin to match;
- has led the large cable multiple system operators to target DBS much more aggressively than in the past, including with cable modem bundles, national advertising targeted at DBS services, "dish bounties," and other satellite-specific promotions; and
- has introduced true two-way VOD in a number of markets, which currently cannot be matched by one-way only DBS systems, and enables the development of vastly expanded interactive services.

In addition, although DBS has become a more substitutable service to cable now that local channels may be carried on DBS systems, unless the merger is consummated neither DIRECTV nor EchoStar has the capacity or subscriber base, especially in the presence of must carry obligations, to carry local channels in anything close to the 210 DMAs in the United States.

Even the merger opponents agree that digital cable is emerging as a formidable incumbent cable response to DBS,<sup>80</sup> but they fail, of course, to recognize the

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<sup>80</sup> See Pegasus Petition, Attachment A, Report of Daniel L. Rubinfeld ("Rubinfeld Report") at 19; NRTC Petition at 20 (characterizing digital cable as "reasonably interchangeable" with DBS); MacAvoy Declaration (NRTC) at 6; NAB Petition, Declaration of J. Gregory Sidak Declaration at 9-10 ("Sidak Declaration").

implications of this point. If EchoStar and DIRECTV are to continue to succeed, they must match both the current dominance of incumbent cable operators as well as the dire competitive threat posed by the upgrade of these incumbents' systems. 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. And this development in turn will lessen the competitive pressure on cable firms, enabling them to continue to exercise market power.

**2. NRTC, Pegasus and the NAB Greatly Overstate the Degree of Competition Between DBS Providers Relative to Cable**

Consistent with their strategy of ignoring the “900 pound gorilla” presence of incumbent cable operators in the MVPD market, the Petitioners also use misleading anecdotes and false inferences to suggest that “EchoStar and DIRECTV compete very closely with each other,” while “competition with cable” from the DBS firms allegedly is “more attenuated.”<sup>81</sup> Indeed, each of the NRTC, Pegasus and the NAB go to great lengths to portray EchoStar and DIRECTV as “vigorously competitive” with one another, in order to suggest that the merger will lead to a dramatic reduction in MVPD competition.<sup>82</sup> They of course compete, but this competition is dwarfed in comparison to DBS competition with cable. The Petitioners' point is overstated, and the policy conclusion is incorrect.

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<sup>81</sup> See e.g., Pegasus Petition at 22.

<sup>82</sup> NAB Petition at 15-31; NRTC Petition at 31-35; Pegasus Petition at 12-14, 21-29.

*First*, NRTC mischaracterizes the testimony of the merger parties’ economist, Dr. Willig, as concluding that EchoStar and DIRECTV “do not compete” in the MVPD market, which the NRTC asserts “defies logic.”<sup>83</sup> This is a strawman that clearly does not track Dr. Willig’s statement. What Dr. Willig observed was that “DBS pricing decisions appear to be driven by competition with cable companies,” that EchoStar and DIRECTV focus on gaining market share “by luring consumers away from the leading cable providers,” and thus, that DBS companies “focus” their competitive efforts “on cable providers, rather than the other DBS firm.”<sup>84</sup> Such statements, of course, are in no way inconsistent with the notion that DBS providers also compete to an extent with each other – as MVPD market participants, they clearly do. But the level of competition between DIRECTV and EchoStar, which together control less than 20 percent of the MVPD marketplace, is dwarfed by the level of competition between DBS and cable.

*Second*, to the extent that NRTC, Pegasus and the NAB attempt to support their claims of ultra-vigorous intra-DBS competition with “evidence,” most of it is flawed and misleading.

- The Petitioners claim parallel equipment discounting promotion and offers by both companies. In fact, they ignore that these actions describe the gradual move of both DBS companies towards the cable paradigm of free equipment, a clear effort to better

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<sup>83</sup> NRTC Petition at vii.

<sup>84</sup> Merger Application, Exhibit A, Declaration of Dr. Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation at ¶ 11 (“Merger Application Willig Declaration”).

compete with cable. The DBS firms realized early on that they could not persuade cable subscribers to switch to DBS if the up-front costs were too high in relation to cable, and this dynamic has increased as they seek to grow deeper into cable's installed base.

- The Petitioners claim that five days after DIRECTV announced that it was beginning to offer local service at \$5.99 per month, EchoStar announced it was going to start providing a similar line-up of local channels for \$4.99, events which occurred in late November 1999.<sup>85</sup> In fact, it was exactly at that time, November 29, 1999, that the Satellite Home Viewer Improvement Act (“SHVIA”) of 1999 allowed EchoStar and DIRECTV to begin offering “local-into-local” service for the first time. Given the importance of this regulatory development (and its import in allowing the two DBS companies to begin competing more effectively with *cable operators*), it is hardly surprising that the two companies announced at roughly the same time that they would begin offering local channel service.<sup>86</sup>
- The Petitioners claim that both DBS firms announced on December 27, 2001, that they were going to provide additional local channels in each market. In fact, on January 1, 2002, both DBS firms' must carry obligations went into effect, so that both firms were required *by law on the same day* to offer more local channels.<sup>87</sup>
- The Petitioners claim that each of EchoStar and DIRECTV generally picked the most populous areas in the country to roll out their local-into-local service. In fact, EchoStar and DIRECTV lists of DMAs do *not* overlap completely, suggesting that each company's local-into-local decisions are based on different considerations, to a much greater extent than overlap cities suggest intra-DBS rivalry.
- The Petitioners emphasize that both EchoStar and DIRECTV announced the availability of HDTV-compatible set-top receivers within one day of each other.<sup>88</sup> Petitioners fail to note, however,

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<sup>85</sup> Willig Declaration at ¶ 57.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at ¶ 58.

<sup>88</sup> *See e.g.*, NRTC Petition at 33.

that each of these announcements occurred at the Consumer Electronics trade show, a venue where such announcements regarding new technologies are commonplace. The timing of this announcement is much more logically ascribed to the promotional benefits of making such announcements at the leading electronic trade shows, rather than competitive response.<sup>89</sup>

The bottom line is that the incidents cited by opponents of the merger simply do not provide persuasive evidence of intense competition between the two DBS firms. Rather, each provider primarily targets cable, and to the extent that they appear to be lowering prices or adding services in approximate tandem, those tandem movements for the most part reflect the response of both operators to predictable extrinsic events.

More broadly, the basic question posed by the Petitioners, *i.e.*, whether the DBS providers compete at all, is misplaced. As Dr. Willig observes, the more relevant question for analyzing the impact of the merger on competition in the MVPD market is not whether EchoStar and DIRECTV “compete at all. Rather, it is the *degree* of competition between EchoStar and DIRECTV. . . .”<sup>90</sup>

### **3. The Best Evidence Shows That the Degree of Competition Between EchoStar and DIRECTV Is Modest**

Notwithstanding the optical illusion of contemporaneous action and reaction that Petitioners try to create, the data show that the DBS services of the Applicants do not compete fiercely against each other, and the loss of existing competition from the merger is correspondingly limited. Perhaps the best witnesses of

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<sup>89</sup> Willig Declaration at ¶ 58.

<sup>90</sup> *Id.* at ¶ 59.

this, and certainly the greatest beneficiaries from the lack of perfect competition between the two satellite providers, are NRTC and Pegasus themselves. While these two entities purport to be concerned about the fate of rural consumers, they currently charge rural subscribers \$34.99 – \$3.00 more per month for DIRECTV’s Total Choice package, an expanded basic service, than DIRECTV charges its subscribers for the same programming package in other areas of the country. This subscription fee is also \$3.00 per month more than the price charged by EchoStar for its equivalent America’s Top 100 package.<sup>91</sup>

As explained above, the reasons for NRTC’s and Pegasus’s ability to overcharge their subscribers include the “huge differentiator” associated with sports programming and DIRECTV’s brand name.<sup>92</sup> For whatever reason, EchoStar today does not effectively constrain the prices charged by Pegasus and NRTC in rural areas. As the Applicants will show below, national pricing will better constrain the DBS prices charged rural consumers by NRTC and Pegasus than EchoStar can today.

Dr. Willig’s examination of “churn data” confirms the relatively low degree of competition between DIRECTV and EchoStar. For example, using a DIRECTV subscriber survey, Dr. Willig studied the percentage of current DIRECTV

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<sup>91</sup> Ironically, it appears that the reason that NRTC and Pegasus are able to charge a supracompetitive price is precisely because, unlike EchoStar and DIRECTV, they do not compete with the major MSOs in urban areas.

<sup>92</sup> NAB Petition at 63.

subscribers who were previously EchoStar subscribers.<sup>93</sup> The data showed that only nine percent of DIRECTV's current subscribers were previously EchoStar subscribers.<sup>94</sup> By comparison, roughly 61 percent of DIRECTV's current customers previously subscribed to cable.<sup>95</sup> Dr. Willig concludes that these figures confirm the views expressed by DBS executives that the "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.<sup>96</sup> Analyses by Dr. Willig of other churn data reflect as well that there is only limited competitive interaction between the DBS firms.<sup>97</sup>

#### **4. EchoStar and DIRECTV Have Been Unable to Discipline Cable Prices**

The competition from EchoStar and DIRECTV that Petitioners are so eager to see preserved has not been enough to constrain the pricing behavior, improve the service quality, or enhance consumers' perception of most cable companies. One perennial fact observed by the Commission in its annual reports on the status of competition in the MVPD market is that cable operators continue to increase their prices

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<sup>93</sup> See Willig Declaration at ¶ 61. Each month, DIRECTV surveys a random sample of roughly 350 subscribers and asks them a series of questions, including whether they have ever subscribed to cable or another DBS service. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at ¶¶ 62-66.

at rates that far outpace inflation.<sup>98</sup> EchoStar and DIRECTV, by contrast, have only raised their rates *twice* since 1996.

The findings of a Consumers Union survey of cable and satellite subscribers, published in the September 2001 Consumer Reports, highlights the effects on customer satisfaction of an industry with inadequate competition.<sup>99</sup> The report of this survey summed up its findings on cable service with a lament: “In the national surveys of nearly 2,000 cable- and satellite-TV subscribers conducted for this report, cable companies received among the lowest marks of any service providers we regularly evaluate – even lower than those for technical support from computer manufacturers.”

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<sup>98</sup> Eighth MVPD Competition Report at ¶ 9 (“During the period under review, cable rates rose faster than inflation. According to the Bureau of Labor Statistics, between June 2000 and June 2001, cable prices rose 4.24 percent compared to a 3.25 percent increase in the Consumer Price Index (“CPI”), which measures general price changes.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 Comm. Reg (P&F) 1414 at ¶ 9 (2001) (“Seventh MVPD Competition Report”) (“During the period under review, cable rates rose faster than inflation. According to the Bureau of Labor Statistics, between June 1999 and June 2000, cable prices rose 4.8 percent compared to a 3.2 percent increase in the Consumer Price Index (“CPI”), which measures general price changes.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* 15 FCC Rcd. 978 at ¶ 9 (2000) (“Sixth MVPD Competition Report”) (“During the period under review, cable rates rose faster than inflation, although the difference between the cable price index and the Consumer Price Index (“CPI”) is not as great as in the previous year. According to the Bureau of Labor Statistics, between June 1998 and June 1999, cable prices rose 3.8% compared to a 2% increase in the CPI, which measures general price changes.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 14 FCC Rcd. 923 at ¶ 9 (1998) (“Fourth MVPD Competition Report”) (“During the period under review, cable rates rose more than four times the rate of inflation. According to the Bureau of Labor Statistics, between June 1997 and June 1998, cable prices rose 7.3% compared to a 1.7% increase in the Consumer Price Index (“CPI”), which is used to measure general price changes.”)

<sup>99</sup> See *TV: The Digital Decision, A Guide to Choosing Between Digital Cable and Satellite TV – Or Sticking with Regular TV Service*, Consumer Reports (Sept. 2001).

When the Consumers Union asked the survey respondents if they had been charged a “substantial rate increase” in the last year, more than three times as many cable customers answered affirmatively than did satellite customers (40% to 13%). And when asked if their service was an “excellent value,” more than three times as many satellite subscribers responded affirmatively (“fewer than 10%” of cable subscribers to 30%). Cable customers were also much more likely to report frequent service disruptions, unwanted changes in program packages, and frequent channel-listing changes.

While cable rates have risen steadily and faster than the rate of inflation since they were deregulated in the early 1990s,<sup>100</sup> what follows are a few examples of some recent cable rate hikes in a few representative cities.<sup>101</sup>

- In Austin, Texas, AOL/Time Warner recently raised the monthly fee for expanded basic cable service to \$41.67. They had charged \$34.20 in 1999, \$37.74 in 2000, and \$39.69 in 2001. This is an increase of more than 21% in just three years. For a converter box, the increase over the same period was 93.8%, and the price for service charges increased 77.6%.<sup>102</sup>
- Cable customers in Reno, Nevada saw Charter raise its expanded basic rates approximately 15% this year, to \$39.99 per month. Monthly service charges had been just \$16.45 in 1990, increasing 143% over the next eleven years.<sup>103</sup>

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<sup>100</sup> See Comments of Consumer Groups at 7-10.

<sup>101</sup> See Attachment D for news articles announcing recent rate hikes.

<sup>102</sup> Austin American Statesman, “Time Warner is upping cable rates,” Nov. 28, 2001.

<sup>103</sup> The Associated Press State & Local Wire – Reno, Nevada, “Cable television rates to jump in northern Nevada,” Nov. 26, 2001.

- Monthly cable fees in Syracuse, New York have been repeatedly raised by AOL/Time Warner by 5.4% in January 2001, 5.4% in August 2001, and another 5% in January 2002, with the number of channels remaining the same.<sup>104</sup>
- AT&T Broadband raised its monthly rates for expanded basic service an average of about 8% around the country, after two similar rate hikes in 2001.<sup>105</sup>

When Comcast recently increased its rates in line with the other dominant cable operators around the country, cable consumers in the Washington, D.C. area experienced this lack of effective competition first-hand.<sup>106</sup> Comcast's Basic Plus package went from \$36.04 to \$38.17 a month, another 6% increase. This particular Comcast package compares closely to EchoStar's Top 50 programming package with local channels, except in price: EchoStar still charges only \$28.98 per month. That's a yearly difference of over \$110.

Mark Cooper, director of research for the Consumer Federation of America, correctly observes that the primary reason for these enormous rate hikes is the lack of effective competition: "The simple fact of the matter is that they [cable operators] know they can pass through all those increases. The only people who raise prices in the middle of a deep recession are the monopolists. They use market power to force those

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<sup>104</sup> The (Syracuse, NY) Post-Standard, "Time Warner raises cable rates again," Dec. 1, 2001.

<sup>105</sup> The Boston Globe, "AT&T will hike cable rates 8.7%," Nov. 22, 2001; The Miami Herald, "AT&T to raise cable rates," Nov. 3, 2001; Atlanta Journal and Constitution, "AT&T Broadband to raise cable TV fees for metro Atlantans," Nov. 3, 2001.

<sup>106</sup> See Attachment E, "*Dear Comcast Customer*" Letter.

increases through to the public.”<sup>107</sup> Gene Kimmelman, co-director of Consumer Union’s Washington, D.C. office, agrees: “This reflects ongoing price gouging by cable monopolies. It’s particularly astounding that they’re raising prices at a time when the economy is stalled.”<sup>108</sup>

It is against the backdrop of these quintessential elements of cable market power that the Commission must analyze the proposed transaction. As reflected in the views of the Consumers Groups and others,<sup>109</sup> as well as the attached economic analyses,<sup>110</sup> the proposed merger is the only clear path to introducing effective competition to cable operators throughout the country.

In sum, EchoStar and DIRECTV both compete in the MVPD market, and to some limited degree they compete against one another. But the undeniable facts remain that the MVPD market is dominated by incumbent cable operators, both EchoStar and DIRECTV compete primarily against those cable operators, and the two firms must merge to stay competitive with those cable operators.

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<sup>107</sup> The (Albany, NY) Times Union, “Higher cable TV bills coming,” Nov. 22, 2001.

<sup>108</sup> The Seattle Times, “AT&T to raise cable fees 5.5%,” Nov. 3, 2001.

<sup>109</sup> *See e.g.*, Comments of Consumer Groups at 21; Comments of the National Taxpayers Union at 1; Comments of the Missouri Chamber of Commerce at 1; Comments of the Competitive Enterprise Institute at 1; Comments of Frontiers of Freedom at 1; Comments of Farm Bureau Financial Services at 1; Comments of the Third Millennium Communications & Electronics Co. LLC at 4; Comments of the Small Business Survival Committee at 1.

<sup>110</sup> Willig Declaration at 4, 70-71.

## 5. The Merger Opponents Wrongfully Ignore Other MVPD Providers and Potential Entrants

Another part of the strategy of the merger opponents is to argue that, apart from cable and DBS, other MVPD competitive services are “fringe technologies,”<sup>111</sup> with no prospect of “entering the market on a time frame or a scale sufficient to constrain a DBS monopolist.”<sup>112</sup> Again, such statements miss the mark.

First, the statements are inaccurate. There are other MVPD services across the country that retain significant subscribership. C-band satellite, Multichannel Multipoint Distribution Service (“MMDS”) providers, Satellite Master Antenna Television (“SMATV”) systems, and cable overbuilders all compete with DBS and incumbent cable systems. In fact, the combined MVPD market share of these technologies surpasses 3.25 million households – nothing like the dominance of cable, of course, but about one fifth of the total share of DBS subscribership.<sup>113</sup> In addition, the merger opponents do not accurately characterize the extent to which new MVPD market entry is possible or probable. Thus, the Commission itself has recognized that “competitive [MVPD] alternatives continue to develop.”<sup>114</sup>

Second, even if there were no other competitive distribution technologies or prospects for additional near-term entry in the MVPD market – neither of which is the

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<sup>111</sup> NRTC Petition at 23. It is odd that NRTC would make this characterization as it is one of the four major distributors of C-Band programming. Eighth MVPD Competition Report at ¶ 67.

<sup>112</sup> Pegasus Petition at 36.

<sup>113</sup> Eighth MVPD Competition Report at ¶¶ 67-76, 107-112.

<sup>114</sup> *Id.* at ¶ 5.

case – the fact remains that the dominant providers in the market remain cable operators, who have a 78% share. These are the providers that need “constraining,” and New EchoStar will achieve that goal.

(a) *Satellite Competition.* As indicated above, the formative years of the DBS industry have demonstrated that effective competition against the dominant cable providers in the MVPD market now requires the combination of the facilities and spectrum to which EchoStar and DIRECTV have access. At the same time, other companies have ample opportunity to use satellite spectrum and orbital locations, as well as other technologies, in an attempt to introduce additional competition in the MVPD market. Nothing in this merger will act to preclude such additional entry.

In this regard, Mr. Sidak is simply wrong in his assessment that “[b]ecause orbital slot allocation is governed by the International Telecommunication Union, not the FCC, the number of orbital locations is fixed.”<sup>115</sup> In fact, several orbital locations allotted by the ITU to other countries in the Western Hemisphere have the technical capability to serve the entire continental United States. Two of these countries, Mexico and Argentina, have reached agreements with the U.S. allowing satellites from these orbital locations to serve the U.S. direct-to-home market subject to the same FCC licensing requirements that apply to the U.S. DBS orbital slots.<sup>116</sup> Canada also has an ITU allocation for two DBS orbital locations that could be used to serve the U.S. market.

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<sup>115</sup> Sidak Declaration (NAB) at 20.

<sup>116</sup> See *International Bureau Announces Conclusion of U.S.-Argentina Framework Agreement and Protocol for Direct-to-Home Satellite Services and Fixed-Satellite Services*, 13 FCC Rcd. 16581 (1998); *International Bureau Announces*

(Continued ...)

MVPD competition could be brought to bear by any number of Ka-band licensees. Pegasus, for example, is free to use its valuable Ka-band licenses to provide MVPD service throughout the United States. Far from the dire picture of spectrum warehousing painted by opponents of the merger,<sup>117</sup> there is wide dispersion of Ka-band and other FSS licenses among a variety of licensees.<sup>118</sup> In fact, of the full CONUS Ka-band and FSS orbital locations (those from 83° W.L. to 133° W.L. according to Pegasus),<sup>119</sup> licensees other than New EchoStar would hold a majority of the assets.<sup>120</sup>

Non-full CONUS licensees, such as R/L DBS and Dominion, also will pose a competitive threat to New EchoStar. R/L DBS has proclaimed its ability to serve nearly every corner of the United States with regional programming from the 61.5 W.L. orbital location.<sup>121</sup> Assuming this is true, it and its progeny will be able to compete head-to-head with New EchoStar.

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*Conclusion of U.S.-Mexico Framework for Agreement and Protocol for Direct-to-Home Satellite Services*, 12 FCC Rcd. 13105 (1996).

<sup>117</sup> NAB Petition at iii, 11-12; Pegasus Petition at 63-69; NRTC Petition at 50-56.

<sup>118</sup> Even medium-power FSS satellites still lend themselves to various DTH initiatives, as shown for example by BellSouth's recent plan for a DTH offering. While BellSouth has not gone forward with that plan, the fact remains that ample FSS spectrum remains available for medium-power and high-power satellite DTH initiatives.

<sup>119</sup> See Pegasus Petition at 71.

<sup>120</sup> Eleven other entities affiliated with neither EchoStar nor Hughes currently control orbital slots in the 83° W.L.-103° W.L. arc, which demonstrates that there are more than enough prime Ka-band slots controlled by others to ensure that the merger will not "stifle" competition in providing broadband services. See "FCC International Bureau Authorizes Second Round Ka-Band Satellite Systems," Press Release (Aug. 2, 2001).

<sup>121</sup> See Ex Parte Presentation by Howard J. Symons, Petition of R/L DBS Company L.L.C., For Extension of the R/L DBS Direct Broadcast Satellite Construction Permit, Spot Coverage Map (June 6, 2000).

NRTC and its affiliate Pegasus will also likely compete against New EchoStar by using certain facilities of the combined entity if they desire to do so. Specifically, to the extent that DIRECTV's contract with NRTC grants NRTC the right to distribute certain video programming in certain areas, the merger would not alter its contractual rights. Since NRTC and Pegasus would not in those circumstances be constrained by New EchoStar's national pricing commitment, they would be able to continue to charge more to rural subscribers, as they do now, than DIRECTV or EchoStar, separately or together. In fact, however, the DIRECTV/ NRTC agreement makes clear that NRTC's *exclusive* rights are limited and will expire in the future. As 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. This may in turn mean that, for commercial reasons, NRTC and Pegasus no longer will be able to charge more than New EchoStar for the same service, but such a result would be a benefit, not a loss, for rural consumers.

C-band satellite services are maintaining efforts to attract rural subscribers. While C-band is certainly not an effective alternative in urban areas, it should not be discounted as an alternative in rural areas. NRTC itself is a major distributor of C-band service even as it resells DBS service. While acknowledging that the number of C-band subscribers has fallen over the past few years, PrimeTime 24, the self-proclaimed "leading provider of network television programming to the C-band

marketplace,” claims that, as of November 2001, there were almost 900,000 C-band subscribers in the United States.<sup>122</sup>

(b) *Terrestrial Competition.* The Commission has also observed that entrants using a number of different technology platforms are having an impact on MVPD competition that cannot be ignored. Terrestrial services such as MMDS are capable of serving an estimated 36 million homes.<sup>123</sup> Although MMDS subscribership remained steady in the past year, the competitiveness of MMDS video offerings will likely be enhanced by MMDS operators’ roll out of high-speed Internet access service, which can be paired with video to create the type of bundled service offering that consumers increasingly find attractive.<sup>124</sup>

The Commission recently recognized “the growing importance of providers that are overbuilding existing cable systems with state-of-the-art systems that offer a bundle of telecommunications services, including video, voice, and high-speed Internet access.”<sup>125</sup> The Commission has termed these overbuilders “Broadband Service Providers” (“BSPs”), and noted that despite the challenges inherent in BSPs’ strategy of entering markets with entrenched competitors, BSPs such as RCN and Knology are continuing to grow in terms of revenue and subscribership.<sup>126</sup>

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<sup>122</sup> Comments of PrimeTime 24 Joint Venture at 3.

<sup>123</sup> Eighth MVPD Competition Report at ¶ 71.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at ¶ 13.

<sup>126</sup> *Id.* at ¶ 109, 111.

Electric and gas utilities are moving forward with ventures involving video distribution. The Commission noted that although the utilities are “not yet major competitors in the telecommunications or cable markets,” characteristics of these entities, “such as ownership of fiber optic networks and access to public rights-of-way, could make them competitively significant.”<sup>127</sup> Importantly, utilities appear to hold great promise for competition in rural areas, as the Commission observed that “utilities, particularly some municipal utilities in rural areas, are willing to build advanced telecommunications networks offering a full range of services where incumbent cable operators and telephone companies are not.”<sup>128</sup>

Finally, 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.<sup>129</sup> The Commission has adopted a Further Notice of Proposed Rulemaking seeking comment on technical and service rules for licensing the new services.<sup>130</sup> Four companies, Northpoint Technologies, MDS America, Satellite Receivers, Ltd. and PDC Broadband Corporation have sought licenses or otherwise expressed interest in providing such a service. While EchoStar and DIRECTV have opposed the interference levels posited by proponents of MVDDS, they also have stated

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<sup>127</sup> *Id.* at ¶ 104.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at ¶ 64.

<sup>130</sup> *Id.*

on the record that competition from such services is welcome so long as no interference occurs.<sup>131</sup>

(c) *Analogous examples of “intermodal competition.”* The broad view of MVPD as the relevant market is consistent with that of other agencies regulating different but competing technologies. In their competitive analysis, agencies typically consider not only the provision of service by the particular mode of carriage utilized by the company at issue, but also other competing forms of carriage (frequently referred to as “intermodal” competition).<sup>132</sup>

In an analogous case, for example, the Interstate Commerce Commission (“ICC”) took a broad view of the relevant market in approving the merger of the

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<sup>131</sup> *Cable and Satellite Broadcast Competition: The Status of Competition in the Multi-Channel Video Programming Distribution Marketplace Before the House of Representatives Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet* (statement of Charles Ergen, Chairman and CEO, EchoStar Communications Corporation) (Dec. 4, 2001) (“While EchoStar does not oppose the emergence of new competitors in the MVPD market, we are opposing the proposal by Northpoint, because Northpoint’s current proposal would cause electrical interference with the satellite reception of our established satellite TV customers as confirmed by the MITRE Corporation’s testing.”); *see also* Comments of EchoStar Satellite Corporation in CS Docket No. 99-250 (Aug. 16, 1999) at 1, 3 (“EchoStar welcomes new entry into the MVPD market and applauds the Commission’s proposal” to open the 12.7 – 13.2 GHz band for use by all MVPD providers... [T]he Commission should consider this band as yet another possible home for the service planned by Northpoint Technology.”)

<sup>132</sup> *Market Dominance Determination & Consideration of Product Competition*, 365 I.C.C. 118, 130 (1981); *see also* *Market Dominance Determinations – Product and Geographic Competition*, STB Ex Parte No. 627, 1 n.2 (served April 6, 2001)(noting that Board’s market dominance analysis considers, among other things, “whether the complaining shipper can use other transportation modes, such as trucks or barges, to transport the same commodity between the same points”); *Williams Pipe Line Co.*, 68 F.E.R.C. ¶ 61, 136, at 61, 660 (1994).

Trailways bus line into Greyhound, at a time when those two lines accounted for the vast majority of intercity bus transportation in the U.S. As the ICC stated, “the relevant ‘product’ market is the intercity transportation of passengers,” including private automobile, airlines, intercity bus, and Amtrak.<sup>133</sup> The Commission went on to explain that, essentially, the national pricing of bus transportation was a sufficient safeguard: “bus passengers, even those with limited access to air, Amtrak, or private auto will continue to be protected from unreasonable rates by the market discipline of intermodal competition since remaining bus firms must set rates and service to attract passengers who do have these options.”<sup>134</sup> In affirming, the Court of Appeals for the D.C. Circuit cited approvingly the ICC’s findings that the market included other modes of transport, that “competition in the national market was necessary to promote the public interest,” and that “even in rural markets, the consolidation would have little effect because intermodal competition would provide a sufficient cap on unreasonably high prices or inadequate services.”<sup>135</sup>

Like the Greyhound/Trailways transaction, the proposed merger should be evaluated in the broader market. Here, as there, all consumers will be protected because New EchoStar “must set rates and service to attract [consumers] who do have these options.”

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<sup>133</sup> *GLI Acquisition Company Purchase Trailways Lines, Inc.*, ICC Decision No. MC-F-18505, at 7 (May 27, 1988).

<sup>134</sup> *Id.* at 10.

<sup>135</sup> *Peter Pan Bus Lines, Inc. v. ICC*, Nos. 88-1532, 88-1566, 88-1567, slip op. at 5 (D.C. Cir. May 8, 1989).

**6. Petitioners Cannot Prove the Existence of a DBS Market from EchoStar's Pre-Trial Position in a Dismissed Proceeding**

Petitioners NAB and Pegasus, among others, try to prove their economic case by recourse to statements that EchoStar made in a 2000 pre-trial request for extension of time in a now dismissed antitrust dispute with DIRECTV.<sup>136</sup> The Petitioners use these statements to suggest that EchoStar believes in the existence of a separate DBS market, that therefore there must be such a market, and that EchoStar has reversed course now only to serve its interest in approval of the merger Application. The Petitioners misread these litigation statements, and in any event their reliance on them to prove their economic case is misplaced, particularly since none of their own economic experts has argued in favor of a separate DBS market.

First, it is certainly not true that EchoStar's belief in a single MVPD market is of recent origin. EchoStar has always held the same view: that there is one MVPD market, in which cable is the incumbent and dominating player, and that DBS competes, although presently with distinct disadvantages, against cable within the MVPD market. It has also consistently recognized that certain factors have historically inhibited DBS from robustly competing with cable.

EchoStar has expressed that view on dozens of occasions, starting as early as 1995. In 1996, for example, EchoStar asserted that "the relevant market includes all

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<sup>136</sup> NAB Petition at 37-40; Pegasus Petition at 12-14.

multichannel video programming distributors, not just DBS service providers.”<sup>137</sup> In 1997 EchoStar wrote in comments to the Commission: “Ever since it commenced DBS service in the spring of 1996, EchoStar has viewed cable subscribers as its primary target market. Accordingly, EchoStar has priced and structured its offering with the primary purpose of attracting cable subscribers.”<sup>138</sup>

In December 1998, EchoStar expressed a similar view with respect to the potential impact of its transaction with MCI: “EchoStar emphasizes that the MVPD market – not any subset of that market – is the relevant market for analyzing the public interest impact.”<sup>139</sup> It also noted that “DBS service has emerged as the most likely alternative with the potential for introducing full-fledged competition against dominant cable operators in the MVPD market, but is still a long way from realizing that potential because of various spectrum-related and regulatory constraints.”<sup>140</sup> Appearing before a congressional committee in 1999 regarding EchoStar’s efforts to compete with cable systems, EchoStar’s Chief Executive Officer Mr. Ergen testified: “The relevant market for our service is the MVPD market. DOJ has found extensive evidence of customers

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<sup>137</sup> *In re Application of Direct Broadcasting Satellite Corp.*, 11 FCC Rcd. 10494 (1996) at ¶ 8.

<sup>138</sup> Comments of Echostar Communications Corp., *In re Annual Assessment of the Status of Competition in Market for the Delivery of Video Programming*, CS Docket No. 97-141 (July 23, 1997) at 2.

<sup>139</sup> *In re Application of MCI Telecommunications Corp. and EchoStar 110 Corp.* (Dec. 2, 1998) at 7.

<sup>140</sup> *Id.* at ii.

switching from cable to DBS, contrasted with the early days of DBS, when subscribers most often came from uncabled areas.”<sup>141</sup>

While this view of the relevant market was certainly the prevalent one in 2000, this does not mean that it was free from any doubt. As zealous advocates, EchoStar’s lawyers in the litigation had the duty to explore fully the extent to which any such doubt could be used to bolster EchoStar’s case. This was the context of the statements seized on by Petitioners in EchoStar’s request for more discovery to shed additional light on the factual issues. In its *Request for Rule 56(f) Continuance to Respond to Defendants’ Motion for Summary Judgment*, EchoStar argued that the summary judgment requested by DIRECTV was inappropriate pending ongoing discovery and in light of the need for additional discovery on highly complex issues such as market definition. The statements cited by Petitioners described only beliefs about what the evidence could establish, and they did not purport to be statements of proven fact. Indeed, EchoStar explicitly noted that its assertions were based on a preliminary understanding of the case, stating that “expert witnesses will play an important role on several issues, including the definition of the relevant market.”<sup>142</sup>

Finally, even if there were any potential counter-argument about the relevant market in 2000, it has been dispelled by developments that were then in their early stages and that have since matured decisively. As explained above, these

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<sup>141</sup> Charles W. Ergen, Testimony Before the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate (Jan. 27, 1999) at 3.

<sup>142</sup> *Request for Continuance*, at 3.

developments include: on the one hand, the fuller extent to which DBS providers have since been able to capitalize on the local-into-local opportunity afforded by SHVIA since the end of 1999; and, on the other hand, the aggressive roll-out of digital cable.

**B. NRTC, NAB and Pegasus Criticisms Of The FCC’s “Homes Passed” Estimate Are Not Persuasive and Rely on Inaccurate Data Sources**

In discussing the lack of anti-competitive impact on rural markets of the proposed transaction, the Application referenced the Commission’s then-current statement on cable availability, which observed that over 96% of all television households in the United States are passed by cable television systems and that these cable operators continue to be the dominant distributors in the national MVPD market.<sup>143</sup> The Commission has since released its Eighth Annual MVPD Competition Report which places the current percentage of television households passed by cable at 97.1%.<sup>144</sup> NRTC, NAB and Pegasus argue that the statistics cited by the Commission overstate the percentage of TV households that have access to cable. These Petitioners, however, provide nothing but speculation to support their claims. And, even if the parties in this proceeding could agree on a percentage of homes not passed by cable, the practical

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<sup>143</sup> Merger Application at 39-40 (citing Seventh MVPD Competition Report, 16 FCC Rcd. 6005, at App. B., Table B-1).

<sup>144</sup> Eighth MVPD Competition Report at ¶ 17.

significance of this number would be insignificant, since New EchoStar effectively would be unable to isolate such consumers for an anticompetitive action.<sup>145</sup>

In every Annual Report on the status of competition in the MVPD market since the Commission first began issuing them, the Commission has relied on data collected by Paul Kagan Associates, Inc. for the number of homes passed by cable.<sup>146</sup> Likewise, each year the Commission has compared the number of homes passed with the number of television households to obtain a sense of the availability of cable services to television viewers.<sup>147</sup> No Petitioner argues that this is the incorrect comparison for the Commission to make; nor could they, since the availability of cable to unoccupied housing units and occupied households without a television is indisputably irrelevant. Instead, the Petitioners argue that the Kagan data relied upon by the Commission overstates the number of television households in determining the number of homes passed, and that as a result, the percentage of television households passed by cable may

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<sup>145</sup> See Willig Declaration at ¶ 98 (explaining that the percentage of homes passed by cable is only relevant if New EchoStar is able to “find” the non-cable passed homes, a process that would be extremely difficult and costly).

<sup>146</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd. 2060, 2068 n. 19 (1995) (“Second MVPD Competition Report”) (explaining source of data for First MVPD Competition Report); Third MVPD Competition Report, 12 FCC Rcd. 4358, 4368, 4465; Fourth MVPD Competition Report, 13 FCC Rcd. 1034, 1049, 1174; *In the Matter of Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284, 24322 (1998) (“Fifth MVPD Competition Report”); Sixth MVPD Competition Report, 15 FCC Rcd. 978, 990, 1080; Seventh MVPD Competition Report, 16 FCC Rcd. 6005, at ¶ 18, App. B. Table B-1; Eighth MVPD Competition Report, FCC 01-389, at ¶ 17, App. B. Table B-1.

<sup>147</sup> *Id.*

be inaccurate and could be as low as 81% instead of the 97% figure cited by the Commission.<sup>148</sup>

The Petitioners' entire argument in this regard is based on the assertion that cable operators include unoccupied housing units and non-television households in the homes passed data that they provide to Kagan.<sup>149</sup> The assumption underlying this theory is that cable operators have no way to determine the number of television households in their service area.<sup>150</sup> Yet, this assumption is entirely unsupported by the Petitioners. Cable operators have every incentive to determine this figure because it defines their potential local customer base. The figure is relevant to any number of budgeting, marketing and other financial efforts undertaken by cable operators. Moreover, the number of television households in a service area is not unknowable. To the contrary, Nielsen Media Research publishes yearly estimates of TV households on a county-by-county basis for the entire U.S.,<sup>151</sup> and provides studies at an even finer level of granularity at the request of private entities. There is every reason to believe that cable operators are well informed concerning their potential customer base when they respond to Kagan data requests.

Indeed, the Petitioners' own attack on the numerator of the calculation shows that the Kagan number of homes passed may in fact be *understated* in one

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<sup>148</sup> NRTC Petition at 9; Pegasus Petition at 16; NAB Petition at 46.

<sup>149</sup> NRTC Petition at 9; NAB Petition at 46.

<sup>150</sup> NRTC Petition at 9-10 (quoting NTIA/RUS Report at 19 n. 62)

<sup>151</sup> See Broadcasting & Cable Yearbook 2001 at B-160 – B241.

important respect. NRTC attacks the data based on each cable operator’s uncertainty about which of several possible “homes passed” criteria to use: feeder cables in place nearby; cable television “readily available”; “potential” to be connected; or, households “capable” of receiving service.<sup>152</sup> As Dr. Willig notes, the correct criterion is the broadest one, i.e., the number of homes with the potential for being connected to the cable system.<sup>153</sup> The potential for a home to be connected to a cable system is enough for the purpose of disciplining a satellite provider’s conduct. All of the other criteria listed by the NRTC may be read as requiring *more than that* for a home to be considered “passed.” To the extent that a cable operator may be using a more restrictive “homes passed” criterion, the number of homes passed may in fact be *understated* from the economic point of view.

Petitioners also attempt to support their theory regarding the Kagan data by citing data from Warren Communications (“Warren”) on homes passed in six states, which exceeds the 2000 Census Bureau data on the number of occupied households in those states.<sup>154</sup> However, as Dr. Willig observes, Petitioners make no attempt to explain how data and collection practices by Warren Communications support their theory that *the Kagan* data is erroneous.<sup>155</sup> Petitioners also compare the Kagan data on homes

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<sup>152</sup> See NRTC Petition at 10.

<sup>153</sup> See Willig Declaration at ¶ 98, n.119.

<sup>154</sup> NRTC Petition at 11-12; NAB Petition at 46.

<sup>155</sup> See Willig Declaration at ¶ 98 (“No commenter has provided any evidence that the Warren data are more accurate than the Kagan data.”)

passed in the U.S. with Census Bureau data on occupied households in the U.S., but this comparison is likewise unavailing in support of Petitioners' theory because there is no indication that the data collection and analysis practices of Kagan and the Census Bureau are the same or even similar. Simply put, the Petitioners do not make a persuasive case supported by hard evidence that the Kagan data, on which the Commission, industry and investors have relied for years, is incorrect or overstated.<sup>156</sup>

Certainly, the opposite appears to be true for the figures proffered by the NRTC the NAB and their economic experts. As Dr. Willig explains, Dr. MacAvoy and Mr. Sidak both present a series of maps that purport to show areas where cable is available and where cable is not available and purport to show that it is possible to identify these areas with a great deal of precision.

As an initial matter, it is important to realize that these maps are based on information that is provided to Warren Communications by the cable companies. To the extent this information is inaccurate or not kept current, Warren's information will not be accurate.<sup>157</sup>

Dr. Willig independently tested the accuracy of the Warren data in two ways: First, he analyzed DIRECTV churn data and examined whether any customers who lived in zip codes that the Warren data suggest were not passed had churned from

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<sup>156</sup> NRTC also attempts to manipulate the numbers to its own advantage by arguing that 23 million homes do not have access to cable. NRTC Petition at 14; *see also* Pegasus Petition at 17. By NRTC's own analysis this 23 million home figure includes unoccupied housing units and homes without televisions. *Id.*

<sup>157</sup> Willig Declaration at ¶ 95.

DIRECTV to cable. The data that Dr. MacAvoy and Mr. Sidak present suggest that a large number of zip codes are not passed by cable. But the DIRECTV data indicate that *more than one quarter* of the customers who lived in these supposedly non-cable passed zip codes and who left DIRECTV, *left for a cable provider*.<sup>158</sup>

Next, to ensure that the problem is not with misreporting in the DIRECTV churn data, Dr. Willig asked Ginsberg Lahey, LLC, a Washington-based research firm, to check the accuracy of these results by contacting the local cable firms to ensure that subscribers in these zip codes could receive cable service. For a significant number of these zip codes, Ginsberg Lahey was able to confirm the accuracy of the DIRECTV churn data by verifying with the local cable provider that cable service was indeed available.<sup>159</sup> Ginsberg Lahey also contacted local cable firms in zip codes that the Warren data suggested were not passed by cable. In two weeks alone, Ginsberg Lahey discovered that *at least 20 zip codes that Warren indicated were not passed by cable were in fact cable passed*.<sup>160</sup>

In any event, even assuming *arguendo* the correctness of Pegasus's characterization that "[t]here is a range of estimates and some controversy over the number of U.S. homes that lack access to cable,"<sup>161</sup> the homes passed issue is only

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<sup>158</sup> *Id.* at ¶ 96.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* Ginsberg Lahey found that cable service was available in the following zip codes: 13635, 13690, 24649, 25040, 25205, 30045, 30297, 30127, 37191, 40165, 46175, 47145, 42085, 55783, 63966, 66040, 70577, 72073, 77561, and 77650. The Warren database suggests that each of these zip codes is not passed by cable.

<sup>161</sup> Pegasus Petition at 17.

relevant to the extent that New EchoStar would be able to discriminate against consumers in those areas not served by cable. This is not possible for at least three reasons. First, as described more fully by Dr. Willig, economic theory predicts that in the situation that Pegasus describes, where homes passed data may be unsound and yield uncertainty regarding the identification of customers in non-cable passed areas, a firm is not likely to engage in price discrimination.<sup>162</sup> In particular, New EchoStar would need to be wrong only in a relatively small number of cases to make it unprofitable to charge different prices to non-cabled and cabled customers.<sup>163</sup>

Second, as originally described in the Application, the geographical diversity of those television households not served by cable makes discrimination between television households that are served by cable and those that are not very difficult.<sup>164</sup> Indeed, this latter point is aptly demonstrated by the maps of the fourteen “clusters” of rural areas included in the MacAvoy Declaration.<sup>165</sup> Those maps quite clearly show that census blocks without access to cable are interspersed with census blocks that do have access to cable in a way that would not permit a DBS provider to discriminate between cabled and non-cabled areas. In short, as Dr. Willig observes, even if the Warren (or Kagan) maps and data were accurate, cable franchise areas do not correspond to geographic designations such as DMAs, counties, or even zip codes. Thus,

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<sup>162</sup> See Willig Declaration at ¶ 94.

<sup>163</sup> *Id.* (citation omitted).

<sup>164</sup> Merger Application Att. A, Willig Declaration at ¶ 37.

<sup>165</sup> MacAvoy Declaration (NRTC) at 10-25.

even if New EchoStar were to price differently based on the zip code of a customer, the zip code of a customer will not tell New EchoStar precisely whether that customer is passed by cable or not. Therefore, Dr. Willig found, it “cannot be concluded from these maps that New EchoStar could implement a price discrimination scheme based on whether customers had cable available or not.”<sup>166</sup>

Finally, New EchoStar’s commitment to the one nation, one rate card plan, which is addressed in more detail below, also will ensure that no discrimination occurs. At bottom, the question that the NRTC and others have injected into this proceeding over the number of homes passed by cable is a red herring that is not decisionally significant.

**C. Petitioners’ Analyses Begin From a False Baseline of Healthy Competition in the MVPD Market**

The proposed merger will have significant pro-competitive effects in the relevant MVPD market, and the Applicants’ one nation, one rate card commitment can demonstrably address any alleged anti-competitive effects on this market. The Petitioners’ assertions that the merger will result in higher prices for consumers are wrong from the starting point. They are based on false, rosy assumptions about the welfare of MVPD consumers today. In particular, as shown above, Petitioners disregard at least two crucial facts: (1) EchoStar’s and DIRECTV’s services are *not* perfect substitutes for each other; and (2) neither company on its own has been able to rein in the

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<sup>166</sup> *Id.* at 63.

behavior of large cable MSOs, which continue to raise their prices well in excess of the Consumer Price Index.

Instead of recognizing these facts, the Petitioners assume implicitly that there is now full-blown competition in the MVPD market between DBS and cable. Starting from that premise, they attempt to show that the merger will destroy much of this competition to the detriment of consumers. The premise is false, however.

To the question of whether MVPD consumers are well off today, the consumers' representatives correctly answer, no.<sup>167</sup> The Commission should not base its evaluation of the merger on the contrary assumptions entertained by the NAB, Pegasus and NRTC – that all is basically well today in the MVPD market.<sup>168</sup>

**D. The Merger Will Result In Lower Prices for MVPD Consumers In Urban And Rural Areas**

Some Petitioners argue that the merger will decrease the number of competitors from 2 to 1 in some areas, and 3 to 2 in others, thereby resulting in increased prices for MVPD consumers and a net public welfare deficit.<sup>169</sup> In support of this

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<sup>167</sup> Comments of Consumer Groups at 4-7.

<sup>168</sup> NAB Petition at 13-15; Pegasus Petition at 9-10; NRTC Petition at 1-2.

<sup>169</sup> *See, e.g.*, NAB Petition at 52-56 (“a horizontal merger may ‘create a single firm with substantial market power, enabling that firm to unilaterally raise prices. . .’” (quoting ABA Section of Antitrust Law, *Antitrust Law Developments* 493 (4<sup>th</sup> ed. 1997)); NAB’s Sidak Declaration at 21-30 (calculating supposed price increase that would result from “duopoly-to-monopoly merger” and from a 3-to-2 merger); NRTC Petition at 30 (merger would lead to “monopoly prices to rural Americans”); NRTC’s MacAvoy Declaration at 47-51 (predicting price increases as a result of merger); Rubinfeld Report (Pegasus) at 3.

proposition, Petitioners pursue two somewhat inconsistent lines of attack: (1) that New EchoStar will seek to maximize profits by instituting a patchwork of different prices in different areas of the country; or (2) that even with a national price commitment, New EchoStar will be able to raise its prices unilaterally in both urban and rural areas; and that the merger will facilitate collusion and allocation of territories between New EchoStar and cable operators.<sup>170</sup> The first category of arguments ignores the Applicants' national pricing commitment, the Applicants' past pricing practices, and the reasons why national pricing makes as much sense for satellite television services as it does for national offerings of Internet access and cell-phone services. The second category of arguments disregards that New EchoStar must set its price to be competitive in the most competitive markets where the largest number of potential subscribers are located. By setting its price above competitive rates or colluding with a cable operator, New EchoStar would forego large pools of U.S. consumers and fail to maximize its profits.

**1. The One Nation, One Rate Card Plan Will Be an Effective Constraint on New EchoStar**

The Petitioners question the value of New EchoStar's commitment of national pricing as a constraint on prices.<sup>171</sup> Their arguments ignore the fact that national pricing is consistent with the Applicants' efficiency-enhancing incentives and with their prior practices. It is also consistent with the practices of other national providers in

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<sup>170</sup> NAB Petition at 96-98 (Sidak Declaration at 34-35); Pegasus Petition at 53-55; NRTC Petition at 35-38 (MacAvoy Declaration at 52-55).

<sup>171</sup> NAB Petition at 96-98; Pegasus Petition at 53-55; NRTC Petition at 35-38.

comparable network industries. The ability to offer local promotions for installation and equipment will not undermine the effectiveness of national pricing as a constraint.

Discrimination in the quality of service has not been a problem in the past, and the same incentives that have prevented the Applicants from practicing such discrimination to date will remain in place after the merger to prevent it in the future.

As set forth in the attached Declaration of Dr. Willig, national pricing, which both EchoStar and DIRECTV have always used, makes sound economic sense. Offering a national price will allow New EchoStar to take advantage of this national footprint when marketing its services – using television advertising, for example, and making the price of the service part of such campaigns. In contrast, tailoring packages to particular areas would cause the loss of the economies of scale inherent in a national marketing campaign.<sup>172</sup> Moreover, customer service and direct sales are also done on a national basis, and implementing local price variations would require customer service representatives to be knowledgeable about a wide range of prices, only some of which would be available to any particular customer.<sup>173</sup>

Even if these efficiencies did not attend national pricing, it would be extremely difficult to charge different programming prices in different areas. As Dr. Willig explains, evidence of this difficulty is demonstrated in areas where NRTC sells DIRECTV service at a price \$3 per month higher than DIRECTV charges for the same

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<sup>172</sup> See Willig Declaration at ¶ 94. As Dr. Willig observes, while it is true that some local variations exist with respect to promotions, these are largely with respect to equipment, installation and value-added gifts, for example, an umbrella. *Id.* at 60-61.

<sup>173</sup> *Id.*

service. In such areas, EchoStar could maintain or perhaps strengthen its competitive position vis-à-vis DIRECTV and charge an extra \$1 or \$2 in NRTC areas (which are easily identifiable). However, EchoStar has not reacted to this price disparity by charging higher prices, providing additional evidence of the inefficiencies of regionally pricing DBS services.<sup>174</sup>

Nor could New EchoStar implement a price discrimination scheme based on whether customers had access to cable or not.<sup>175</sup> Dr. Willig shows that the task of isolating consumers without cable is inherently difficult and imprecise (for example, the Warren data used by Sidak and MacAvoy are rife with inaccuracies). And as Dr. Willig explains, it would only be necessary for New EchoStar to be wrong in a relatively small number of cases before it would become unprofitable to charge different prices on this basis.<sup>176</sup> Such a price discrimination scheme, therefore, simply would not make good economic sense.

The fact that in the past the Applicants have used a limited number of local promotions to attract new subscribers in no way undermines their national pricing commitment. In a “Catch-22,” the Petitioners attack the notion of national pricing both if New EchoStar renounces the ability to offer local promotions (they say it would be inefficient) *and* if New EchoStar retains that ability (they say local promotions will

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<sup>174</sup> Willig Declaration at ¶ 93.

<sup>175</sup> Sidak Declaration (NAB) at 34-35; MacAvoy Declaration (NRTC) at 52-53.

<sup>176</sup> Willig Declaration at ¶ 94.

undermine the value of the national pricing commitment).<sup>177</sup> The truth is that local promotions can be a valuable tool to the same limited extent that Applicants have used them in the past, for example, in testing a promotion before taking it national, and that such limited promotions will not detract from the effectiveness of national pricing as a safeguard against price discrimination.

The local promotions that EchoStar and DIRECTV have offered over the years have been limited in geographic scope, time, value and number of subscribers affected. In the last year, for example, EchoStar and DIRECTV have offered local promotions in only a handful of areas. These areas have been targeted due to localized, specialized reasons such as cable bounty programs targeted at local rate increases. Importantly, the promotions have been limited in duration and very limited in scope. Over the last year, for example, subscribers gained by local promotions were a very small percentage – less than 5% of EchoStar’s total new subscribers for that period. Such limited local promotions for installation or equipment have not affected at all the levels at which the Applicants have set their national rates in the past and, according to Dr. Willig, will not do so in the future. For example, the effect on the profit-maximizing national pricing level would be negligible if New EchoStar were to offer in the first year of its operations only promotions of the same scope as those EchoStar and DIRECTV offered in the past. Indeed the Applicants are willing to commit to reasonable requirements to ensure that national pricing is an effective constraint on pricing behavior, consistent with efficiency and market dictates.

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<sup>177</sup> NAB Petition at 94-95; NRTC Petition at 31-35.

The Applicants also have engaged in no regional discrimination in the quality of service for several reasons. These reasons include the importance of national brand building and the significance of the DBS quality rankings by national consumer services evaluating quality on a national basis, such as J.D. Power. Some Petitioners nonetheless assert that New EchoStar will have an incentive to discriminate in the quality of the service it offers to subscribers with fewer MVPD alternatives.<sup>178</sup> The facts, however, disprove this assertion. Dr. Willig analyzed DIRECTV's customer satisfaction survey to determine whether DIRECTV currently engages in any form of non-price discrimination. Dr. Willig found that "the results suggest that rural customers are just as satisfied with DIRECTV's overall service and customer service as non-rural customers."<sup>179</sup> EchoStar, for its part, has generally received significantly fewer complaints, both on an absolute and a proportionate basis, from consumers in rural areas than from urban households. This fact alone disproves the Petitioners' assertion that New EchoStar will have an incentive to discriminate against customers with fewer choices, for if this speculation were valid, each company today would have the incentive to reduce its service quality in those rural areas. EchoStar has not done so, proving that it values the image of its brand over the alleged incentive to pick and choose to whom it offers its top-ranked customer service.<sup>180</sup>

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<sup>178</sup> Rubinfeld Declaration (Pegasus) at 16; NAB Petition at 98, Sidak Declaration (NAB) at 36; NRTC Petition at 31, MacAvoy Declaration (NRTC) at 55.

<sup>179</sup> Willig Declaration at ¶ 69.

<sup>180</sup> American Customer Satisfaction Index of the University of Michigan Business School, Aug. 20, 2001. *See* <http://www.theacsi.org>.

**2. “One Nation, One Rate Card” Will Translate Effective Competition in Urban Areas Into Benefits to All Households and Renders the “3 to 2” and “2 to 1” Arguments Baseless**

Petitioners allege that, even with a national price commitment, New EchoStar would raise its prices or collude with cable operators to maximize its profits. Petitioners specifically argue that the merger will reduce the number of competitors from 2 to 1 in areas without access to a non-satellite MVPD provider, which will permit New EchoStar to charge “monopoly” prices, and that it will also reduce the number of competitors from 3 to 2 in areas served by non-satellite MVPD, leading to higher “duopoly” prices and facilitating collusion.<sup>181</sup> The cost/benefit analysis posited by Petitioners to reach this conclusion, however, assumes that New EchoStar would have no interest in growing its base of subscribers, and the only question would be how to maximize its profits from its existing subscriber base. Under Petitioners’ analysis, New EchoStar would increase its prices if the additional profits from *existing* subscribers that have no realistic alternative service exceed the lost revenues from *existing* subscribers

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<sup>181</sup> See, e.g., NAB Petition at 52-56 and Sidak Declaration (NAB) at 21-30 (calculating supposed price increase that would result from “duopoly-to-monopoly merger” and from a 3 to 2 merger); NRTC Petition at 30 and MacAvoy Declaration (NRTC) at 47-51 (predicting price increases as a result of merger); Pegasus Petition at 21-22, 29-30 (speculating that the merger will lead to “unilateral anti-competitive effects enabling a single DBS firm to increase price independently of how rivals behave, or will enable one satellite and one cable firm to coordinate behavior resulting in “greater freedom to raise prices”); CWA Petition at 2 (the reduction of competitors from 2-to-1 or from 3-to-2 will allow the merged firm to raise prices); Letter from the National Consumers League, National Farmers Union and the National Grange to William F. Caton, Acting Secretary, FCC (Feb. 4, 2002), at 1 (merger to monopoly will lead to higher prices).

choosing to cancel New EchoStar's service. However, Dr. Willig explains that such an approach would not be in New EchoStar's economic interests, for the simple reason that New EchoStar would not be maximizing revenue if it restricted itself to existing subscribers.

A subscriber growth strategy is far more profitable for a firm such as New EchoStar that would serve a little more than 20% of the nation's MVPD households with a relatively high cost satellite fleet and uplink centers and relatively low marginal costs. As Dr. Willig explains, given the national pricing commitment, the prospect of gaining even a small percentage of new subscribers from the largest DMAs in the country would be much more valuable to New EchoStar than any prospect of extracting extensive rents from rural subscribers.<sup>182</sup> In other words, the benefits of gaining additional subscribers in the largest DMAs by charging a competitive price would be much more valuable to New EchoStar than the additional margin from any conceivable rate increase above a competitive price. And this comparison does not even take into account the revenue streams from advertising or from pay-per-view, VOD, and interactive services. These services are likely to be relatively more attractive in more affluent, urban areas, and they are more reason why New EchoStar would not want to forgo the huge pools of urban subscribers.

This profit maximizing strategy is consistent with the way in which both DBS companies have uniformly favored growth to date, even though the prospects of growth are dampened by the constraints on EchoStar's and DIRECTV's ability to take on

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<sup>182</sup> Willig Declaration at ¶ 39-41.

digital cable as an equal and from their ability separately to offer local channels to all DMAs and thereby compete more effectively with cable providers in all markets. EchoStar, for example, aggressively prices its America's Top 50 and 100 packages at \$22.99 and \$31.99 per month in order to convert cable subscribers, even though Pegasus and NRTC charge a full \$3.00 more per month in rural areas, leaving EchoStar ample room to raise its prices in those areas without losing rural subscribers. This growth strategy will make even more sense post-merger as New EchoStar takes advantage of the spectrum and other efficiencies gained by combining the two companies' resources in order to better compete with digital cable and therefore increasing the prospects for urban subscriber growth.

Therefore, based on current and past practices in the DBS industry, as well as sound economic theory and modeling, there is no question that New EchoStar will set its national price at a competitive level based on the MVPD prices prevailing in the most populous markets in the nation. Precisely because of these profit-maximizing incentives, national pricing will act as a means of bringing to all Americans, wherever they are located, the benefits of MVPD competition, wherever in the country it is the most intense. Competitive pressures from MVPD distributors operating in the largest cities will translate into benefits for consumers that are not directly served by these distributors.

Accordingly, the merger will not, as alleged by Petitioners,<sup>183</sup> be a "2 to 1" in any respect that matters for any area that is not passed by cable any more than it will

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<sup>183</sup> NAB Petition at ii, Sidak Declaration (NAB) at 12); NRTC Petition at v; ACC Satellite TV Comments at 5.

be a “3 to 2” for any household that is served by a cable system. To maximize its profits, New EchoStar will have to set its prices at levels allowing it to compete for subscribers in the most densely populated and most heavily contested markets.

**3. There Is No Realistic Possibility of Collusion Among the Cable MSOs and New EchoStar**

For the same reasons that New EchoStar will attempt to maximize its profits by competing vigorously with those MVPD distributors serving the largest DMAs, the concerns expressed by Petitioners about collusion among New EchoStar and cable operators are unfounded. First of all, this particular tango would require New EchoStar to dance with as many as 10 cable MSO partners simultaneously. New EchoStar would have to coordinate not only with one cable operator but at least with most, if not all, of the largest cable MSOs operating in the nation’s most populated areas.

As explained by Dr. Willig, if any one of the major cable MSOs – AT&T/Comcast, AOL/Time Warner, Cablevision, Charter or Adelphia – were to refuse to participate in a deal to set prices at artificially high levels, a pool of millions of potential customers would automatically become unavailable to New EchoStar, making such a deal among the remaining parties economically unattractive.<sup>184</sup> Nor is Mr. Sidak’s postulation of a “tacitly collusive strategy of market allocation” where “DBS would keep the rural customers and cable would be free to take the urban customers,”<sup>185</sup> a realistic

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<sup>184</sup> Willig Declaration at ¶¶ 72-73.

<sup>185</sup> Sidak Declaration (NAB) at 34-35.

possibility. Such a deal could not happen for a simple reason, among others: the failure of consideration. New EchoStar would be giving up a huge pool of potential subscribers without getting anything in return. In particular, a promise on the part of large cable operators to hold back from expanding into the few truly unpassed rural areas would be meaningless, as cable operators would be unlikely to find such expansion profitable anyway. In short, under this theory, New EchoStar would be willing to act irrationally by forgoing the opportunity to gain subscribers in the nation's most populated urban areas and getting nothing in return.

Ever since the inception of their services, both EchoStar and DIRECTV have consistently followed a strategy of making their services increasingly competitive with cable systems in order to convert cable customers and obtain a large percentage of new MVPD subscribers. The proposed merger is the next logical step in that direction in order to keep pace with digital cable, and it is illogical to view it as an attempt to revert to the bygone era of rural-only satellite television. Such a strategy would be equivalent to economic suicide for New EchoStar.

**E. Rural Cable Operators Will Continue To Be A Competitive Factor**

The fear expressed by the American Cable Association that rural cable operators may be forced to discontinue operations is both overblown, inconsistent with the cable industry's representations to the Commission in other proceedings, and ultimately irrelevant.<sup>186</sup> Apparently, what these rural cable companies fear most is that

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<sup>186</sup> ACA Petition at 2, 13-20.

due to the efficiencies of the proposed merger, New EchoStar will be able to bring more services to rural America at lower prices. It is this threat of enhanced competition from DBS that they believe will make it more difficult to maintain and expand their customer base.<sup>187</sup>

First, as the cable industry has repeatedly pointed out in the broadband and open access proceedings, rural cable operators can incorporate digital upgrades at an affordable cost, and have increasingly been doing so.<sup>188</sup> Using such technological innovations as the much touted “Headend in the Sky,” small analog cable companies unable or unwilling to invest in new facilities can expand their channel capacity to compete with other MVPD providers. Indeed, in its comments to the Commission in the open access proceeding, the American Cable Association asserts that its “ACA Cable Modem Survey shows members are making substantial progress in deploying cable modem service” and that

[t]he efforts of ACA members are providing hundreds of thousands of consumers the option of high-speed cable modem service in smaller markets. The number of homes passed by ACA members surveyed should exceed 1.7 million within 24 months. Other facilities-based providers have chosen not to invest in these markets. In this way, ACA members deliver a choice of broadband Internet access where none would otherwise exist . . . Emerging

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<sup>187</sup> ACA Petition at 14-23.

<sup>188</sup> See Comments of the American Cable Association, CS Docket No. 00-30, at 5-8 (Apr. 25, 2000) (describing progress by ACA members, including Mediacom Communications Corporation, Galaxy Cablevision, Pine Tree Cablevision and Rural Route Video in providing cable modem service to small markets.)

competition from satellite delivered Internet access should add to consumer choice in even the smallest markets.<sup>189</sup>

And just this past month, NCTA and several smaller rural cable operators lobbied the Commission on their digital upgrades “seeking to demonstrate to policy-makers that cable TV companies were rolling out broadband services in markets outside major metropolitan areas.”<sup>190</sup> NCTA’s president and CEO is quoted as follows:

Cable operators – even those serving midsize and rural markets – are widely delivering on the deployment of high-speed Internet service and other broadband services.<sup>191</sup>

Second, even if a particular cable operator were to discontinue operations, the cable plant would remain available for use and would likely be used by a successor entity that could run it more efficiently and avail itself of the decreasing cost of digital upgrades. The possibility of harm to a particular competitor does not constitute the type of harm to competition that the Commission is called upon to evaluate.

### **III. THE MERGER WILL MAKE TRUE BROADBAND SERVICES AVAILABLE FOR THE FIRST TIME TO ALL AMERICAN HOMES**

#### **A. The Merger Will Create The First True Satellite Broadband Service**

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<sup>189</sup> See Petition to Deny of the American Cable Association, ET Docket No. 00-185, at 12 (Dec. 1, 2000).

<sup>190</sup> See Telecommunications Reports, “NCTA Touts Cable Modem Deployment in Rural Areas,” (Feb. 4, 2002). See also *Ex Parte* Letters from Lisa A. Schoenthaler, NCTA Senior Director, Office of Rural/Small Systems and Association Affairs to William Caton, Acting Secretary, Federal Communications Commission (Feb. 8, 2002).

<sup>191</sup> *Id.*

Some commenters claim that the merger will result in an elimination or reduction of competition by reducing the number of broadband competitors from “two to one” in some areas, and from “three-to-two” in other areas.<sup>192</sup> These commenters completely miss the point. They appear to begin with the assumption that all Americans enjoy vibrant competition among providers of true broadband services *today*; they then seek to prove that this competitive marketplace will suffer as a result of the proposed merger.

In fact, however, the merger of EchoStar and Hughes will *create* for the first time a truly competitive broadband alternative to DSL and cable modem service. In doing so, it will help alleviate the real problem, which these commenters assume away:

- by any measure, the broadband revolution is far from reaching every corner of the United States. For many Americans living in remote areas, DSL or cable modems remain out of reach. Satellite high-speed service is the only platform with a national footprint, yet today’s satellite broadband services are not comparable in price or quality to DSL or cable modem services, resulting in a low level of subscription to satellite services by rural Americans; and
- even the remaining consumers today located in areas served by DSL or cable modems lack access to effective satellite broadband competition.

The high-speed Ku-band access services provided by the Applicants today do not cure either part of this problem. As a threshold matter, they do not satisfy the Commission’s definition of an “advanced service.”<sup>193</sup> Nor could either company

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<sup>192</sup> See, e.g., Comments of the State of Alaska at 6; NAB Petition at 102; NRTC Petition at 50.

<sup>193</sup> 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 Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33 (rel.

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standing alone deploy on a timely basis an advanced residential broadband service of mass scale and appeal at an affordable price. Partly due to these issues, SPACEWAY has been developed with a focus on the larger commercial, or “enterprise,” customers while EchoStar’s Ka-band program has remained modest in scope. Both of these Ka-band programs will need to be refocused and integrated with one another to achieve the required economic scale for ubiquitous residential true broadband service.<sup>194</sup> Therefore, the effects of this transaction on the broadband market are more akin to an increase in the number of broadband competitors from “zero to one” in most areas and “one-to-two” or “two-to-three” in other areas of the country. New EchoStar is the best hope for true and competitive satellite broadband service to virtually all Americans at an attractive price.

Ultimately, the question for Congress and the Commission is simple: will the government try to tackle the limited availability of advanced broadband services across America only through a costly web of cross-subsidy and regulation? Or, will it allow a multi-billion dollar private capital initiative to create a true broadband service competitor that will provide service virtually to every home in America? The latter alternative is the better one for the public interest. Indeed, the approval of the proposed

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Feb. 6, 2002), at ¶ 60 (“none of these [satellite] lines satisfies the Commission’s definition of advanced services.”) (“Third Advanced Services Report”).

<sup>194</sup> As discussed in more detail below, the estimates about the stand-alone Ka-band capacity of each company made by one Petitioner’s expert are over-inflated by a host of inaccurate assumptions, such as the collocation of two SPACEWAY satellites in one orbital location and the mistaken belief that EchoStar can use the spectrum licensed to another company through its minority investment in that company.

merger will help fulfill several of the Commission's stated broadband principles and policy goals by:<sup>195</sup>

- encouraging the ubiquitous availability of broadband access to the Internet to all Americans;
- promoting competition across different platforms for broadband services; and
- ensuring that broadband services exist in a minimal regulatory environment that promotes investment and innovation.

The importance of being able to offer a seamless bundle of video and broadband services cannot be overemphasized in considering what tools will be necessary to become and remain competitive with cable companies capable of leveraging their tremendous power in video into the broadband market. The Commission recognized years ago that “[m]ulti-service offerings and bundling services for sale seems to enhance subscription to alternative services offered by cable companies. . . . Indications are that consumers value receiving those services through ‘one-stop-shopping.’”<sup>196</sup> Cable is far ahead of any other service in fulfilling consumers’ demand for “one-stop-shopping,” thanks to its bandwidth advantages and market power in the MVPD market. Cable’s strategy was succinctly described by one commenter in the Commission’s cable modem open access proceeding:

The cable industry has informed everyone else outside the Commission that it is *cable itself* that is advantageously

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<sup>195</sup> See “FCC Launches Proceeding to Promote Widespread Deployment of High-Speed Broadband Internet Access Services,” News Release (Feb. 14, 2002).

<sup>196</sup> Fifth MVPD Competition Report at ¶ 60.

positioned to leverage *cable's* dominant incumbent position in *cable's* existing video markets, in order to secure *cable's* dominance of the broadband market. Cox openly declares that it has 'outlined a clear strategy: Leverage the power of our delivery network to offer customers not just cable television, but advanced services including . . . high-speed Internet access.'

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The cable industry expects its leveraging to solidify cable's dominance of existing video markets, as well.<sup>197</sup>

Present-day, spectrum-constrained, satellite providers simply cannot offer a bundled video, broadband and interactive service comparable to that being rolled out by those cable companies offering digital cable service.

#### **1. The Current State of Deployment of Advanced Telecommunications Capability**

The problem with broadband is a threshold one: availability. Many areas of the country still have *no access whatsoever* to what the Commission has described as "advanced telecommunications capability" (referred to here as "true broadband" services).<sup>198</sup> Such services are defined by the Commission as having upstream (customer-to-provider) and downstream (provider-to-customer) transmission speeds of

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<sup>197</sup> Reply Comments of SBC Communications, Inc. and BellSouth Corporation, *In the Matter of Inquiry Concerning High Speed Access to Internet Over Cable and Other Facilities*, GN Docket No. 00-185 (filed Jan. 10, 2001), at 6 (citing a Cox Communications press release).

<sup>198</sup> The Commission has also used the terms "advanced service" and "advanced telecommunications service" to refer to these capabilities. See Third Advanced Services Report at ¶ 8, n.23 (noting the Commission's adoption of the terms "advanced telecommunications services" or "advanced services" in its Second Report on such services, because it determined that the term "broadband services" "had come to include a much broader range of services and facilities" than those examined by the Commission.)

more than 200 kbps.<sup>199</sup> The Commission distinguishes true broadband services from those having 200 kbps capacity in only one direction, such as currently available satellite offerings, which the Commission defines as “high speed.”<sup>200</sup> The Commission’s data make clear that in terms of actual levels of subscribership, true broadband is less broadly deployed than high-speed services. In other words, a significant number of Americans, both urban and rural, still do not subscribe to true broadband service, whether because it is not available to them, the service is too costly, or for other reasons.

The present patchwork quilt of true broadband availability demonstrates that while the pace of deployment is acceptable, *the coverage is far from complete*. Even in areas served by cable, the availability of true broadband service remains limited. For example, out of more than 60 million homes passed by cable modem plant in July 2001, only about 5.2 million had high-speed cable modem lines and less than two-thirds of these met the definition of “advanced service.”<sup>201</sup> This number is, of course, a subset of

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<sup>199</sup> *Id.* at ¶ 8. According to the Commission, a transmission speed of 200 kbps “is enough to provide the most popular applications, including web-browsing at the same speed as one can flip the pages of a book.” *Id.* at ¶ 11.

<sup>200</sup> *See id.* at ¶ 9.

<sup>201</sup> The Commission reported that of the 5.2 million high speed cable lines existing in June 2001, 64 percent met the definition of advanced services, *id.* at ¶ 44, meaning that there were approximately 3.3 million such lines. Relying on a report by the National Cable Television Association (“NCTA”), the Commission reported that “more than 60 million homes” were passed by cable modem plant in July 2001. *See id.* at ¶¶ 44-45 & n.93. These figures yield a penetration rate of roughly 5.5 percent of cable modem capable homes assuming 60 million homes are passed by cable modem service. The NCTA has reported that as of November 2001, there were 6.4 million cable modem subscribers and 70 million homes passed by cable modem service. *See* [http://www.ncta.com/industry\\_overview/indStat.cfm?indOverviewID=2](http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2) . Estimates vary as to the percentage of U.S. homes that have access to cable modems, ranging from 66

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the total number of homes passed by cable,<sup>202</sup> which in turn is a subset of the total number of U.S. homes. Thus, while the availability of advanced services via cable modem is growing, with the number of subscribers predicted to double in one year's time,<sup>203</sup> advanced service via cable modem is currently being provided to only a small fraction of all U.S. homes.

Likewise, the Commission has noted that service via asymmetric digital subscriber line ("ADSL"), the most popular residential wireline offering, is available to less than half of all U.S. homes.<sup>204</sup> Moreover, only about 37 percent of the 2.7 million ADSL lines reported at the end of June 2001 met the Commission's definition of advanced services.

While satellites offer the best hope for filling the gaps left by cable modem and DSL, satellite broadband today is not fully comparable to cable modem and DSL, leaving many Americans without a true broadband alternative. The Commission found that none of the current satellite offerings qualifies as an advanced service under its

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percent to roughly 80 percent of U.S. households by year-end 2001. Third Advanced Services Report at ¶ 46 & n.98.

<sup>202</sup> See Eighth MVPD Competition Report at ¶ 17 (reporting that by the end of June 2001, the number of homes passed by cable was estimated at 104 million).

<sup>203</sup> See Third Advanced Services Report at ¶ 66 (citing a Morgan Stanley report on broadband cable that estimated growth in subscribers from year-end 2000 to year-end 2001).

<sup>204</sup> See *id.* at ¶ 51 (quoting an estimate that ADSL was available to "about 45 percent of U.S. homes" at the end of 2001). Assuming that there are 107 million households, the number of households without ADSL access amounts to 58.85 million.

definition.<sup>205</sup> It follows that in areas where advanced services via cable modem or DSL are not available, the number of competitors providing true broadband services is essentially zero. Nor is the situation likely to change soon. A number of reports have suggested that a sizable number of homes in the U.S. will not have access to cable modem or DSL technology in the near future, if ever. A report cited by the Commission puts the number of homes that may never have such access at 20 to 30 million.<sup>206</sup> Many of these homes will be in rural areas, as reflected in another study cited by the Commission which found, for example, that “about 25 to 30 percent of rural telephone subscribers are not likely to have access to high-speed services in the near future.”<sup>207</sup>

This conclusion is consistent with the Commission’s general finding that there is a “positive correlation” between “population density and the presence of high-speed subscribers.”<sup>208</sup> With respect to advanced and high-speed services in the aggregate, the Commission reports that such services are currently utilized in “fewer than 40 percent of the most sparsely populated zip codes,” in contrast to the most densely populated zip codes, nearly all of which report use of such services.<sup>209</sup> As the NRTC

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<sup>205</sup> *Id.* at ¶ 60 (“none of these [satellite] lines satisfies the Commission’s definition of advanced services.”).

<sup>206</sup> *See id.* at ¶ 78 (citing studies by Salomon Smith Barney and Merrill Lynch).

<sup>207</sup> *Id.* at ¶ 113 (citing a study by the National Telephone Cooperative Association).

<sup>208</sup> *Id.* at ¶ 109.

<sup>209</sup> *See id.* at ¶ 35 and App. C, Table 11 (observing that “well over 90 percent” of “the most densely populated zip codes” have high speed subscribers. The Commission defined the most densely populated zip codes as those in the top three deciles of its study in terms of density. Those most sparsely populated zip codes were those in the bottom three deciles. *Id.*, App. C at 4, n.13. It should be noted that the Commission’s data report

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observes, a joint report by the National Telecommunications and Information Administration (“NTIA”) and the Rural Utilities Service (“RUS”) in 2000 noted that “only 5% of towns with fewer than 10,000 residents have access to cable modem service, and only 1.4% of such towns have access to DSL service.”<sup>210</sup> And as discussed above, not all of these cable modem and DSL lines meet the definition of advanced services. In one important respect, however, rural areas with no access to true broadband are in the same position as urban and suburban areas without this service – the current number of providers offering this service in these areas is essentially zero.

Even in those areas where cable modem and DSL services are available, real broadband competition has not been effective in restraining prices that are high and rising. This likely reflects the current lack of effective broadband competition even in urban markets. As the Commission has found, cable modem service is by far the most widely used mode of high-speed and advanced service. According to the Commission, cable modem lines accounted for 54 percent of the estimated 9.6 million high-speed lines reported as of June 2001,<sup>211</sup> with subscribership figures expected to double in one year’s

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the presence of subscribers in a zip code, and that this data cannot necessarily be used to precisely calculate the percentage of the population to whom a service is available. *See id.* at ¶ 25.

<sup>210</sup> NRTC Petition at 44 (citing NTIA/RUS Report at 18-21).

<sup>211</sup> *See* Third Advanced Services Report at ¶ 44 and App. C, Table 1.

time according to a report cited by the Commission.<sup>212</sup> ADSL lines accounted for roughly 28 percent of all high-speed lines.<sup>213</sup>

On the other hand, satellite-based and terrestrial fixed wireless systems accounted for only 2 percent of all high speed lines, with less than 195,000 subscribers.<sup>214</sup> These data reflect that subscribership for high-speed satellite services, which again do not meet the definition of true broadband, with only approximately 140,000 residential and small business subscribers to Hughes' DIRECWAY and EchoStar's StarBand combined,<sup>215</sup> pales in comparison to the figures for high-speed cable and wireline technologies.

Cable likewise dominates in providing true broadband service, accounting for approximately 56 percent of the reported 5.9 million true broadband lines in service

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<sup>212</sup> See *id.* at ¶ 66 (citing a Morgan Stanley report on broadband cable that estimated growth in subscribers from year-end 2000 to year-end 2001).

<sup>213</sup> *Id.* at ¶ 48 & ¶ 71. Other wireline technologies, such as T1, symmetric DSL, and optical fiber services, which are used primarily by businesses, accounted for approximately 16 percent of all high-speed lines. *Id.* at ¶ 48.

<sup>214</sup> See Third Advanced Services Report, App. C, Table 1 (data for satellite and fixed wireless services, which was aggregated by the Commission due to confidentiality concerns, reflect that such services accounted for 194,707 of the nation's 9,616,341 high speed lines).

<sup>215</sup> As a percentage of homes with Internet service, the figure for satellite service is even smaller. The NTIA's most recent study reflected that only 0.5 percent of all Internet homes utilized high-speed services other than cable and DSL, while 12.9 percent of such homes used cable modem, and 6.6 percent used DSL. See U.S. Department of Commerce, National Telecommunications and Information Administration and Economics and Statistics Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet* (Feb. 3, 2002), at 39 (reporting that technologies other than standard dial-up, cable modem, and DSL, were used by only 0.5% of Internet households).

as of June 2001.<sup>216</sup> The Commission reported that cable companies increased residential subscribership for advanced services by 261 percent in the 18 months preceding its *Third Advanced Services Report*.<sup>217</sup> Wireline technologies including ADSL accounted for 35 percent of all true broadband lines, and residential subscribership to ADSL advanced services grew by 683 percent in the 18 months leading up to the Commission's *Third Advanced Services Report*.<sup>218</sup> Fiber accounted for less than 8 percent of all true broadband lines.<sup>219</sup> As noted above, none of the satellite operators currently offers true broadband service, reflecting the fact that satellite providers account for zero percent of this market. With cable far outstripping other high-speed technologies in terms of availability, it comes as no surprise that competition is lacking in the high-speed and advanced services market, and that, as NRTC has observed, prices for such services are high and rising.<sup>220</sup>

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<sup>216</sup> See *Third Advanced Services Report*, App. C, Table 1.

<sup>217</sup> *Id.* at 16, n.70.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See NRTC Petition at 50 (citing reports that conclude “price appears to be a key obstacle to broadband penetration.”)

**2. EchoStar’s and Hughes’ Current Ku-Band Broadband Offerings Are Competitively Inadequate**

**a. Current Ku-Band Offerings Are Simply Not Competitive in Today’s Market**

What many Petitioners describe as a loss of competition from the merger<sup>221</sup> relates to two interim alternatives that have not been able to realize anything close to the full potential of satellite broadband offerings. The Commission itself has described the DIRECWAY and Starband offerings as “still in the early stages of deployment,”<sup>222</sup> and although each company has tried to make the most of these delivery modes, it is clear that these services are subject to significant constraints that will limit their long-term viability, especially in light of the emergence and rapid deployment of more advanced broadband service alternatives.

Foremost among these constraints are transmission speeds, capacity limitations and overall cost. As noted above, current satellite offerings do not meet the Commission’s definition of “advanced services” because the satellite offerings are not capable of providing transmission speeds in excess of 200 kbps in both directions.<sup>223</sup> These Ku-band offerings have limited capacity. As discussed in the attached Declaration of Mr. Arnold Friedman (“Friedman Declaration”) attached as C hereto, there are

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<sup>221</sup> See NRTC Petition at 50-52; Pegasus Petition at 30; NAB Petition at 98-104.

<sup>222</sup> Third Advanced Services Report at ¶ 60.

<sup>223</sup> *Id.*

operational limits on the number of subscribers that can be served on the Ku-band transponders that Starband and DIRECWAY lease from existing Ku-band satellite operators.<sup>224</sup> Although satellite broadband providers seek to group transponders on the same satellite for operational efficiencies and customer service quality, there are limits on their ability to successfully do so. The Ku-band is used for many commercial purposes other than DIRECWAY and Starband services, and satellite operators have already committed many Ku-band transponders for such other uses. Moreover, Starband and DIRECWAY directly compete with other users for access to the available Ku-band capacity. As a result, it is not always possible to obtain additional capacity on the same spacecraft where DIRECWAY and Starband have already located existing broadband subscribers.<sup>225</sup> These limitations directly impact the economics of the currently provided Ku-band services.

Obtaining Ku-band capacity is also expensive. In today's market, the cost to lease a single 36 MHz transponder is approximately \$2,000,000 per year. The cost of acquiring space segment capacity from third parties is a large component of the total cost of the monthly service cost for satellite broadband service. Thus, the cost of leasing Ku-band capacity increases the cost to provide DIRECWAY and Starband service, relative to the cost to provide DSL and cable modem service.<sup>226</sup>

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<sup>224</sup> Friedman Declaration at ¶ 12.

<sup>225</sup> *Id.* at ¶¶ 13-14.

<sup>226</sup> *Id.*

The long-term ability of services of this nature to compete with faster, true broadband services is therefore questionable, especially since, as the Commission observes, “new and unforeseen capacity hungry applications that require advanced service platforms will drive demand, and in turn deployment, in the future.”<sup>227</sup> For example, the Commission notes that one report forecasts that “by 2005, the average broadband household will download about 70 megabits [sic] of files, consume more than 20 minutes of video streaming per day, and download three two-hour long movies per month.”<sup>228</sup> Consumers will demand nothing less than true broadband service and more to facilitate their use of the Internet for such activities.<sup>229</sup>

Other constraints on the competitiveness of present-day satellite broadband services versus cable modem or DSL service include higher up-front costs for equipment and installation, and the need for professional installation.<sup>230</sup> As explained in Mr. Friedman’s Declaration, the impact of these constraints is that current Ku-band

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<sup>227</sup> Third Advanced Services Report at ¶ 64.

<sup>228</sup> *Id.*

<sup>229</sup> A survey conducted by McKinsey & Co. and JP Morgan in April 2001 characterized consumer interest in broadband as already “surprisingly high.” McKinsey & Co. and JP Morgan, *Broadband 2001: A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market* (Apr. 2001), at 25. Ninety-four percent of survey respondents indicated that the “primary benefits of broadband – data speeds many times faster than with most dial-up connections, not tying up the phone line, always being on, never having any busy signals” were either extremely, very, or somewhat important to them.

<sup>230</sup> Friedman Declaration at ¶ 8. Professional installation of satellite equipment is required by FCC licenses for transmit-receive Ku-band terminals used for two-way service to consumers. This requirement has negatively impacted installation costs and consequent pricing.

broadband offerings are unable to compete with cable modem and DSL offerings.<sup>231</sup> The price of these satellite services is significantly higher than that of cable modem and DSL services.<sup>232</sup> Monthly charges for the Starband and DIRECWAY services, for example, start at approximately \$70 and \$60 respectively,<sup>233</sup> compared to approximately \$30-60 for cable modem service from major providers<sup>234</sup> and \$45-59 per month for standard DSL service.<sup>235</sup> Second, equipment and installation costs are much higher for satellites than cable modem or DSL services. The suggested retail price of equipment for satellite broadband service is more than \$500, plus the customer must obtain professional installation at a cost starting at \$199, for a total price tag of over \$700. Moreover, satellite subscribers typically have no alternative other than to purchase their satellite equipment, as the equipment is usually not offered on a lease basis. Cable modem and DSL installations, on the other hand, entail significantly lower costs to bring the subscriber on line. Cable modems are offered by one major provider for \$199 or a \$5 monthly rental

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<sup>231</sup> *Id.* at ¶ 9.

<sup>232</sup> *Id.*

<sup>233</sup> *See* Third Advanced Services Report at ¶ 48. DIRECWAY service is obtained through Hughes' distributors. The current monthly fee for DIRECWAY service is \$59.99 and for Starband service is \$69.99. *See* Friedman Declaration at ¶ 9.

<sup>234</sup> *See* Friedman Declaration at ¶ 9. A \$40-55 price range was reported by Comcast Corporation's website, [www.comcast.com](http://www.comcast.com), visited Feb. 18, 2002. Cox Communications-Northern Virginia offers a high-speed Internet access service for \$30-40 per month. *See* [www.coxcable.com/Fairfax/RoadRunner/rates.asp](http://www.coxcable.com/Fairfax/RoadRunner/rates.asp) (visited Feb. 21, 2002). Time Warner Cable advertises high-speed Internet access in Bergen County, New Jersey for \$45-60 monthly including the cost of modem rental. *See* [www.timewarnercablenj.com/road\\_runner/faq.html#gq17](http://www.timewarnercablenj.com/road_runner/faq.html#gq17) (visited Feb. 21, 2002).

<sup>235</sup> Third Advanced Services Report, App. B, at ¶ 25.

fee, with a self installation kit.<sup>236</sup> DSL installation costs to consumers ranged from no cost to \$250 according to a recent Commission survey.<sup>237</sup>

The sum effect of all of these factors is that current Ku-band satellite broadband offerings are not as competitive, and therefore not as attractive as cable modem and DSL offerings. Low rates of subscribership to satellite broadband offerings – only 140,000 satellite subscribers to date compared to subscribership numbers in the millions for cable modem and DSL – demonstrate this lack of competitiveness of satellite offerings. Logically, a merger that will result in the combination of two interim and struggling broadband alternatives that are already not competitive with cable modem and DSL services will not produce a further loss of broadband competition.<sup>238</sup> According to

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<sup>236</sup> These prices were reported by Comcast Corporation’s website, [www.comcast.com](http://www.comcast.com), visited Feb. 18, 2002. Cox Cable-Northern Virginia offers cable modem rentals for \$15 per month with a \$124.99 professional basic installation fee. The modems may also be purchased from computer equipment retailers. *See* [www.coxcable.com/Fairfax/RoadRunner/rates.asp](http://www.coxcable.com/Fairfax/RoadRunner/rates.asp) (visited Feb. 21, 2002). Time Warner Cable in Bergen County, New Jersey charges a basic installation fee of \$69-99, depending on the configuration of the subscriber’s computer. *See* [www.timewarnercablenj.com/road\\_runner/faq.html#gq17](http://www.timewarnercablenj.com/road_runner/faq.html#gq17) (visited Feb. 21, 2002).

<sup>237</sup> Third Advanced Services Report, App. B. at ¶ 25.

<sup>238</sup> *See* Pegasus Petition at 30. The NAB has also suggested that EchoStar and DIRECTV “compete in the deployment of advanced services.” NAB Petition at 30-31. However, the “evidence” supplied by NAB of supposed competitive reactions is a disjointed litany of events that cannot even be characterized as tandem movements by the two DBS operators, let alone as indicia of intense competition. NAB claims, for example, that the following events are competitive reactions: “On March 17, 1999, DIRECTV announced it would invest \$1.4 billion in Spaceway Broadband Satellite System, with the stated goal of ‘establish[ing] satellites as the preeminent means of delivery broadband services. On April 19, 1999, EchoStar announced that it would work with SkyStream Data Injection Equipment to insert data into the transport stream to reclaim lost bandwidth.” *Id.* at 30 (citations omitted). This “evidence” of intense satellite broadband competition is as unavailing as the Petitioners’ “evidence” of intra-DBS competition in the video market, as discussed in Section II.A.2 above.

Professor Willig, “[d]espite the fact that satellite-based Internet access is technically available in all areas of the United States, the low penetration rate of this technology -- even in areas without any access to DSL or cable modem service -- raises questions about whether households in both rural and urban areas are likely to accept it on a large scale.”<sup>239</sup>

**b. Current Satellite Offerings Clearly Have Not Functioned as a Check on Broadband Prices**

Petitioners such as NRTC, Pegasus and NAB argue that what they characterize as competition between DIRECWAY and StarBand must be preserved as a check on broadband prices. The lack of satellite competitiveness is borne out not only by the low subscribership rates discussed above, but also by the rising cable modem and DSL prices also observed by these Petitioners. NRTC’s own data reveal that its characterization of the current market is simply wrong – NRTC states that “the price of high-speed services is an impediment to 36% of those interested in subscribing,” and that “the lack of advanced services competition has resulted in monopoly pricing [of DSL services] by ILECs.”<sup>240</sup> These facts contradict NRTC’s argument that the merger will reduce or eliminate competition. Consumers are already subject to monopoly pricing notwithstanding the presence of both DIRECWAY and StarBand in the marketplace.

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<sup>239</sup> Willig Declaration at ¶ 29.

<sup>240</sup> NRTC Petition at 50 (citing comments of Focal Communication Corporation and Pac-West Telcomm, Inc. and quoting comments of the Competitive Telecommunications Association before the NTIA) (internal quotation marks omitted).

**3. Neither Company's Stand-Alone Ka-Band Ventures Would Allow Timely Deployment Of An Affordable Broadband Product to Residential Subscribers**

As the Application explains, the future of satellite broadband lies with the deployment of next-generation systems in the Ka-band capable of competing with the advanced services offerings of cable companies and DSL providers.<sup>241</sup> Because of the challenges involved in bringing these satellite systems to fruition, however, deployment of these new satellites has taken longer, and will require more capital than many Ka-band licensees have been able to sustain. Just recently, Astrolink reported that it had terminated its Ka-band spacecraft contract with Lockheed Martin, after having built 90% of its first spacecraft, and after spending about \$710 million on its Ka-band system and finding itself unable to finance the remaining cost of implementing the Astrolink broadband system.<sup>242</sup> Indeed, the current satellite programs are not immune to downturns in the capital markets or changes in the projected demand for broadband services. However, as discussed in Section III.B. below, the efficiencies flowing from the merger will enable New EchoStar to deploy a competitive true broadband satellite offering for the benefit of all U.S. consumers, rural, suburban and urban alike.

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<sup>241</sup> See Merger Application at 47.

<sup>242</sup> “Decision Nears on Astrolink as Lockheed Ends Funding, *Communications Daily*, Nov. 1, 2001. See also Letter from Peter A. Rohrbach and David Martin, Counsel for Astrolink International LLC, to William F. Caton, Acting Secretary, FCC, Re: Astrolink International LLC, File Nos. 182 through 189, SAT-P/LA-95 & SAT-MOD-19971222-00200 (Feb. 8, 2002) at 2.

**a. Hughes' Ka-Band Venture – SPACEWAY**

The Hughes SPACEWAY system is licensed to operate at two U.S. orbital slots with full-CONUS coverage: 99° and 101° West Longitude. Consistent with the FCC license for the system, and Hughes' system design, the first spacecraft to be deployed at each of these locations is constructed to utilize 500 MHz of spectrum in each direction (19.7-20.2 GHz downlink; 29.5 – 30.0 GHz uplink).<sup>243</sup>

Deploying the SPACEWAY system requires a capital expenditure in excess of \$1.8 billion, and the development of very complex technology that has never before been deployed in a commercial satellite network, such as on-board processing and switching. It also involves the substantial commercial risks associated with implementing cutting edge technology in outer space. In order to support these expenditures and mitigate the attendant risks, the Hughes SPACEWAY business plan targets enterprise customers.

There are a number of reasons why focusing on enterprise customers increases the commercial viability of the SPACEWAY system and reduces the business risk.

- Hughes' experience from Ku-band VSATs is that enterprise customers are willing to subscribe to broadband services more quickly than residential customers.

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<sup>243</sup> Hughes also is licensed to operate a Ka-band spacecraft at the 131° W.L. "wing" slot, which the Commission has acknowledged is not suitable for CONUS service, as well as spacecraft at a number of other locations that are suitable only for international service.

- Targeting enterprise users provides a greater opportunity to generate additional revenue from value-added broadband services.
- Because Hughes already provides Ku-band VSAT services to hundreds of thousands of enterprise Ku-band VSAT terminals, SPACEWAY services can readily be marketed to this large base of installed enterprise users.
- Enterprise customers are not as cost-sensitive as residential users to the up-front costs of acquiring VSAT equipment, or the complexities associated with professionally installing that equipment.
- Serving the enterprise sector provides the opportunity for Hughes to recover more quickly the enormous capital cost of deploying this system; conversely, focusing on a ubiquitous residential service is a far riskier endeavor that would take far longer to recover such costs.
- The profit margins of residential service are significantly lower, partly because subscriber acquisition costs are significantly higher.

In short, the focus on enterprise users is based on the expected higher and quicker “take up” rate by those users, larger profit margins through increased opportunity for value-added services, as well as more modest subscriber acquisition costs, and it has justified Hughes’ making capital investment in the SPACEWAY system and incurring the associated technology risks. By contrast, costs of actually marketing a ubiquitous residential service on a broad scale and equipping residential users to use SPACEWAY-enabled services most likely would not be feasible without the merger.

The SPACEWAY spacecraft at 99° and 101° W.L. will be capable of providing coverage of the 50 states, Puerto Rico and the U.S. Virgin Islands. However, the fact that those spacecraft will be technically capable of serving users throughout the

U.S. does not mean that it is economically feasible to actually market broadband service to, and equip, residential households, particularly those in rural areas.

The recent experiences of terrestrial broadband providers demonstrates that U.S. consumers are very price sensitive in the case of broadband services, and are willing to stay with or revert to dial-up phone service if the cost of broadband service is too high.<sup>244</sup> Thus, DSL and cable modem service providers are moving toward a model in which consumers can self-install their modems, and in which there is no up-front cost to the subscriber – the inexpensive modem often is provided free of charge by the service provider, and there is no installation charge.<sup>245</sup> Current monthly costs for DSL and cable modem service are as low as \$30-60. DSL and cable modem service can therefore be offered to residential customers at a lower “all-in” cost than is possible with satellite-delivered broadband. As a result, both Starband and DIRECWAY currently substantially subsidize Ku-band equipment costs.

Thus, actually marketing and deploying SPACEWAY services to U.S. households will require a substantial additional investment by Hughes that is far and beyond the \$1.8 billion of capital costs for the SPACEWAY system. Particularly in the current economic climate, it is extremely risky for Hughes to make this type of investment to provide service to residential customers. Such an investment makes sense only if the costs of acquiring residential users are at a level that is sustainable by the

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<sup>244</sup> See Willig Declaration at ¶ 29 (observing that “consumers appear to be very sensitive to the price of broadband services”) (citing studies of consumer demand for broadband service).

<sup>245</sup> See Friedman Declaration at ¶¶ 9, 11.

expected revenue stream from those residential users, after taking into account anticipated subscriber churn. As set forth below, the combined scale produced by the merger offers the *only* way to drive down those subscriber acquisition costs, and thereby to justify the substantial investment needed to market and deploy true broadband services to residential users, including those in rural areas. Moreover, the subscriber acquisition costs for such a large customer base will consume significant cash resources, something that Hughes alone has a very limited financial ability to provide, and the merged entity will be better able to provide.

**b. EchoStar's Limited Ka-band Development**

EchoStar's development of a Ka-band offering is not nearly as advanced as Hughes' SPACEWAY program. While it has been granted licenses for three Ka-band orbital locations (83°, 113° and 121° W.L.), the limited amount of spectrum licensed for its use at two of these locations (500 MHz in each direction) and its lack of experience with enterprise customers, have resulted in relative modest plans for deploying its Ka-band satellite.<sup>246</sup> EchoStar 9 has been designed with a limited number of spot-beams and

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<sup>246</sup> Pegasus and the State of Alaska suggest that EchoStar's statements in the Application regarding the development of its stand-alone Ka-band offerings are somehow inconsistent with statements made in other proceedings. *See* State of Alaska Comments at 7; Pegasus Petition at 48-49. Alaska and Pegasus misread the Application. While identifying the risks involved with Ka-band ventures, the Applicants do not, as Pegasus and Alaska suggest, state that each has "changed its mind" about deploying a system. *See* Comments of the State of Alaska at 7. Neither is there any inconsistency with regard to EchoStar's statements in the VisionStar transfer of control proceeding concerning the need for spectrum. In that proceeding, EchoStar stated: "EchoStar . . . with two full-CONUS licensed orbital locations (compared to 3 or 4 locations assigned to certain other licensees) does not have adequate bandwidth to serve the same number of potential customers that certain current and future competitors can provide." *Transfer of Control Application, In the Matter of VisionStar, Inc.*, File No. SAT-T/C-20001215-000163 (filed

(Continued ...)

could be used to backhaul DBS programming to EchoStar's uplink facilities and/or to provide limited broadband services to consumers. However, its total capacity is quite limited (see below) and prior to the merger, EchoStar had no plans to roll out residential broadband Ka-band service on other than a trial basis.

While several Petitioners have speculated as to the commercial viability of launching a number of high-capacity Ka-band satellites into EchoStar's licensed orbital locations, the simple truth is that EchoStar cannot justify making the enormous capital investment in residential broadband service based upon its limited resources and MVPD subscriber base. As explained in the Application, EchoStar believes that it must achieve at least 5 million broadband subscribers within a five year period in order to recover the significant up-front investment and subscriber acquisition costs associated with launching and marketing a new two-way broadband satellite service.<sup>247</sup> EchoStar currently does not have access to sufficient spectrum, orbital locations or capital resources to achieve these targets. All of these limitations, however, can be overcome by combining the resources of the Applicants once this merger is approved.

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Dec. 15, 2000), at 6. While EchoStar further explained that the combination of EchoStar's and VisionStar's spectrum would "mitigate" the problem of inadequate spectrum, *see id.*, EchoStar never stated that the VisionStar transaction would *resolve* the inadequacy, as Pegasus suggests.

<sup>247</sup> Merger Application, Attachment B, Joint Engineering Statement at 15.

**c. Available Spectrum Resources**

NRTC and Pegasus are simply wrong when they allege that each company could achieve miracles on its own and serve tens of millions of subscribers simply by using its own orbital locations.<sup>248</sup> Mr. Morgan's conclusions to that effect rest upon several erroneous assumptions. Mr. Morgan wrongly assumes, for example, that it is feasible for Hughes to collocate two operating SPACEWAY satellites at the same orbital location. He also believes that Hughes could have unencumbered access to a full 1,000 MHz of spectrum at each orbital location.

A key element of the SPACEWAY design, and a key element to offering a competitive broadband service by satellite, is the ability to deploy the small transmit/receive user antennas on a ubiquitous basis, and without incurring the delay and expense involved with individually licensing each antenna. The reality, however, is that Hughes is only able to use 50% of its assigned spectrum for service to such ubiquitous terminals.

The Commission has designated 1000 MHz of spectrum at 18.3-18.8 GHz and 19.7-20.2 GHz bands for downlinks from Ka-band GSO FSS spacecraft, and 1000 MHz of spectrum at 28.35-28.6 GHz, 29.25-29.5 GHz, and 29.5-30.0 GHz for uplinks to Ka-band spacecraft.<sup>249</sup> However, 280 MHz of this downlink spectrum (18.3-18.58 GHz) and 250 MHz of this uplink spectrum (29.25-29.5 GHz) is not suitable for the

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<sup>248</sup> See NTRC Petition at 54-55; Pegasus Petition at 45.

<sup>249</sup> See *In the Matter of Second Round Assignment of Geostationary Satellite Orbital Locations to Fixed Satellite Service Space Stations in the Ka-Band*, 16 FCC Rcd. 14389, 14393 n.26 (2001).

deployment of small, ubiquitously-deployed satellite earth terminals. There are number of reasons for this. First, the Commission has indicated its “expectation” that this 280 MHz of downlink spectrum will generally be used for “gateway” type earth stations<sup>250</sup> (which are not part of the SPACEWAY plan) and not for ubiquitous antennas. Second, the Commission has raised questions about whether the ubiquitous deployment of small terminals in this shared uplink and downlink spectrum is practicable, given the Commission’s stated desire to limit widespread FSS deployment in bands where terrestrial deployment is widespread or where feeder links to MSS satellite networks are being deployed.<sup>251</sup>

The net result of this regulatory situation is that Hughes cannot plan on using the 18.3-18.58 GHz band or the 29.25-29.5 GHz band for its SPACEWAY system. These problems have a corresponding effect on the 18.58-18.8 GHz band that prevents Hughes from using that 220 MHz downlink segment for broadband service to ubiquitous

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<sup>250</sup> *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, IB Docket No. 98-172, at ¶ 48 & n. 100 (rel. June 22, 2000).

<sup>251</sup> *FWCC Request for Declaratory Ruling on Partial-Band Licensing of Earth Stations in the Fixed-Satellite Service That Share Terrestrial Spectrum, FWCC Petition for Rulemaking to Set Loading Standards for Earth Stations In the Fixed-Satellite Service that Share Terrestrial Spectrum, Onsat Petition for Declaratory Order that Blanket Licensing Pursuant to Rule 25.115(c) is Available for Very Small Aperture Terminal Satellite Network Operations at C-Band, Onsat Petition for Waiver of Rule 25.212(d) to the Extent Necessary to Permit Routine Licensing of 3.7 Meter Transmit and Receive Stations at C-Band, Ex parte Letter Concerning Deployment of Geostationary Orbit FSS Earth Stations in the Shared Portion of the Ka-band*, FCC 00-369 (released October 24, 2000) at ¶ 99.

small antennas. The SPACEWAY system is designed to use spectrum in 500 MHz segments, and it not feasible to change the design of the SPACEWAY system at this late date. Thus, Hughes cannot simply “add” this other 220 MHz of spectrum to its current system design.

In addition, contrary to the speculation of some of the Petitioners,<sup>252</sup> the 103° W.L. orbital location licensed to PanAmSat Corporation simply is not part of the SPACEWAY program. The spacecraft that PanAmSat is constructing for the 103° W.L. orbital location has a different configuration than the Boeing-manufactured SPACEWAY spacecraft licensed for 99° and 101° W.L. That PanAmSat spacecraft, being manufactured by Orbital Sciences Corporation (i) is incompatible with the SPACEWAY design, (ii) uses a bent-pipe configuration, and (iii) does not contain the advanced switching capabilities that are a central feature of the SPACEWAY system. Thus, the PanAmSat spacecraft under construction for 103° W.L. simply has not been optimized to provide the type of true broadband services that will be offered by SPACEWAY.<sup>253</sup>

Mr. Morgan is equally wrong in his assertion that EchoStar controls Celsat’s use of its licensed Ka-band slots,<sup>254</sup> and even overstates the spectrum available to

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<sup>252</sup> See NRTC Petition at 54-57, Morgan Declaration (NRTC) at 36-37.

<sup>253</sup> Furthermore, PanAmSat is a publicly funded company, with fiduciary obligations to its 19.4 percent stockholders other than Hughes, and has no agreement with Hughes or Hughes Network Systems regarding the operation of any of PanAmSat’s satellites as part of the SPACEWAY system.

<sup>254</sup> On the contrary, an EchoStar affiliate holds only a 17.6 percent interest in Celsat, and EchoStar simply has no control over Celsat’s use of its spectrum. See Merger Application at Attachment D.

that company.<sup>255</sup> Nor is it appropriate for the Commission to speculate about possible alternative combinations between EchoStar and Celsat or any other Ka-band licensee in evaluating the specific merger before it.<sup>256</sup>

Mr. Morgan makes another fundamental mistake by grossly overstating the number of subscribers that could be served in the Ka-band spectrum that is available. Mr. Morgan wrongly relies on dial-up subscriber usage statistics.<sup>257</sup> These figures simply do not apply to broadband users, who spend substantially more time online, and are much more likely to watch movie trailers, watch streaming video, listen to streaming audio and download software and music on demand. Thus, Mr. Morgan's assumption of an "average busy hour demand" of 2.75 kbps per subscriber" is flawed. As a result of these and other errors, Mr. Morgan substantially overstates the number of broadband subscribers that each company could serve.<sup>258</sup>

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<sup>255</sup> Mr. Morgan appears to assume that Celsat was authorized to operate over an additional 850 MHz of spectrum "outside the normal FSS Ka-band allocation." See Morgan Declaration (NRTC) at 37. The basis of this assumption is not clear. In fact, Celsat received authorization for 500 MHz spectrum in each direction at each of the 83° W.L. and the 121° W.L. orbital locations, and not an additional 850 MHz. Moreover, use of this spectrum is limited to feederlinks to and from Celsat's MSS system (Celsat is not licensed to provide ubiquitous broadband service). Celsat is licensed for downlinks at 18.3-18.8 GHz and uplinks at 28.35-28.6 GHz and 29.25-29.5 GHz. See *In the Matter of Celsat America, Inc.*, File Nos. 192-SAT-AMEND-97 and 88-SAT-AMEND-98, Order and Authorization, DA 01-1682 (Int'l Bur. rel. Aug. 3, 2001).

<sup>256</sup> See 47 U.S.C. § 310(d) (in considering a transfer of control application "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee").

<sup>257</sup> Friedman Declaration at ¶ 26.

<sup>258</sup> *Id.*

**B. Efficiencies Flowing From the Merger Will Make Possible Deployment of a Competitive, True Broadband Alternative**

The many efficiencies gained by the merger will allow New EchoStar to deploy a true broadband alternative that is competitive in all major respects to DSL and cable modem services. It will also allow New EchoStar to price its broadband services at competitive levels in those areas unable and unlikely to receive cable modem or DSL services.

The merged company will combine the resources and subscriber bases of both companies which will result in substantial cost and service advantages over any possible individual Ka-band offering of EchoStar or Hughes. As Mr. Friedman explains, the combination of the Applicants' broadband programs through the merger will address many of the economic hurdles facing prospective Ka-band operators today, such as the relatively high costs during the early years of developing and manufacturing subscriber equipment.<sup>259</sup> While some of these costs may be passed on to subscribers, it is clear that much of these costs would have to be borne by the satellite providers in order to attract a critical mass of subscribers relatively quickly. New EchoStar would be in a much better position to drive down the equipment costs for this service with a larger potential subscriber base.<sup>260</sup>

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<sup>259</sup> Friedman Declaration at ¶ 20.

<sup>260</sup> *Id.* at ¶ 21.

The combined company would be able to market its broadband services to a much larger base of MVPD subscribers and bundle broadband and video services to new subscribers more efficiently and economically by, among other things, consolidating advertising and promotion budgets and sharing distribution channels. The merger will also allow New EchoStar to market its broadband services to the combined DBS customer base of the two companies. Indeed, current subscribers of DBS services are more likely to subscribe to satellite broadband services because these households have a clear line of sight to the satellites and because they have a demonstrated willingness to place the necessary equipment and antenna dishes on their homes.<sup>261</sup> In fact, half of Hughes' current broadband subscribers also subscribe to DIRECTV. As Professor Willig explains, the ability to market this broadband service to the combined subscriber base of both companies will lower the acquisition costs necessary to reach the critical mass of subscribers and also likely shorten the time period necessary to reach this level of subscribers.<sup>262</sup>

New EchoStar will also be able to manage its satellite fleet and spot-beam capacity more efficiently than either Applicant could do separately. Additional cost savings would also be achieved, according to Mr. Friedman, through the consolidation of customer service centers, uplink facilities, network operating centers, trunking facilities and billing functions.<sup>263</sup>

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<sup>261</sup> *Id.*

<sup>262</sup> *See* Willig Declaration at ¶ 32.

<sup>263</sup> Friedman Declaration at ¶ 22.

There also can be little doubt that New EchoStar must pass on these cost and efficiency advantages directly to consumers in order to be competitive with DSL and cable modem services, which in turn will spur competition among cable modem, DSL and any other broadband service providers.

A broad range of commenters understand the potential that this new service holds for closing the “digital divide” between urban and rural areas, including business owners who see the potential boost to the competitiveness of rural economies, rural healthcare providers who see the potential for improved telemedicine services via a true broadband satellite link to urban healthcare centers, rural educators desiring to provide their students with a true broadband link to the Internet equal to what is available to their urban counterparts, and citizens who simply seek access to the same types of services available in urban areas.<sup>264</sup> These commenters recognize that the merger will be

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<sup>264</sup> See, e.g., Comments of Arnold Sherman, Executive Director, Montana World Trade Center, Missoula, Montana; Comments of Jeff Hoffman, Champion Rural Economic Area Partnership Alliance Director; Comments of W.A. (Bill) Gallagher, Farm Bureau Financial Services, Helena, Montana; Comments of Dave Lewis, State Representative, State of Montana; Comments of Susan Fischetti, Fischetti Enterprises, Inc., Eagle River, Alaska; Comments of Dick Maxwell, Executive Director, Buckeye Association of School Administrators, Columbus, Ohio; Comments of Amy Paster, Director, Church Point Chamber of Commerce, Church Point, Louisiana; Comments of Shelby Robert, Robert Farms, Gonzales, Louisiana; Comments of Sen. Noble Ellington, Chairman, Senate Judiciary A Committee, State of Louisiana; Comments of Russell Hanson, President, North Dakota Retail Association, Bismarck, North Dakota; Comments of Lois Hartman, Executive Director, North Dakota Firefighter’s Association, Bismarck, North Dakota; Comments of Jason Brostrom, NetExpress LLP, Bismarck, North Dakota; Comments of Jeffrey Masten, Medical X-Ray Center, Sioux Falls, South Dakota; Comments of Mary E. Jones, Ed.D. Sioux Falls, South Dakota; Comments of Edward T. Clark, M.D., Central Plains Clinic, Sioux Falls, South Dakota; Comments of Rick Bauermeister, Director of Business Development, Market Solutions Group, Inc., Sioux Falls, South Dakota; Comments of George Landrith, President, Frontiers of Freedom, Fairfax, Virginia; Comments of David Charles, M.D., National Alliance of Medical Researchers & Teaching Physicians, Washington, D.C.

a step forward toward parity between the services available in rural and urban areas , and not the “step backward” feared by the National Rural Electric Cooperative Association.<sup>265</sup> The merger will help make this potential a reality for all of these constituencies.

### **C. The Merger Does Not Preclude Additional Entry**

While the merger will create a true broadband service alternative, including in areas where none currently exists, it will not preclude new, additional entrants from providing high-speed and advanced services. Arguments to the contrary by some Petitioners, claiming that the merger will “stifle” Ka-band competition, or “prevent” Ka-band competition from emerging in rural areas,<sup>266</sup> are mistaken.

NRTC and Pegasus argue that the merger will adversely affect broadband competition with regard to Ka-band services because the merged entity would control enough Ka-band slots to preclude new Ka-band entrants.<sup>267</sup> Simple arithmetic reveals the flaws in this argument. Pegasus identified orbital slots capable of serving CONUS as those from 83° W.L. to 133° W.L. and complains that New EchoStar will control “between 8 and 11 of the slots.”<sup>268</sup> Pegasus fails to mention that *eleven* other entities affiliated with neither EchoStar nor Hughes currently control orbital slots capable of serving CONUS, which demonstrates that there are more than enough prime Ka-band

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<sup>265</sup> See Comments of National Rural Electric Cooperative Association at 9.

<sup>266</sup> See NRTC Petition at 52-56.

<sup>267</sup> Pegasus Petition at 69-72; NTRC Petition at 52.

<sup>268</sup> Pegasus Petition at 71.

slots controlled by others to ensure that the merger will not “stifle” competition in providing broadband services.<sup>269</sup> Moreover, as explained above, SPACEWAY only has access to only two full-CONUS slots and EchoStar has access to at most three such slots, not three and five, respectively, as Pegasus and NRTC claim.<sup>270</sup>

Pegasus and NAB also argue that merger approval would violate Section 25.140(e) of the Commission’s Rules, which limits the number of FSS orbital slots to two per applicant.<sup>271</sup> This argument is without merit. The Commission has never held that Section 25.140(e) operates to preclude a merger that results in a transfer of control over orbital slots.<sup>272</sup> It does not. In any event, the Commission has never applied this rule to

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<sup>269</sup> See “FCC International Bureau Authorizes Second Round Ka-Band Satellite Systems,” Press Release (Aug. 2, 2001) and attached “Ka-Band GSO Orbit Assignment Plan,” which reflects that Lockheed Martin Corporation, DirectCom Networks, Inc., CAI Data Systems, Inc., TRW, Inc., Pegasus Development Corporation, CyberStar Licensee LLC, GE American Communications, Inc., Astrolink International, NetSat 28 Company, LLC, Motorola, Inc., and Loral Space & Communications Corporation are authorized to operate satellites at orbital locations ranging from 83° W.L. to 133° W.L.

<sup>270</sup> See Pegasus Petition at 69; NRTC Petition at 52.

<sup>271</sup> Pegasus Petition at 71-72; NAB Petition at 110.

<sup>272</sup> See e.g., *In the Matter of Loral Space & Comm. Ltd. and Orion Network Syst.*, 13 FCC Rcd. 4592 (1998); *In the Matter of Hughes Comm. Inc. and Affiliated Companies and Anselmo Group Voting Trust/PanAmSat Licensee Corp.*, 12 FCC Rcd. 7534 (1997); *In the Matter of VisionStar, Inc.*, Order and Authorization, File No. SAT-T/C-20001215-00163, DA 01-2481 (Int’l Bur. rel. Oct. 30, 2001) (approvals of transfer of control applications which resulted in the transferee controlling more than two Ka-band slots. In none of these instances did Rule 25.140(e) operate to preclude the transfer). Pegasus and NRTC are likewise incorrect in their assertion that Commission Rule 25.140(f) precludes this transfer of control. See NRTC Petition at 52-53; Pegasus Petition at 71-72. Rule 25.140(f) limits an FSS applicant to one additional slot beyond its assigned authorizations, provided that its in-orbit satellites are filled and that it has no more than two unused orbital locations for previously authorized but unlaunched satellites in that band. 47 C.F.R. § 25.140(f). This rule too has never been held to preclude transfers of control, and Petitioners cite no authority to the contrary.

restrict assignments in the Ka-band because it concluded that there were sufficient slots to accommodate all applicants.<sup>273</sup>

The Commission has recently observed that new entrants using several different technology platforms have already begun, or are poised to begin, playing a significant role in providing high-speed and advanced services to many areas of the country including smaller markets. The Commission has reported, for example, “that there are at least 241 different companies using unlicensed spectrum to provide high-speed terrestrial fixed wireless Internet access in approximately 503 different counties” across the nation.<sup>274</sup> Importantly, the Commission recognized that industry observers have pegged fixed wireless as a solution for rural areas, noting that “while fixed wireless has the potential to compete with DSL and cable modem service, the technology is best-suited for rural and underserved markets where these services are not available.”<sup>275</sup>

MMDS systems have been cited by the Commission as another competitor expected to gain strength in the next two years. MMDS, which currently reaches 55 percent of the population by Commission estimates, is expected to reach 90 percent of the population by the end of 2004.<sup>276</sup> The Commission noted that industry observers predict that “[d]espite the setbacks that the fixed wireless industry has faced during the past year,

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<sup>273</sup> See *In the Matter of Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service Space Stations in the Ka-Band*, DA 01-1693, 16 FCC Rcd. 14389 (2001) at ¶¶ 16-17.

<sup>274</sup> Third Advanced Services Report at ¶ 59.

<sup>275</sup> *Id.* at ¶ 75 (citing industry observers).

<sup>276</sup> *Id.* at ¶ 61.

including financial problems and halting of deployment plans by major operators, analysts believe that the industry still has the potential to grow and become a successful vehicle for offering high-speed services.”<sup>277</sup>

Furthermore, Loral, WB Holdings and Teledesic recently certified to the Commission that they have commenced construction of their Ka-band satellite networks.<sup>278</sup>

The Commission has observed as well that multiple providers are beginning to deploy third generation wireless (“3G”) systems, including “many commercial mobile radio service licensees [who] are beginning to deploy, or have developed plans to deploy, 3G services within their existing spectrum.”<sup>279</sup> The Commission concluded that “successful deployment of 3G wireless services may significantly expand availability of advanced services, especially to consumers that are currently unserved by wireline connections.”<sup>280</sup>

Advances in technology will also expand the reach of DSL services. The Commission has reported that “DSL extension products” have been developed to relieve significant constraints on DSL availability. The Commission describes these products,

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<sup>277</sup> *Id.* at ¶ 71. The Commission has also pointed out that during 2001, it authorized the use of MMDS and Instructional Television Fixed Service spectrum for mobile in addition to fixed use, by licensees, and that industry analysts predicted that this action by the Commission “gives fixed wireless carriers and equipment vendors additional flexibility and may help revive the industry.” *Id.* at ¶ 76.

<sup>278</sup> “Satellite Companies File Milestone Documents with FCC,” *Communications Daily* (Feb. 11, 2002) at 9.

<sup>279</sup> Third Advanced Services Report at ¶ 80.

<sup>280</sup> *Id.*

developed to serve subscribers who are located beyond the range of the central office or who are blocked by a digital loop carrier that cannot be modified with a remote access multiplexer or remote DSLAM, and capable of “bring[ing] consumers, especially those in low-density areas, within the range for DSL services.”<sup>281</sup> A new DSL standard recently announced by the International Telecommunication Union, G.SHDSL, also has the potential to expand DSL availability. G.SHDSL can reportedly be deployed nearly twice as far from the central office as symmetric DSL, while increasing the amount of available bandwidth. As a result the Commission has noted that this new standard “would . . . extend DSL capability to consumers that are currently beyond the reach of the central office.”<sup>282</sup>

With respect to cable modem deployment, the ACA has reported that its member companies are “leading the industry in delivering broadband services to smaller markets,” noting that the Commission “has received substantial data on ACA members’ broadband deployment in response to the High-Speed Access N[otice of Inquiry].”<sup>283</sup>

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<sup>281</sup> *Id.* at ¶ 83. The Commission has also pointed out that the number of rural subscribers receiving DSL may be under-reported in Commission studies because the Commission only requires high-speed providers that have 250 or more subscribers in a given state to report subscriber numbers. “Thus, many smaller providers that serve discrete communities in sparsely-populated areas may not have reported, thereby creating the impression that there is less high-speed service in rural areas than there may actually be.” *Id.* at ¶ 35. The Commission further cites a report by the National Telephone Cooperative Association that “almost 80 percent of respondents to a recent survey of its members are offering high-speed services to all public centers in the carrier’s service territory.” *Id.* at n.82

<sup>282</sup> *Id.* at ¶ 84.

<sup>283</sup> ACA Petition at 7-8 (citing ACA’s comments in *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities*, GN (Continued ...))

According to ACA, small cable systems passed “nearly one million homes with cable modem service,” had invested “about \$300 million” in plant upgrades and equipment, and planned to nearly double the number of homes passed with cable modem service in the next 12-24 months.<sup>284</sup>

In sum, the merger will do nothing to stifle new entry in the broadband market. A multitude of new entrants are able to provide broadband service using a variety of technologies, and will compete with cable modem, DSL and satellite broadband services.<sup>285</sup> Competition between the various technologies is consistent with the view expressed by FCC Chairman Powell in recent reports that “sufficient competition comes from the different types of broadband service available: via DSL, cable networks, or satellite dishes.”<sup>286</sup>

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Docket 00-185 (Dec. 1, 2000), and its Reply Comments in that proceeding (Jan. 10, 2001).

<sup>284</sup> See ACA Reply Comments, *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities*, GN Docket 00-185 (Jan. 10, 2001) at 4, 7 and Table 1. Although the ACA intimates that the merger will force small cable providers out of business, ACA Petition at 7-8, this contention is both overblown and inconsistent with the cable industry’s representations to the Commission in other proceedings regarding the aggressive roll-out of digital upgrades in smaller markets, as discussed in Section II.E, *supra*.

<sup>285</sup> The number of current and up-and-coming participants in the broadband market make clear that the Commission should give no weight to the claim of Pappas Telecasting Companies that the merger would create a “broadband monopoly.” See Comments of Pappas Telecasting at 16-17.

<sup>286</sup> Jonathan Krim, “FCC Rules Seek High-Speed Shift,” *Washington Post* (Feb. 15, 2002), at E1 (reporting on FCC Chairman Powell’s view of broadband competition and observing further “Powell and his supporters argue that it is difficult to foster competition within each mode of high-speed Internet access because of the huge cost involved in building networks”).

**D. The Merger Provides A Market Solution to the Lack of True Broadband Availability While Avoiding the Need for Costly and Contentious Regulatory Measures**

There are two ways to achieve universal broadband deployment: through adopting a complicated web of regulations, or through private capital investment. Both Congress and the Commission have recognized the superiority of reliance on market forces and encouraging private investment. Regulation as a tool for facilitating broadband deployment, on the other hand, has historically led to market inefficiencies. Some of the regulatory broadband initiatives contemplated by the Commission or aspired to by some parties would present exactly this problem. By contrast, the merger presents a market-based path to similar results – the creation of a broadband alternative without need for subsidy, cross-subsidy, franchise rights or any other government support.

Congress's preference for market-based solutions is evident in Section 706 of the Telecommunications Act of 1996, which directed the Commission to:

[E]ncourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.<sup>287</sup>

The Commission has interpreted this directive to mean:

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<sup>287</sup> Telecommunications Act of 1996, Pub. L. 104-104, § 706, 110 Stat. 153, reproduced in notes under 47 U.S.C. § 157.

[T]he language and spirit of the Act require that we promote advanced services deployment within a framework that relies significantly on market forces.<sup>288</sup>

Accordingly, the Commission explained that it is “actively engaged in removing barriers and encouraging investment in advanced telecommunications,” and described its efforts as working to:

[E]stablish a rational regulatory framework for these services, to promote investment through competition and the administration of our universal service support mechanisms, make efficient use of available spectrum and ensure that lack of access to public rights-of-way do not slow deployment.<sup>289</sup>

At the same time, struggling with some intractable problems associated with the digital divide, the Commission has had to contemplate initiatives that are not necessarily consistent with this preference for market solutions. These involve the highly controversial, complicated universal service subsidies that created so many long-running disputes in the telephone context. For example, in its *Third Report on Advanced Services*, the Commission stated that it has “encouraged investment in [advanced services] infrastructure in high cost areas” by modifying explicit subsidy provisions, high-cost loop support for rural carriers and access charges for rate-of-return companies.<sup>290</sup> The Commission has also noted that it is considering changes to its

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<sup>288</sup> Third Report on Advanced Services at ¶ 33.

<sup>289</sup> *Id.* at ¶ 6.

<sup>290</sup> Third Advanced Services Report at ¶¶ 139-40. The Commission is currently reconsidering its order modifying rules for rate-of-return carriers. *See id.* at 56, n.336.

controversial physical collocation rules, as well as the definition of “core services” eligible for universal service support, to facilitate deployment of advanced services.<sup>291</sup>

If possible, of course, the Commission should strive to promote broadband deployment without need to resort to universal service funds or any other system of subsidy. The efficiencies unleashed by the EchoStar/Hughes merger will facilitate universal broadband service without need for any such regulation or subsidy. The Applicants propose to use their private investment to create a true advanced service provider that will go a long way toward resolving the problem without demanding subsidies, without requesting monopoly rights, and without precluding entry by other providers.<sup>292</sup>

The single act of approving the merger will set in motion deployment of the very type of true broadband service Congress and the Commission have sought to make available to all Americans – competitive, widely available, advanced service capability.

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<sup>291</sup> *Id.* at ¶¶ 155, 158. The Commission’s collocation rules were vacated in part and remanded in *GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000), and the Commission released an order on remand in August 2001. *See In re Deployment of Wireline Services Offering Advance Telecommunications Capability*, 16 FCC Rcd. 15435 (2001). Changes to the definition of “core services” are being considered in the pending rulemaking *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Public Notice FCC 01J-1 (rel. Aug. 21, 2001).

<sup>292</sup> The merger will require the Commission to do none of the “things” recently cited by an FCC official as “things government shouldn’t do: (1) Agree to ‘give me a monopoly and I’ll give you broadband’ requests. (2) Favor one technology over others through subsidies.” Edie Herman, “Telecom Experts Debate Why Broadband Subscription Lacks,” *Communications Daily* (Jan 24, 2002), at 3 (citing comments by FCC Chief of Office of Plans and Policy Robert Pepper).

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

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

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

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

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

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

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<sup>293</sup> See Willig Declaration at ¶ 34.

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

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

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<sup>294</sup> NAB Petition at 98; ACA Petition at 14-15; Pegasus Petition at 58.

<sup>295</sup> ACA Petition at 14-15.

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

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

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

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

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<sup>297</sup> For example, four of the top six for-profit video programming networks ranked by subscribership are vertically integrated with a cable provider, as are four of the top five video programming networks ranked by prime-time ratings. *See Annual Assessment* (Continued ...)

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

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

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

<sup>298</sup> See *e.g.*, NRTC Petition at 68-72; Pegasus Petition at 73-76.

<sup>299</sup> See *e.g.*, Application at 6.

<sup>300</sup> See Letter from Pantelis Michalopoulos to Magalie Roman Salas at 1-2 (Dec. 18, 2001) (“Vivendi Notification Letter”).

<sup>301</sup> *Id.* at 2.

<sup>302</sup> See 47 C.F.R. § 76.1000.

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

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

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

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

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

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

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

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

<sup>305</sup> Vivendi Comments at 7.

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

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<sup>306</sup> *See id.* at 3.

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

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

public.<sup>308</sup>

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

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

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

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

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

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

<sup>310</sup> ACA Petition at 14.

<sup>311</sup> *Id.* at 15.

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

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

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<sup>312</sup> The Washington Post, *Giant Cable Merger Planned, AT&T, Comcast Set \$72 Billion Deal*, Dec. 20, 2001.

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

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

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

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

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

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<sup>315</sup> 47 C.F.R. § 76.501(a).

<sup>316</sup> *Fox Television Stations, Inc.* at \*24.

<sup>317</sup> NAB Petition at 58.

<sup>318</sup> *Id.*

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

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

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

retransmission consent fees to many local broadcasters that otherwise would have no such opportunity for many years (if ever). In short, the merger will be the only foreseeable way to make local satellite transmission available in those markets in the first place, which is virtually certain *not* to occur without the merger.

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

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

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

<sup>320</sup> Willig Declaration at n.17.

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

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

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

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

<sup>322</sup> *See* Consumer Groups at 21 (“Because of these potential positive benefits, we urge the Commission to approve the transaction with conditions.”).

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

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

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

<sup>324</sup> See Comments of Consumer Groups at 13-14.

<sup>325</sup> Comments of Consumer Groups at 9.

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

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

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

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

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

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

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

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

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

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

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

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

<sup>329</sup> Eighth MVPD Competition Report at ¶17.

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

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

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

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

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

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

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

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

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

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

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

<sup>334</sup> *Qwest-US West Order*, 15 FCC Rcd. at 5399, 5406 ¶¶ 46,62.

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

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

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

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

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

<sup>337</sup> Johnson Broadcasting Petition at 4-7; Family Stations, Inc. and North Pacific International Television, Inc. Petition at 4.

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

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

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

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

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<sup>340</sup> Comments of Consumer Groups at 13-14.

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

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

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

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

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

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

<sup>344</sup> Comments of Consumer Groups at 15-16.

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

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

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

<sup>346</sup> See *Petition to Deny of the Word Network* at 5-7.

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

<sup>348</sup> See *Comments of Consumer Groups* at 4, 15.

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

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

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<sup>349</sup> *See* Northpoint Petition at 11-12.

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

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

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

<sup>351</sup> *See* Comments of Consumer Groups at 4, 21.

<sup>352</sup> *See id.* at 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>357</sup> *See AT&T/TCI Order*, 14 FCC Rcd. at 3207 ¶ 96.

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

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

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

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

<sup>360</sup> CWA Petition at 5.

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

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

## VII. CONCLUSION

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

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

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

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

**Respectfully submitted,**

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**DECLARATION**

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

\_\_\_\_\_  
/s/

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*CERTIFICATE OF SERVICE*

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

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