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July 19, 2002

**BY HAND DELIVERY**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

RECEIVED

JUL 19 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**REDACTED -- FOR PUBLIC INSPECTION**

**Re: Consolidated Application of EchoStar Communications Corporation,  
General Motors Corporation and Hughes Electronics Corporation for  
Authority to Transfer Control, CS Docket No. 01-348**

Dear Ms. Dortch:

EchoStar Communications Corporation ("EchoStar") hereby submits to the Commission certain additional documents that were collected at the request of the Department of Justice ("DOJ") subsequent to the first "sweep" of document production and that are responsive to portions of the Commission's February 4, 2002 Initial Information and Document Request (the "Request") that call for the production of documents. The documents being produced to the Commission are identified by specification (as set forth in the Request) and custodian (where applicable) on Attachment A.

Attachment A to this cover letter is being provided to the Commission pursuant to the Protective Order issued on January 9, 2002. See *EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation*, DA 02-27 (rel. Jan. 9, 2002). The supplemental documents being provided to the Commission with this cover letter have been classified as being available for public inspection. Pursuant to the Protective Order, EchoStar will also be filing two copies of a redacted public version of this cover letter and Attachment A. In addition, enclosed please find an additional copy of this cover letter to be date-stamped and returned with our messenger.

No. of Copies rec'd \_\_\_\_\_  
List ABOVE

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
July 19, 2002  
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In the event you have questions regarding the foregoing, we are available to discuss it with you at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Pantelis Michalopoulos" followed by a stylized set of initials "MAP".

Pantelis Michalopoulos  
*Counsel for EchoStar Communications Corporation*

cc: Marcia Glauberman  
Linda Senecal



Attachment A  
to July 19, 2002 Submission of  
EchoStar Communications Corporation

FCC REQUEST	FCC DOCUMENT NUMBER	CUSTODIAN
I.M.	ES-FCC031235 - ES-FCC031299	
I.M.	ES-FCC031300 - ES-FCC031311	
XV.A.	ES-FCC031557 - ES-FCC031577	

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JUL 19 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

1 IN THE UNITED STATES DISTRICT COURT FOR THE  
2 EASTERN DISTRICT OF VIRGINIA  
3 Alexandria Division

4 SATELLITE BROADCASTING & COMMUNICATIONS )  
5 ASSOCIATION OF AMERICA, )

6 ECHOSTAR COMMUNICATIONS CORPORATION and )  
7 DISH, LTD., d/b/a "The Dish Network," )

8 DIRECTV ENTERPRISES, INC., DIRECTV )  
9 OPERATIONS, INC., and DIRECTV, INC., )

10 Plaintiffs, )

11 vs. )

12 FEDERAL COMMUNICATIONS COMMISSION, and )  
13 WILLIAM E. KENNARD, Chairman, and )  
14 SUSAN NESS, HAROLD FURCHTGOTT-ROTH, )  
15 MICHAEL K. POWELL and GLORIA TRISTANI, )  
16 Commissioners in their official )  
17 capacities, Washington, DC 20554, )

18 COPYRIGHT OFFICE OF THE LIBRARY OF )  
19 CONGRESS, and JAMES H. BILLINGTON, )  
20 Librarian of Congress, and MARY PETERS, )  
21 Register of Copyrights, in their )  
22 official capacities, )

23 and )

24 UNITED STATES OF AMERICA, )

25 Defendants. )

CIVIL NUMBER

00-1571-A

20 MOTIONS HEARING

21 Friday, February 9, 2001

22  
23 BEFORE: THE HONORABLE GERALD BRUCE LEE  
24 United States District Judge  
25

ES 039 10451

ES-FCC031235

## 1 APPEARANCES:

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24 For Intervenor NAD

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For Intervenor Public Broadcasters

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U.S. District Court  
401 Courthouse Square, 5th Floor  
Alexandria, VA 22314  
(703)549-5322

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(Hearing recessed)	

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1 THE COURT: All right. Motion is granted.

2 MS. PODOLSKY: Good morning, your Honor.  
3 Susan Podolsky with Jenner and Block. With me are Don  
4 Verrilli and Nori Miller. We represent the commercial  
5 intervenor defendants. Both Ms. Miller and Mr. Verrilli  
6 have been admitted pro hac vice, Mr. Verrilli will be  
7 presenting arguments on our behalf this morning.

8 THE COURT: Good morning.

9 MR. WASHINGTON: Good morning, your Honor.  
10 George Washington of Covington and Burling on behalf of the  
11 Public Broadcasters Intervenors. With me today is my  
12 colleague, Mark Lynch, who will be arguing on the matter.  
13 He has been admitted pro hac vice.

14 THE COURT: Good morning, everyone.

15 Let's hear from the federal defendants first.  
16 Tell us your name again, please.

17 ARGUMENT BY THE FEDERAL DEFENDANTS

18 MR. LOBUE: Good morning, your Honor. Joseph  
19 W. Lobue. I'm an attorney with the Department of Justice,  
20 and I represent the governmental defendants in this action.

21 This case involves the Satellite Home Viewer  
22 Improvement Act, which creates a new license available to  
23 satellite carriers, which allows them to retransmit the  
24 local broadcasts of television stations.

25 The statute is available -- the statutory

1 license is available only in circumstances where they carry  
2 all of the local stations in a given market area. It does  
3 not impose any restrictions on satellite carriers. It does  
4 not require them to carry any channel. It does not  
5 prohibit them from carrying any channel. They can do  
6 anything that they can do before the statute was passed.

7           What it does do, is gives them a new option,  
8 which they can choose to avail themselves of, in which they  
9 can use a federal license to carry all the television  
10 stations in a given market area.

11           Plaintiffs are dissatisfied with the scope of  
12 the benefit that Congress has given them through this  
13 statute, and they're here today asking the Court to rewrite  
14 that package that Congress has created.

15           They want to rewrite it in a manner such that  
16 they get all of the benefits of that license, but apply it  
17 in circumstances where they're not carrying all local  
18 channels. By rewriting it in that fashion, they would not  
19 only extend the benefits of the license in circumstances  
20 where Congress didn't intend to extend it, they would  
21 undermine the very purposes of the statute, which were to  
22 create a license which did not create a competitive  
23 advantage for anyone.

24           Neither the First Amendment, the Fifth  
25 Amendment, or the Copyright Clause permits the type of

1 relief they're seeking to rewrite this benefit created by  
2 Congress.

3 THE COURT: Let me ask you this. Several  
4 weeks ago we were here on a summary judgment motion, and  
5 all the defendants and intervenors said you needed time for  
6 discovery.

7 Now I'm here on a motion to dismiss that  
8 looks very much like you not only asked on your motion to  
9 dismiss, it seems like the same issues are being presented  
10 here. And so we don't need discovery; is that right?

11 MR. LOBUE: Well, the problem is -- that we  
12 have here, your Honor, is that the plaintiffs' claims have  
13 evolved over the course of this case. The motion for  
14 summary judgment that you were presented with two weeks  
15 before our answer was due raised not only a set of legal  
16 issues, but a set of factual issues --

17 THE COURT: With technology limitations.

18 MR. LOBUE: Yes, yes. We were put in a  
19 position where we either had to concede those factual  
20 issues or come up with proof that they were untrue, which  
21 we could not do without the necessary discovery.

22 We maintained at that time that we intended  
23 to file a motion to dismiss. There was a scheduling order  
24 entered in this case on November 6th, in which the  
25 defendants announced that they were going to file the

1 motion to dismiss. We reiterated that again in our reply  
2 brief on the 56(f) motions.

3 THE COURT: All right.

4 MR. LOBUE: We had legal defenses to these  
5 claims. We're prepared to assume all of their channel  
6 capacity allegations are true for purposes of this motion.  
7 What we cannot do is put in affidavits that show that those  
8 allegations are incorrect.

9 THE COURT: All right.

10 Well, it seems in reading both sides' briefs  
11 that they're not making it as an applied challenge here.  
12 This is a facial challenge to the constitutionality of the  
13 statute. Do you agree with that?

14 MR. LOBUE: That's the way they currently  
15 characterize it, yes, your Honor.

16 THE COURT: Help me with your view of the,  
17 first of all, the copyright law issues. Does Congress have  
18 the power to grant a statutory license to categories of  
19 broadcasters? Can Congress do that under the Copyright  
20 Clause?

21 MR. LOBUE: Congress, under the Copyright  
22 Clause, is under Sony, authorized to define the scope of  
23 the limited monopoly they can create. They can create  
24 exceptions where it's in the national interest to do so.  
25 Sony emphasizes that. They certainly can create

1 exceptions.

2                   Whereas here, it promotes the broad public  
3 availability of information. That is one of the central  
4 purposes of the copyright clause.

5                   Let me add that even if Congress did not have  
6 that authority under the Copyright Clause, it most  
7 certainly does under the Commerce Clause. This is a  
8 channel of interstate commerce.

9                   It doesn't matter whether Congress has the  
10 authority under the Copyright Clause or it has the  
11 authority under the Commerce Clause. Plaintiffs do not  
12 even dispute that this is a channel of interstate commerce.  
13 The Supreme Court has so held.

14                   THE COURT: Well, I think the part of their  
15 argument is that -- I think that they refer to the  
16 copyright issue here as an obstacle to their discretion,  
17 editorial judgment about which channels to select for  
18 broadcast, and is there a right to retransmit the signals  
19 of these local stations in the absence of this statutory  
20 license.

21                   MR. LOBUE: No, there certainly is not, and  
22 certainly not under the First Amendment. The distinction  
23 drawn in the case law is that the First Amendment applies  
24 to an -- a company or individual who is trying to get their  
25 message out, get their ideas across. It does not allow one

1 to appropriate the expression of another.

2           It certainly does not give one the right to  
3 utilize the expression as opposed to the ideas of another.  
4 Plaintiffs are free to communicate in whatever fashion they  
5 see fit.

6           What they don't have a right to do, under the  
7 First Amendment, is to appropriate for themselves the  
8 copyrighted works of others.

9           Now, this is not to say that the First  
10 Amendment is not applicable in this context. It simply  
11 doesn't give them a right which the Copyright Laws violate.  
12 That is clear from the case law.

13           THE COURT: Let's go to the First Amendment  
14 question. I think one of the critical questions that has  
15 to be answered is what standard of review to apply to the  
16 statute. And I guess before we begin that, the question  
17 is: Does the statute on its face implicate the First  
18 Amendment?

19           MR. LOBUE: Our view is that it does not.  
20 And the reason -- the reason that is, is that this statute  
21 is voluntary. Whatever obligations it has are voluntarily  
22 assumed by the plaintiffs. They're not required to accept  
23 the benefits of this license, and they're not required to  
24 carry any channel. They choose to do that as a vehicle for  
25 getting the benefit of this license.

1           The reason we have this carriage obligation,  
2 the reason Congress imposed this carriage obligation was  
3 because it was trying to level the playing field as far as  
4 the Federal Government statutory schemes are concerned. It  
5 was trying to establish a copyright license scheme which  
6 didn't create an advantage for anyone.

7           As it has stood for the past 25 years, the  
8 cable industry had a license to retransmit broadcasts. The  
9 satellite industry did not. Congress wanted to rectify  
10 that disparity. But it wanted to do so in a way that did  
11 not create a different problem, that is, a problem for a  
12 segment of the broadcast industry, if it were to create a  
13 new licensing scheme that permitted satellite companies to  
14 cherry pick.

15           And I would refer the Court to the complaint,  
16 Paragraph 47 of plaintiff's complaint. They carry right  
17 now Channels 4, 5, 7 and 9. They do not carry the rest of  
18 the channels.

19           So, the situation that Congress was faced  
20 with, if it had no licensing scheme at all, people would be  
21 likely to go out and get an antenna to get all the  
22 channels, including Channels 4, 5, 7 and 9.

23           If it created this partial license, as  
24 plaintiff suggests, which allows Four, Five, Seven and Nine  
25 to be carried, but not the rest, the licensing scheme

1 itself would put the remaining channels at a disadvantage.  
2 The Federal Government would be intervening in the  
3 marketplace to the disadvantage of remaining channels.

4 THE COURT: What's the value of having all  
5 these channels, as it relates to the government's interest  
6 here?

7 What is the value of having multiple local  
8 channels broadcasting, available on satellite, anyway?

9 MR. LOBUE: Well, I think there two different  
10 aspects of this. One, the Federal Government clearly has a  
11 right, recognizing Turner, of fostering and promoting  
12 competition and not creating precisely the type of unfair  
13 advantage I just described, advantaging one group of  
14 broadcasters over the other through the federal licensing  
15 scheme.

16 Secondly, the government, as recognized in  
17 Turner, has an interest in assuring that there is a broad  
18 number of diverse voices out there available to the public,  
19 that the public has access not just to the three networks,  
20 but to a variety of different voices with a variety of  
21 different messages.

22 In Turner, the Supreme Court recognized that  
23 that interest is not only an important governmental  
24 interest, but it's squarely what the First Amendment is  
25 trying to accomplish.

1 THE COURT: Well, in this case, plaintiffs  
2 contend that the First Amendment is implicated because the  
3 statute is not content neutral on its face, and it prefers  
4 one speaker over another.

5 And as I understand their argument, they're  
6 saying that because it requires the satellite broadcaster  
7 to carry local channels it would not prefer to carry, that  
8 is, that Congress is controlling the message and  
9 preferring, as a speaker, all of the local stations over  
10 stations that they might exercise their choice about.

11 THE COURT: Where -- do you see in the  
12 statute where Congress is directing the message? Is  
13 Congress directing the message in this statute anywhere?

14 MR. LOBUE: They're clearly not directing any  
15 messages. The requirements come into play when two things  
16 happen. First, there is geographic limitation to the  
17 license. If the plaintiffs choose to carry a particular  
18 channel in a particular geographic area, it does not matter  
19 what the content of the character is.

20 THE COURT: So, they're not forced to carry  
21 local stations nationwide. They have to decide on a  
22 locality before, and then they have to elect to seek this  
23 copyright license?

24 MR. LOBUE: That's absolutely right. That's  
25 a distinction from the "cable must carry" provisions at

1 issue in Turner, where it was a mandatory requirement that  
2 they carry every channel, every local channel everywhere.  
3 There is no such similar requirement here. It's a market  
4 by market license, with market by market carriage  
5 obligations.

6           It applies only in circumstances where the  
7 license itself may create an imbalance among broadcasters,  
8 such that the licensing scheme that has Channels 4, 5, 7  
9 and 9 gets the benefit of satellite carriage and the extra  
10 advertising revenues from that. The rest of them are left  
11 out in the cold.

12           Why? Because the Federal Government created  
13 a licensing scheme. That was what Congress tried to avoid,  
14 that very situation.

15           THE COURT: Well, in terms of the standard of  
16 review here, if you say the strict scrutiny would not  
17 apply, then how should the Court assess the issue, and  
18 under what standards of review?

19           There is some question about whether or not  
20 Red Lion applies. I don't know if we have to reach that,  
21 but what is your view about the appropriate standard of  
22 review here?

23           MR. LOBUE: Well, we agree with the Court.  
24 You do not need to reach the question of whether Red Lion,  
25 which allows content based regulation, applies here,

1 because this is not a content based regulation. This is a  
2 content neutral regulation.

3 So, even under the standards applied in the  
4 Turner case, the intermediate O'Brien standard of review,  
5 this statute passes muster, assuming that the First  
6 Amendment applies in the first place.

7 Number one, it is clearly content neutral.  
8 Content based statute is one that distinguishes favored  
9 speech from disfavored speech, based upon the ideas  
10 expressed.

11 There is nothing in the statute that does  
12 that. It doesn't matter what programming a particular  
13 channel carries. It just matters where it's located,  
14 number one.

15 And number two, it matters whether the  
16 plaintiffs have decided to invoke the benefits of this  
17 license. Those are the only criteria which kick the  
18 carriage obligations into effect.

19 Secondly, where you have a content neutral  
20 regulation, the question becomes whether the government has  
21 identified important governmental interest unrelated to  
22 speech, whether this statute furthers those interests, and  
23 whether it does not burden substantially more speech than  
24 is necessary.

25 We contend that each of these requirements,

1 just from looking at the statutory scheme itself, are  
2 satisfied. The statute focuses on the statutory scheme.  
3 It doesn't try to level the playing field out in the  
4 industry. It doesn't try to assure that Channel 20 has the  
5 same exact competitive advantage as Channel 4. What it  
6 does do is try to make sure that the federal licensing  
7 scheme doesn't give somebody an advantage.

8 To determine whether the statute accomplishes  
9 that purpose, you only need look at the federal statutory  
10 licensing scheme itself. Looking at this scheme, the  
11 license applies on a market by market basis. It applies  
12 only when plaintiffs choose to invoke it. And when  
13 plaintiffs do choose to invoke it, it assures that either  
14 all the broadcasters are affected equally, or none of them  
15 are affected.

16 THE COURT: Well, that's part of their  
17 trouble with the statute, is that it is, in their view, a  
18 condition that's being applied to this license that is  
19 unconstitutional.

20 They're saying that it impinges upon their  
21 editorial judgment about which programming to broadcast,  
22 because it forces them to choose from either participating  
23 or not.

24 And the way you describe it from the  
25 standpoint of the government's point of view, it is

1 beneficial to seek this license, because you'll be able to  
2 broadcast more programs, which theoretically ought to make  
3 it more attractive to your viewer.

4 But there are some costs associated with  
5 that, and that leads to their concern that Congress here is  
6 burdening what would otherwise be a very attractive license  
7 with an unconstitutional condition.

8 How about that?

9 MR. LOBUE: Well, let me say, number one,  
10 we're sort of flip-flopping. You can find that our  
11 voluntariness argument is wrong and get to the O'Brien  
12 standards and still uphold the statute. The  
13 unconstitutional conditions argument that they've raised  
14 goes to whether the statute even implicates the First  
15 Amendment.

16 Secondly, the cases they rely upon do not  
17 apply here. The unconstitutional condition cases are cases  
18 where Congress has prevented the recipient from getting  
19 their message across outside the scope of the program that  
20 they're funding.

21 In Russ, for example, where the government  
22 was funding a specific program which Congress did not want  
23 to include counseling on abortion in that program, okay?  
24 That restricted their speech, in a sense. During the day,  
25 when they were working on this program, when they were

1 working on this particular funded project, they could not  
2 counsel people concerning abortion.

3 That, however, was not an unconstitutional  
4 condition. The reason the Court found was because when  
5 they were acting outside the scope of the program, when  
6 they were not acting under the auspices of the government's  
7 program, they were free to convey what message they wished  
8 to about abortion.

9 The same is true here. Whatever editorial  
10 discretion obligations they take on, they take on only when  
11 they're acting under the auspices of this license.  
12 They are free, outside the scope of this license, to  
13 exercise their editorial discretion in a completely  
14 unfettered fashion.

15 Secondly, there is no absolute right to  
16 editorial discretion. Turner established that. In Turner,  
17 the same arguments were made, the same arguments based upon  
18 Miami Herald were made, which is a newspaper.

19 This is not a newspaper. Newspapers have a  
20 situation, anybody can go out and speak. Anybody can go  
21 out and publish. We're dealing here with satellite  
22 frequencies. There are only 96 of them up there that can  
23 transmit high-powered DBS to the entire United States.  
24 There are only 96. We've got to regulate them. You can't  
25 create a new set of satellite frequencies. That's all we

1 have.

2 So, the Supreme Court has held over and over  
3 and over again, in Turner, in Red Lion, in Pacifica,  
4 they've held over and over and over again, you cannot take  
5 principles developed in connection with a newspaper medium  
6 and apply it in this totally different forum, this totally  
7 different medium.

8 And that's what the plaintiffs are trying to  
9 do here. That's what the Court rejected in Turner. It  
10 rejected it for that reason. It rejected it because the  
11 requirement in Turner was content neutral, as it is here,  
12 and it rejected it because nobody's going to get confused  
13 about whose message a TV show is. It's not the satellite  
14 carriers. Everybody knows that.

15 The Supreme Court found the same thing with  
16 the cable system. Everybody knows that the programs that  
17 they carry off of local television are those of the local  
18 television stations. They're not the satellite carriers.  
19 So the cable companies, the Turner Court found, are not  
20 required to alter their speech to respond, as they were in  
21 Miami Herald.

22 The same is true here. The satellite  
23 carriers are not required to alter their own speech to  
24 respond. So, those principles, that sort of absolute  
25 notion of editorial discretion, has no application

1 whatsoever to this case.

2 THE COURT: All right. I think that their  
3 argument about editorial judgment is, at best, an argument  
4 that they have the right to determine which channels they  
5 will select, and at issue, they have a right to decide what  
6 content they would put on their own individual channels,  
7 and that Congress, by granting statutory license, favors  
8 these local broadcasters, that they would not otherwise  
9 carry, more than others.

10 Let me ask you this: What is your view on  
11 the so-called taking?

12 Is there a taking here under the Fifth  
13 Amendment?

14 What property is being taken from the  
15 plaintiffs here?

16 MR. LOBUE: I -- the property that is being  
17 taken from the plaintiffs here is somebody else's  
18 copyrighted material. We're taking away their right to use  
19 somebody else's property. That's it.

20 There is no -- they can use their property  
21 today, their satellites, their equipment, for the same  
22 thing they could use it for two years ago. They can do  
23 whatever they want with it, subject to not intruding on  
24 somebody else's right. This statute does not take anything  
25 away from these satellite carriers.

1 THE COURT: Well, the statute is not in  
2 effect yet, as it relates to this statutory license; is  
3 that right?

4 MR. LOBUE: Even when it becomes effective,  
5 they can voluntarily choose to accept the benefits of that  
6 license, or they can ignore it.

7 THE COURT: So, what do they do now with  
8 respect to local stations? Do they have to negotiate --

9 MR. LOBUE: Right now they have an interim  
10 license which permits them to cherry pick Channels 4, 7 and  
11 9, and they have no carriage obligation. The carriage  
12 obligation kicks in January 1st, 2002.

13 THE COURT: All right. Both sides have  
14 briefed this fairly extensively. I think I have covered  
15 the questions that I had.

16 If you would concede the podium to the  
17 intervenors, I'll do this all at one time. I'll give  
18 Mr. Cooper ample time to respond. Let me hear from the  
19 other side first, and then I'll give you ample time to  
20 respond.

21 MR. VERRILLI: Good morning, your Honor.

22 On behalf of the commercial broadcasters,  
23 what I will try to do this morning --

24 THE COURT: Tell me your name again.

25 MR. VERRILLI: Don Verrilli. I'm sorry, your