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April 4, 2002

Via Electronic Filing

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

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

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

Dear Mr. Caton:

On behalf of our client, the National Rural Telecommunications Cooperative, the attached ex parte letter to W. Kenneth Ferree is being submitted electronically in the above-captioned proceeding in accordance with 47 C.F.R. § 1.1206(b)(1) of the Commission's Rules.

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

Sincerely,

Jack Richards

Jack Richards

Enclosure

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

W. Kenneth Ferree
Chief, Media Bureau
Federal Communications Commission
445-12th Street, SW
Washington, DC 20554

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

Dear Mr. Ferree:

On behalf of our client, the National Rural Telecommunications Cooperative (NRTC), this in regard to a letter to the Commission dated March 22, 2002 (*March 22 Letter*), from EchoStar Communications Corporation (EchoStar), General Motors Corporation and Hughes Electronics Corporation (collectively, the Applicants). The *March 22 Letter* responds to a letter to the Commission from NRTC, dated March 13, 2002 (*NRTC Letter*).[1]

In the *NRTC Letter*, NRTC complained that the Applicants decided on their own to narrow the scope of the Commission's pending request for information regarding the proposed Merger (*Information Request*).[2] NRTC also objected that the Applicants met with Commission staff and discussed the *Information Request* but failed to provide a substantive description of the meeting as required by the Commission's ex parte rules. In their *March 22 Letter*, the

[1] Letter from Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation, to William F. Caton, Secretary, Federal Communications Commission (March 22, 2002). In addition to NRTC, the National Association of Broadcasters (NAB) also objected to the Applicants' efforts to limit the scope of the Commission's inquiry. Letter from Edward P. Henneberry, Counsel for NAB, to William F. Caton, Secretary, Federal Communications Commission (March 14, 2002).

[2] Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (February 4, 2002).

Applicants argue that their response to the *Information Request* is strictly between the Applicants and the Commission, and that NRTC has no right to participate in the process.[3]

NRTC is an interested party in this proceeding.[4] NRTC assisted in capitalizing the launch of the DIRECTV satellite business, and through its members and affiliates currently distributes DIRECTV's DBS programming to approximately 1,900,000 rural households. NRTC's members and affiliates also distribute StarBand and DIRECWAY broadband satellite services to rural America.[5]

NRTC is extremely concerned that the proposed transaction -- an unlawful merger to monopoly -- is contrary to the interests of rural Americans as well as the Commission's long standing goals of promoting facilities-based competition and consumer choice in the delivery of multichannel programming and broadband services. Subject to the terms and conditions of the Commission's *Protective Order*, NRTC is entitled to review and copy the information produced by the Applicants in response to the *Information Request*.[6] Further, NRTC is entitled to ensure that all information responsive to the *Information Request* is being made available for public inspection in accordance with the *Protective Order*. As such, NRTC is entitled to know whether the Applicants will be required to provide all of the information requested by the Commission or only the information the Applicants themselves deem appropriate. Furthermore, NRTC is entitled to object when the Applicants meet in secret with Commission staff and provide no details about their meetings except to note that the pending *Information Request* was "discussed."

The Applicants' *March 22 Letter* provides no answers to NRTC's concerns and is fraught with inaccuracies. Below are quotations from the Applicants' *March 22 Letter*, followed by NRTC's responses.

"The [Applicants'] March 5 Letter described the procedures that the Applicants are following in responding to the Commission's [Information Request]. . ."[7]

In their letter to the Commission dated March 5, 2002 (*March 5 Letter*),[8] the Applicants did much more than "describe" procedures that they are following in responding to the Commission's *Information Request*. Rather, as detailed in the *NRTC Letter*, the Applicants

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[3] *March 22 Letter, p.3.*

[4] *See* Petition to Deny of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed February 4, 2002) (*NRTC Petition*). *See* 47 C.F.R. § 1.939.

[5] *See NRTC Petition.*

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

[7] *March 22 Letter*, p. 1.

[8] Letter from Pantelis Michalopoulos, Counsel for EchoStar Communications Corporation, to William F. Caton, Secretary, Federal Communications Commission (March 5, 2002).

substantially changed the parameters of the *Information Request* and significantly reduced the scope of the information they would be producing for review by the Commission and the public.

> ***". . . NRTC and NAB seek only to delay the Commission's public interest inquiry in this matter. Under the guise of baseless procedural arguments, NRTC and NAB are effectively seeking boundless litigation-type discovery to which they are indisputably not entitled, and which would inject unwarranted delay into the Commission's review process."***[9]

This statement is wrong on several counts. First, this proceeding has been "delayed" not as a result of NRTC's or NAB's actions, but because the Applicants failed to produce the information requested by the Commission within the timeframe established by the Commission.[10] As a result, the Commission formally admonished the Applicants last month and "stopped the clock" on the review of the Merger until the Applicants produce the required information.[11] To date, the Applicants' continuing failure to comply with the Commission's *Information Request* has resulted in a delay of more than 28 days -- and counting -- in the Commission's review of this proceeding. It is wrong for the Applicants to try and shift the blame for their own delay onto NRTC and NAB.

Second, NRTC's concerns regarding the Applicants' disregard of the Commission's *Information Request* and ex parte rules can hardly be considered "baseless procedural arguments." This proceeding must be conducted in as open a manner as possible. Pursuant to the terms and conditions of the *Protective Order*, all interested parties (including NRTC) are entitled to review information produced in response to the *Information Request*. The Applicants' unilateral decision to change the scope of the *Information Request*, and its corresponding failure to provide notification of ex parte meetings as required by the Commission's rules, undercuts the public's ability to participate fully in this proceeding.

Finally, NRTC does not seek "boundless litigation-type discovery." Rather, NRTC seeks only to ensure that the Applicants produce the information they are required to produce under the *Information Request*.

> ***"Simply put, NRTC and NAB should not be permitted to disrupt the Applicants' efforts to provide the Commission with additional information on as straightforward and expeditious basis as possible."***[12]

This is nonsense. Neither NRTC nor NAB has sought to disrupt the efforts of the Applicants to provide information to the Commission. If the Applicants had produced all the

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[9] *March 22 Letter*, p. 1.

[10] Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (March 7, 2002) (*Admonition Letter*).

[11] *Id.*

[12] *March 22 Letter*, p.1.

information originally requested by the Commission within the timeframe originally set by the Commission, this matter would have been resolved weeks ago. There would have been no need for the Commission to "stop the clock."

> ***". . . the Applicants promptly submitted a notice memorializing their February 21, 2002 meeting with Commission's staff on February 23, 2002, and elaborated further on that meeting in a notice filed on March 5, 2002."***[13]

The Applicants never submitted a notice to the Commission on February 23, 2002. Instead, they waited until February 25, 2002 -- four days after meeting with Commission staff -- to submit a notice of the meeting (*February 25 Letter*).[14] As with their notification of the March 11 ex parte meeting,[15] the *February 25 Letter* failed to provide any substantive information regarding the meeting and instead simply noted that the *Information Request* was "discussed."[16] Neither letter satisfied the notification requirements of the Commission's ex parte rules.[17]

> ***"The oral communications by the Applicants in the meetings referenced in [the NRTC Letter] . . . were focused on clarifying and refining procedures for the efficient and timely production by the Applicants of information requested by the Commission . . . As such, these were not "presentations" to the staff within the meaning of the ex parte rules that required any type of filing with the Commission."***[18]

This is an obvious attempt by the Applicants' to bootstrap their failure to comply with the ex parte rules. Both of these meetings (February 21 and March 11) were clearly ex parte presentations (as the Applicants conceded in their ex parte notifications), and they went far beyond mere "procedural issues." They went to the heart of the Applicants' obligation to produce relevant information for review by the Commission and the public in connection with the proposed Merger.

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[13] *March 22 Letter*, n.2.

[14] Letter from Alex Hoehm-Saric, Counsel for General Motors and Hughes Electronics Corporation, to William F. Caton, Acting Secretary, Federal Communications Commission (February 25, 2002). Even if the Applicants had submitted their notice on February 23, 2002, it would have been one day late under the Commission's rules. 47 C.F.R. § 1.1206(b)(2).

[15] Letter from Pantelis Michalopoulos, Counsel for EchoStar Communications Corportion, to William F. Caton, Secretary, Federal Communications Commission (March 12, 2002), p.2.

[16] *February 25 Letter*, p.1.

[17] Any ex parte notice disclosing an oral presentation to the Commission "must contain a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required." 47 C.F.R. § 1.1206(b)(2). Furthermore, if the *February 25 Letter* had been sufficient to comply with the Commission's requirements, it is unclear why the Applicants felt compelled to "elaborate further" on the meeting almost two weeks later. *March 22 Letter*, n.2.

[18] *March 22 Letter*, p.3.

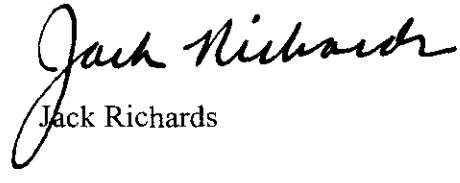
"Finally, NRTC and NAB fail to point out the crushing impact their demands would have on the Commission's workload."[19]

The Applicants -- not NRTC -- have made "demands" on the Commission's workload by changing the nature and scope of the *Information Request* rather than complying with it. NRTC asked only that the *Information Request* be enforced. Had the Applicants simply complied with the *Information Request*, as directed by the Commission, the Commission would have received exactly what it requested. There would have been no unforeseen impact on the Commission's workload.

The Commission's *Information Request* is reasonable, appropriate and necessary in order to ensure that the proposed Merger receives the full and open scrutiny that it deserves. The Applicants should not be permitted to narrow unilaterally the scope of the *Information Request*. Nor should they be permitted to continue violating the ex parte rules by failing to disclose publicly what was "discussed" in their meetings with the Commission regarding the *Information Request*.

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

Sincerely,



Jack Richards

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Donald Abelson
James Bird
Catherine Crutcher Bohigian
William F. Cayton
Rosalee Chiara
Susan M. Eid
Barbara Esbin
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[19] *March 22 Letter*, p.4.

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