

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

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In the Matter of )

EchoStar Satellite Corporation, and )  
Hughes Electronics Corporation )

Application For Authority to Launch and )  
Operate NEW ECHOSTAR 1 )

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CS Docket No. 01-348  
SAT-LOA-20020225-00023

**To: The Commission**

**REPLY COMMENTS OF  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”), by its attorneys, hereby submits these reply comments concerning the application of EchoStar Communications Corporation (“EchoStar”) and Hughes Electronics Corporation (“Applicants”), to launch and operate a spot beam direct broadcast satellite (New EchoStar 1) to provide additional service from the 110° W.L. orbital location.<sup>1</sup>

The NAB agrees with the National Rural Telecommunications Cooperative (“NRTC”) that the New EchoStar 1 Application should be dismissed because it is contingent on the Commission’s approval of the anticompetitive merger proposed between the EchoStar and DIRECTV DBS services.<sup>2</sup> However, if EchoStar and/or DIRECTV were to propose to launch

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<sup>1</sup> EchoStar Satellite Corporation and Hughes Electronics Corporation, Application for Authority to Launch and Operate New EchoStar 1 (USABBS-16), File No. SAT-LOA-20020225-00023 (February 25, 2002) (“New EchoStar 1 Application”); *see also* Letter to William F. Caton, Acting Secretary, Federal Communications Commission from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation and Gary Epstein, Counsel for Hughes Electronics Corporation, providing supplemental Technical Annex, dated March 28, 2002.

<sup>2</sup> *See* Petition to Dismiss of National Rural Telecommunications Cooperative (filed May 20, 2002).

additional spot beam satellites either individually, or as part of a joint venture that would not eliminate the competition between the two DBS companies, then the NAB would be fully supportive of such efforts.

**I. THE APPLICATION SHOULD BE DISMISSED BECAUSE IT IS  
CONDITIONED ON APPROVAL OF AN ANTICOMPETITIVE  
MERGER**

The New EchoStar 1 Application explicitly states that it is “conditional” and that the Applicants “request this authority subject, and contingent upon, the grant of the New EchoStar Transfer Application.”<sup>3</sup>

The proposed merger<sup>4</sup> would have far-reaching anticompetitive effects, as the NAB and others explained in detail in earlier filings.<sup>5</sup> Most significantly, in many markets it would be a merger to monopoly and, in most others, at best a merger to duopoly. As a result, local broadcasters and many millions of consumers throughout the country would be subject to the market power of a DBS monopolist and all consumers would suffer a loss of competition.

The national pricing plan promised as a fix is unworkable and, under scrutiny, turns out to be ephemeral. In addition, as discussed below, the main alleged benefit now advanced to justify the merger – local broadcast station carriage – is achievable without a merger and, like the national pricing plan, turns out not to be a promise at all when examined closely.

For all of the reasons cited in the earlier filings of the petitioners, the Merger Application should be denied. Because the New EchoStar 1 Application is contingent on approval of the Merger Application, it should be dismissed as well.

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<sup>3</sup> New EchoStar 1 Application at 4-5.

<sup>4</sup> Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor, and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control, File Number 01-348 (filed Dec. 3, 2001) (“Merger Application”).

<sup>5</sup> Petition to Deny of National Association of Broadcasters (filed Feb. 4, 2002); Petition to Deny of the National Rural Telecommunications Cooperative (filed Feb. 4, 2002); Pegasus Communications Corporation’s Petition to Deny (filed Feb. 4, 2002); Ex Parte Reply to Opposition of National Association of Broadcasters (filed Apr. 25, 2002) (“NAB Ex Parte Reply”); Ex Parte Reply to Opposition of the National Rural Telecommunications Cooperative (filed Apr. 4, 2002).

## **II. THE EMPTY PROMISE OF LOCAL CARRIAGE DOES NOT JUSTIFY EITHER THE MERGER OR THE NEW ECHOSTAR 1 APPLICATION**

The main alleged benefit of the merger is a “promise” to carry all local broadcast stations, belatedly advanced by the applicants once they sensed the tide was running against them. The New EchoStar 1 Application is made pursuant to this promised benefit. However, this benefit is not merger-specific because it could be achieved without the merger and, in any event, the “promise” is really no promise at all.

### **A. Carriage of Local Broadcast Stations Is Not a Merger-Specific Efficiency**

The Commission has held that in a merger proceeding any claimed efficiencies:

. . . must be merger-specific, and, therefore, efficiencies that could be achieved through means less harmful to the public interest than the proposed merger cannot be considered true benefits of the merger.<sup>6</sup>

Here, the carriage of local broadcast stations is not a merger-related efficiency because EchoStar and DIRECTV individually could carry all local broadcast stations as well as all of their current national programming using today’s technology, with capacity to spare, and would have even more extra capacity as incremental technical improvements are implemented. The applicants consistently present calculations using compression ratios and frequency re-use factors that are even less than those they are achieving today. For example, the applicants’ recent Technical Presentation to the Commission assumes an extremely low spot-beam re-use ratio of only 5.0,<sup>7</sup> when DIRECTV has already achieved a 7.33 re-use rate and rates of at least

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<sup>6</sup> *In the Matter of Applications for Consent to the Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License by GTE Corp., Transferor, to Bell Atlantic Corp.*, CS Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, 14 F.C.C.R. 14,032, 14,141 ¶ 240 (2000); see United States Dep’t of Justice & Federal Trade Comm’n, *Horizontal Merger Guidelines* § 4 (1997) (efficiencies must be “likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anti-competitive effects.”).

<sup>7</sup> Ex Parte Technical Presentation of EchoStar and DIRECTV to the Federal Communications Commission, “DBS Spectrum/Capacity Issues May 2002”, at 7 (filed May 16, 2002).

9.2 are readily achievable.<sup>8</sup> They also assume that DBS technology is static and that they will never employ even presently available technological improvements (while assuming that the cable industry will achieve huge advances in capacity).<sup>9</sup>

The applicants' claim that only through the merger can they serve all 210 DMAs is highly suspect, given that just a short time ago they told the Commission that the merger would make it possible for them to serve 100 local markets.<sup>10</sup> Yet the applicants themselves acknowledge that DIRECTV by itself will have the capability to serve 103 DMAs once DIRECTV 7S is in place (although they maintain they will serve only 70 markets).<sup>11</sup>

In fact, there is no reason that the applicants could not achieve whatever spectrum-sharing benefits they desire through the less anticompetitive means of a production joint venture. As the NAB pointed out before, the parties' earlier failure to negotiate such a joint venture does not mean one is unworkable.<sup>12</sup> The ability of the applicants to come up with the New EchoStar 1 Application in such short order is further evidence that a joint venture is feasible. And as Mr. Gould points out, there is no technical impediment to such a joint venture.<sup>13</sup>

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<sup>8</sup> Further Supplemental Declaration of Richard G. Gould on behalf of National Association of Broadcasters, at 2 (May 30, 2002) (Appendix); Supplemental Declaration of Richard G. Gould on behalf of National Association of Broadcasters, at 3 (filed Apr. 25, 2002); Declaration of Richard G. Gould on behalf of National Association of Broadcasters, at 4 (filed Feb. 4, 2002).

<sup>9</sup> See Gould Supplemental Declaration at 3-6; Gould Further Supplemental Declaration at 3-4.

<sup>10</sup> Merger Application at 4.

<sup>11</sup> Opposition to Petitions to Deny and Reply Comments of General Motors Corporation and Hughes Electronics Corporation and EchoStar Communications Corporation, CS Docket No. 01-348, at 13-14 (filed Feb. 25, 2002) ("Opposition").

<sup>12</sup> NAB Ex Parte Reply at 21-22.

<sup>13</sup> Gould Further Supplemental Declaration at 4. Interestingly, SES Americom appears to see no technical problem with picking up local stations from a New EchoStar platform. See Comments of SES Americom, Inc. (filed May 20, 2002).

## **B. The Promise to Carry All Local Broadcast Signals is Empty**

While the applicants *could* serve all local broadcast stations in all 210 DMAs, it has become clear that their “promise” to do so is no promise at all. Only one day after Mr. Ergen told Congress that “we will comply with must-carry on a single dish and carry all stations in all markets,”<sup>14</sup> EchoStar filed a Supreme Court Petition in which it admitted it “does not intend to carry all channels in every market unless the decision below is upheld.”<sup>15</sup> So, the promise of universal local coverage proves to be no promise at all.

Even if it had been a real promise, EchoStar set no meaningful deadline as to when it would be fulfilled. The New EchoStar 1 Application merely says that the rollout “can be completed as soon as 24 months”<sup>16</sup> after approval of the two applications, but conspicuously lacks any guarantees as to time.

To place credence in any guarantees by EchoStar would be imprudent in any case, given EchoStar’s unmatched record of violations and evasions of Commission orders. The NAB has much more faith in the power of competition between the two DBS companies to foster DBS carriage of local broadcast stations than in the equivocal representations of EchoStar. For instance, just last week, on May 22, DIRECTV announced plans to carry local stations in Grand Rapids, Michigan and EchoStar followed with a similar announcement *the very next day*.<sup>17</sup> This type of robust rivalry in the marketplace is likely to result in more carriage of local broadcast stations than EchoStar’s latest scheme hatched to obtain Commission approval of its faltering merger.

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<sup>14</sup> Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002.

<sup>15</sup> *Satellite Broadcasting and Communications Ass’n et al., Petition for Writ of Certiorari, Satellite Broadcasting and Communications Ass’n v. FCC*, 70 U.S.L.W. 3580, at 8 n.2 (U.S. Mar. 7, 2002) (No. 01-1332).

<sup>16</sup> New EchoStar 1 Application at 3.

<sup>17</sup> DIRECTV Press Release, “DIRECTV to Offer Local Broadcast Channels in Grand Rapids, Mich.,” May 22, 2002; EchoStar Press Release, “DISH Network Satellite Television Brings Local TV Channels to Greater-Area of Grand Rapids, Michigan”, May 23, 2002.

### **III. DESPITE THEIR PROTESTATIONS, BOTH ECHOSTAR AND DIRECTV CONTINUE TO THRIVE**

The Applicants have consistently poor-mouthed their prospects to this Commission. For instance, earlier this year they claimed a “profound risk” that absent the merger their customers will “abandon the DBS platform.”<sup>18</sup> These claims differ markedly from their financial results and what they tell Wall Street. The NAB already pointed out the two companies’ strong revenue and subscriber growth in 2001.<sup>19</sup> First quarter 2002 results continue the trend. EchoStar reported that it had passed the 7 million subscriber mark in the quarter (25 percent above the preceding year) and had revenues of over \$1.1 billion (up 28 percent over the prior year period).<sup>20</sup> DIRECTV reported similar results and CEO Eddy Hartenstein told a Lehman Bros. conference last week that “[d]emand for DIRECTV service has never been stronger,” with record gross additions in each of the last three quarters.<sup>21</sup> Notably, customer churn rates are down, significantly helped by local broadcast station carriage. Where local stations are offered, churn rates are 25 percent lower than in markets where they are not offered.<sup>22</sup> The strong financial performance of both DBS companies provides no support for their claim that they must merge to succeed.

### **IV. CONCLUSION**

The New EchoStar 1 Application is a belated attempt to save a merger that was rightly perceived as in trouble because of its widespread elimination of competition. Because it is expressly tied to that anticompetitive acquisition, the New EchoStar 1 Application, like the Merger Application itself, should be disallowed by the Commission.

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<sup>18</sup> Opposition at 38.

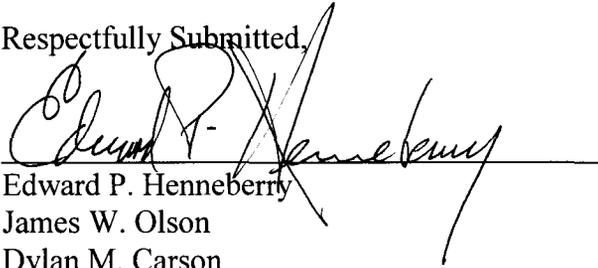
<sup>19</sup> NAB Ex Parte Reply at 14-15.

<sup>20</sup> EchoStar Press Release, “EchoStar Reports First Quarter 2002 Results”, May 2, 2002.

<sup>21</sup> Mike Farrell, “DIRECTV Cleans Up Ahead of Merger,” *Multichannel News*, May 27, 2002, at 23.

<sup>22</sup> *Id.*

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Edward P. Henneberry", is written over a horizontal line. The signature is stylized and cursive.

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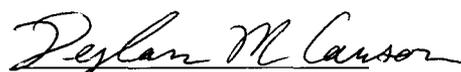
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Date: May 30, 2002

**Certificate of Service**

I, Dylan M. Carson, do hereby certify that on the 30<sup>th</sup> day of May, 2002, I caused true and correct copies of the foregoing Reply Comments of the National Association of Broadcasters to be served, as indicated, electronically and via first class mail upon the parties on the attached service list.

  
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**FURTHER SUPPLEMENTAL DECLARATION OF RICHARD G. GOULD**

I have been asked to comment on the Application for Authority to Launch and Operate New EchoStar 1 and the Ex Parte Notice of EchoStar and DirecTV, dated May 16, 2002, including the “Technical Presentation on DBS Spectrum/Capacity Issues” attached thereto (“Technical Presentation”). These recent filings repeat many of the same unsupported assertions as to Direct Broadcast Satellite (“DBS”) capacity constraints that were made in prior filings by the DBS companies. These assertions of constraints were fully rebutted in several extensive, documented declarations previously filed in this proceeding. Mere repetition does not make those “constraints” any more supportable.

The Declarations of Walter Morgan, Roger Rusch, and myself have demonstrated that each DBS company has adequate spectrum resources now to serve all 1467 local broadcast stations in all 210 DMAs – in addition to their current national programs,<sup>1</sup> with room for still more.

Furthermore, those Declarations cited practical and cost-effective technologies that can be employed by each company to use its own spectrum resources to increase the number of national programs and specialized services. Moreover, an operating agreement between the two independent companies could offer jointly duplicated channels, without the need for a merger.

The recent EchoStar and DirecTV filings, while claiming capacity constraints, fail utterly to deal with this detailed evidence. In addition, while asserting that DBS capacity is static, the Technical Presentation assumes an increase in cable capacity, resulting in an inappropriate “apples vs. oranges” comparison.

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<sup>1</sup> See Declaration of Richard G. Gould in support of Petition to Deny of National Association of Broadcasters (filed Feb. 4, 2002); Supplemental Declaration of Richard G. Gould on behalf of National Association of Broadcasters (filed Apr. 25, 2002); Declaration of Walter L. Morgan in support of Petition to Deny by the National Rural Telecommunications Cooperative (filed Feb. 4, 2002); Reply Declaration of Walter L. Morgan on behalf of the National Rural Telecommunications Cooperative (filed Apr. 4, 2002); Report of Roger J. Rusch in support of Pegasus Communications Corporation’s Petition to Deny (filed Feb. 4, 2002).

## **Echostar and DIRECTV Underestimate Their Independent Spectrum/Capacity**

The Technical Presentation states that advances in compression technology since 1994 have increased the capacity of a single transponder from 6 channels to 8-10 channels. But as explained in several of the earlier declarations, the capacity of a single transponder, resulting in the same perceived quality, is now at least 12 channels, and is predicted by several of the manufacturers of the MPEG-2 encoding equipment that would be employed, to eventually reach 14-16 channels, based solely on improvements in the implementation technology, and not on new algorithms such as MPEG-4. An increase to 12 channels is a 20% increase in channel capacity. In fact, both EchoStar and DirecTV employ compression ratios of 12 in select regions today.

Similarly, the Technical Presentation grossly underestimates the amount of frequency re-use that can be achieved now with spot-beam DBS satellites. The Technical Presentation assumes a frequency reuse level of 5.0. But as the applicants admitted in their Engineering Statement filed in December 2001, the D4S satellite that DIRECTV has already launched and is already operating successfully was designed to achieve an average re-use factor of 7.33, not 5.0. That difference alone amounts to a 46% increase in channel capacity. And my earlier Declarations demonstrated that frequency re-use factors of at least 9.2 are readily achievable from a single satellite, representing an 84% increase over a factor of 5.0.

The statement in the Technical Presentation that “current and planned DBS satellites cannot provide local channels in all 210 DMAs without the merger” is based on their assumption of a compression ration of only 10, and a re-use factor of five, the factor planned by EchoStar for its EchoStar VII spot beam satellite, for a total of 50 channels per frequency throughout CONUS. However, if one uses the already achieved factors of 12 and 7.33 respectively, then about 88 channels can be provided on a single frequency throughout CONUS. Using the eminently achievable factor of 9.2 for re-use, and a compression ratio of 12, the number rises to 110 channels per frequency, a 120% increase over the 50 channels per frequency stated in the Technical Presentation.

Even with a re-use factor limited to 7.33 and a compression ratio of 12, only approximately 16 frequencies would be required to accommodate all 1467 “must carry” local TV stations. That would leave EchoStar with 34 of its 50 currently authorized frequencies for its national and any new special purpose programming. Similarly, DirecTV would be left with 30 frequencies of its 46 currently authorized frequencies for its national and any new special purpose programming.

The fact that Echostar may have specified a spot-beam satellite well behind the state-of-the-art at the time it was ordered is not determinative of what was – and is – technically, operationally and economically feasible.

**Presently Available Technology Could Increase the Spectrum/Capacity Available to Each Company Individually.**

Previous Declarations have also noted other presently available technologies that would increase the channel capacity available to each company. Reverse band working is one. 8-phase PSK modulation is another. These technologies would increase the effective capacity of their currently authorized frequencies and make possible the provision of the additional and specialized future programming such as interactive services and HDTV mentioned in their Technical Presentation.

Reverse band working implies using the currently located feeder link (i.e., uplink) spectrum as DBS downlinks. (There are many options available for a new feeder link band.) Such an arrangement would require interspersing satellites half way between the existing assignments, thereby doubling the capacity of the orbital arc suitable for serving the United States. The FCC supports the use of reverse band working in future years.

8-phase PSK modulation, rather than the presently used QPSK, would greatly increase the capacity of all the orbital locations used for DBS at the expense of higher required satellite transmitted power. Like reverse band working, a change in modulation method would require new subscriber equipment.

## **Comparing Future Cable Capacity with Current DBS Capacity**

The Technical Presentation compares a hypothetical 9 GB/s future capacity into homes from a 1250 MHz cable system, with the 1.2 GB/s pre-merger capacity of each of the two companies, using current technology and current operating parameters.

Given that many cable systems have not yet been upgraded to 750 MHz, it is unclear if and when the 1250 MHz future would be reached, and when a significant portion of the more than 100 million US television households would be equipped with devices capable of receiving these digital transmissions and displaying them on NTSC TV sets. Furthermore, it is unclear from the text of the Technical Presentation how the 1250 MHz future was derived. Finally, the basis for stating that a capacity of 9 GB/s can be achieved in a 1250 MHz bandwidth is not explained. A more equitable comparison would be between realistic and probable future cable capacity and realistic and probable future DBS capacity of the independent companies.

## **There is a Presently Available Alternative to a Merger that Could Eliminate Duplicate Carriage.**

Both companies considered an operating agreement under which the two independent companies would offer duplicated programming jointly, currently several hundred channels (according to the Technical Presentation), including such programming networks as HBO and ESPN. Although technically and operationally feasible with the use of Simulcrypt technology, this spectrum conserving opportunity was not implemented. The possibility of a joint venture foundered not on any question of technical feasibility, but on business issues such as cost allocation, the question of whose technology would be employed, and the portion of frequency resources to be made available by each company. There is no technical obstacle to such a commercial sharing plan and it appears that the business issues could be worked out if the merger is disallowed.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

A handwritten signature in cursive script, appearing to read "R. Gould", is written above a horizontal line.

Richard G. Gould

Executed May 30, 2002