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August 30, 2002

Via Electronic Filing

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Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445-12th Street, SW
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**Re: Notice of 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 (the "Merger");
CS Docket Number 01-348**

Dear Ms. Dortch:

On behalf of our client, the National Rural Telecommunications Cooperative (NRTC), the attached document, which was filed today in a separate Commission proceeding, is being submitted electronically for consideration in the above referenced proceeding in accordance with 47 C.F.R. § 1.1206(b)(1) of the Commission's Rules.

NRTC filed the attached Reply Comments (*NRTC Reply*) in the Commission's Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming.¹ NRTC disputes various claims by EchoStar Communications Corporation (EchoStar) in the same proceeding, that a high percentage of homes throughout the country are passed by cable. In particular, the *NRTC Reply* dispels EchoStar's claims that Idaho, Iowa and North Dakota each have cable pass rates of 90% or more. In addition, NRTC points out that the intense competition resulting from DIRECTV and EchoStar has vastly improved the MVPD market for consumers. These consumer benefits would be lost if the Merger were approved.

¹ Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 02-145, FCC 02-178 (released June 14, 2002) (*NOI*).

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

Sincerely,

/s/ Jack Richards

Jack Richards

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)
)
Annual Assessment of the Status of) **MB Docket No. 02-145**
Competition in Markets for the)
Delivery of Video Programming)
)
To: The Commission

**REPLY COMMENTS OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

Pursuant to Section 1.430 of the Commission’s Rules and Regulations, the National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby submits these Reply Comments regarding the Notice of Inquiry (NOI) issued in the above-captioned proceeding.¹

I. Reply Comments

A. EchoStar, DIRECTV, NCTA And Other Commenters Were Noticeably Silent Concerning The Number Of Homes Passed By Cable.

1. In its previous reports, the Commission simply reiterated the cable industry’s now doubtful claim that up to 97.1% of the country is passed by cable.² As a result of increasing questions regarding the accuracy of this figure, however, the NOI raised concerns “that the

¹ Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 02-145, FCC 02-178 (released June 14, 2002) (NOI). Approximately twelve parties from broad segments of the multichannel video programming distributor (MVPD) industry filed substantive comments in response to the NOI. In addition to NRTC (*NRTC Comments*), Comments were submitted by AT&T Corporation (*AT&T Comments*); Comcast Communications, Inc. (*Comcast Comments*); EchoStar Communications, Inc. (*EchoStar Comments*); DIRECTV, Inc. (*DIRECTV Comments*); the Satellite Broadcasting and Communications Association (*SBCA Comments*); South Dakota Network, LLC; the Broadband Service Providers Association; the National Cable & Telecommunications Association (*NCTA Comments*); The State of Hawaii; Everest Connections; and Hometown Online, Inc.

² Eighth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-389, ¶17 (reporting the cable industry’s claim of 97.1% homes passed by cable) (*Eighth Video Competition Report*); Seventh Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 CR 1414, FCC 01-1, ¶18 (reporting the cable industry’s claim of 96.6% homes passed by cable) (*Seventh Video Competition Report*). “Homes Passed” is defined by the Commission as the total number of households capable of receiving cable television service. See *Eighth Video Competition Report*, n. 11.

number of homes passed as a percent of television households misrepresents the actual availability of cable services, particularly among rural Americans.”³

2. To address the uncertainty surrounding the cable industry’s statistic, the NOI specifically requested comment on the “measure previously reported for the availability of cable services nationwide and whether or not homes passed as a percent of television households is an accurate picture of cable availability.”⁴ Despite the Commission’s noticeable concern and the vital role of an accurate homes passed statistic in assessing MVPD competition, NRTC is the only commenter that made a serious effort to address this issue.

3. For the most part, members of the cable industry simply made vague assertions that cable is nearly as ubiquitous as Direct Broadcast Satellite (DBS). AT&T Corporation (AT&T) claimed that the national footprint of DBS “ensures that nearly all video households have at least three compelling MVPD alternatives.”⁵ Comcast Corporation (Comcast) made the claim -- with no support -- that consumers in virtually “every corner of the nation” have real choices among multiple providers of MVPD services. According to Comcast, the “vast majority of households can choose from among three separate, facilities-based providers, and many can choose from four or more.”⁶

4. The National Cable and Telecommunications Association (NCTA), which presumably is in an excellent position to obtain and report accurate information concerning the number of homes passed by its cable members, remained completely silent on the issue.

5. Neither DIRECTV, Inc. (DIRECTV) nor EchoStar Satellite Corporation (EchoStar), the only nationwide DBS providers, provided any substantive information regarding the number

³ *NOI*, n. 23.

⁴ *Id.*

⁵ *AT&T Comments*, p. 13 (emphasis added).

⁶ *Comcast Comments*, p. 2. Comcast also promised that at some future time it will provide “comp any information” (continued . . .)

of homes passed by cable. DIRECTV completely ignored the issue, while EchoStar simply claimed (without providing any backup data or description of its methodology) that only a “few” television households are not passed by cable.⁷

6. EchoStar also made the claim-- again with no backup data -- that many rural communities show “high percentages of homes passed by cable.”⁸ In particular, EchoStar claimed that Idaho, Iowa and North Dakota “all have 90% or more homes passed by cable.”⁹ These claims, however, are unsupported by EchoStar and are unsupportable in fact.

7. Simply using Census Bureau data on housing units and NCTA’s own statistics on homes passed demonstrates that the cable pass rates for Idaho, Iowa and North Dakota are nowhere near EchoStar’s claimed 90%:¹⁰

States	Homes Passed	Housing Units	Cable Passage Rate Using Housing Units
Idaho	333,398	527,824	63.1%
Iowa	827,390	1,232,511	67.1%
North Dakota	226,062	289,677	78.0%

regarding the number of homes passed by its systems. *Id.*, p. 1.

⁷ *EchoStar Comments*, p. 9. EchoStar’s sole argument that the Commission should maintain its past practice of using the Kagan data to identify what percentage of homes is passed by cable is based on the “Commission’s history of citing the Kagan data,” and alleged flaws in the Warren data. But in attempting to undermine the Warren data, EchoStar simply cites to a survey -- the parameters of which are undefined -- in which cable companies were queried as to whether they “served” particular zip codes identified as unpassed by Warren. No further information is provided. *Id.*, pp. 8 - 9. Any dispute between the merits of Warren vs. Kagan data is completely unrelated to the deficiencies in the cable industry’s *methodology* of calculating the number of Homes Passed. *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, pp. 5-16 (filed February 4, 2002) (*NRTC Petition*).

⁸ *EchoStar Comments*, p. 9.

⁹ *Id.*

¹⁰ Data for these figures can be obtained from the U.S. Census Bureau, *Profiles of General Demographic Characteristics, 2000 Census of Population and Housing*, at A-2 (Released May 2001) (*2000 Census Report*), and the National Cable & Telecommunications Association web site (visited August 29, 2002). <http://www.ncta.com/industry_overview/indStats.cfm?statID=16> (*NCTA State Web Site*). The cable passage rate for each state is determined by dividing the number of Homes Passed (obtained from the *NCTA State Web Site*) by the number of Housing Units (obtained from the *2000 Census Report*).

8. A New York Times report corresponds with NRTC's findings.¹¹ Citing as independent sources the NCTA, the Census Bureau, SkyRESEARCH, the Satellite Broadcasting and Communications Association (SBCA), and Kagan World Media, The New York Times found that in 22 states more than 30% of homes are not passed by cable (*i.e.*, the cable pass rates for these states are less than 70%). North Dakota is reported to have a pass rate of less than 80%, and Idaho and Iowa are less than 70% (well below EchoStar's claimed rate in excess of 90%).

9. EchoStar made the same type of claim regarding cable availability in Idaho, Iowa and North Dakota during the course of the Commission's proceeding evaluating its proposed Merger with DIRECTV.¹² Although EchoStar provided its backup data and methodology in that proceeding (unlike the instant proceeding), it did so under a cloak of confidentiality that blocks public access.¹³ If EchoStar wants the Commission -- and the public -- to believe that Idaho, Iowa and North Dakota "all have 90% or more homes passed by cable," then EchoStar should pull back the curtain and open the books.¹⁴

10. Despite its impact on MVPD competition, EchoStar has submitted wholly unsupportable "findings" regarding the number of homes passed by cable, and the cable industry has adopted a policy of blind indifference. As NRTC has demonstrated, the homes passed

¹¹ *Look, Up in the Sky! Big Bets on a Big Deal*, N.Y. Times, October 30, 2001, at C-1 *Look, Up in the Sky! Big Bets on a Big Deal*, N.Y. Times, October 30, 2001, at C-1. A copy of the map, which has been re-colored and re-created by NRTC, is attached hereto as **Exhibit A**. See, *NRTC Petition*, pp. 5-16.

¹² *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; DA 02-964, released April 25, 2002) (*Protective Orders*). See Ex Parte Presentation, Submitted by Counsel for General Motors Corporation and Hughes Electronics Corporation and Counsel for EchoStar Communications Corporation, Docket No. 01-348, p. 67 (July 2, 2002). Indeed, EchoStar and DIRECTV have repeatedly argued that the proposed merger of the only two nationwide DBS providers will not result in "any kind of monopoly," because the FCC has found that "over 96% or 97%" of the country is passed by cable. See SEC Form 425, filed by EchoStar Communications, Inc., Transcript of "Charlie Chat," November 12, 2001, p.6 (November 16, 2001).

¹³ Any party desiring to examine EchoStar's books on this matter will be required to submit to the Commission Acknowledgements of Confidentiality in order to gain access to what EchoStar claims is Confidential and Highly Confidential data.

¹⁴ Pursuant to the *Protective Orders*, NRTC has examined EchoStar's methodology for "demonstrating" that 90% or more of the homes in Idaho, Iowa and North Dakota are passed by cable. It is not credible.

statistic is greatly affected by changes in the numerator (the number of “homes passed”) and the denominator (the universe of homes used for comparison purposes). For years, the cable industry has been *overcounting* the numerator while simultaneously *undercounting* the denominator.¹⁵ In fact, the percentage of homes passed nationwide could be as low as 81%, with more than 25,000,000 homes unpassed.¹⁶

11. Although EchoStar and DIRECTV repeatedly rely on the 96.7% national homes passed rate as a justification for their proposed Merger, the Commission has never independently verified that number nor analyzed local or regional cable distribution. Rather, over the years, the Commission has simply accepted the cable industry’s self-serving figure while noting questions raised by NRTC and others regarding its accuracy.¹⁷

12. By grossly inflating the extent of cable coverage in rural America, DIRECTV and EchoStar continue to advance the false impression that the Commission need not worry about the impact of their proposed Merger on tens of millions of consumers across rural America. Despite their claims to the contrary, millions of rural Americans do not have ready access to a comparable cable alternative and will clearly be trapped in a monopolistic vise if the Merger is approved.

B. The Intense Competition Resulting From DIRECTV and EchoStar Has Vastly Improved The MVPD Market For Consumers.

13. When the Commission released its first competition report in 1994, it said that the newly minted DBS industry “had the potential to ‘readily compete with cable.’”¹⁸ Even the most

¹⁵ Cable operators providing the statistics relied upon by the Commission do not even apply a uniform definition of “Homes Passed.” *NRTC Petition*, ¶¶ 16-25.

¹⁶ See *NRTC Comments*, pp. 3-8.

¹⁷ See *Eighth Video Competition Report*, ¶17, nn. 20-22; *Seventh Video Competition Report*, ¶18, nn. 21, 22, 24.

¹⁸ First Report, *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, ¶62 (1994).

optimistic Commission officials probably could not have foreseen the tremendous and positive impact that DBS would have on the MVPD market in a few short years.

14. The fierce competitive environment that exists today is plainly apparent in the various comments filed in this proceeding. Both cable and DBS industry leaders paint a dynamic picture of the MVPD market. Exciting new services are being planned, designed and implemented by both the DBS and cable industries: video-on-demand, HDTV, interactive and other advanced services.¹⁹ In order to keep up with the pace set by the DBS industry, cable providers are spending billions of dollars to upgrade their infrastructure to new digital systems.²⁰ At the same time, both EchoStar and DIRECTV are successfully competing with cable and with each other, and are thriving in their own right.

15. NCTA points out that DIRECTV now has more customers than all but two cable operators (AT&T and AOL Time Warner). Likewise, EchoStar has more subscribers than all but three cable companies.²¹ AT&T notes that “[i]n the past two years, DBS subscribership has increased over 47% and is well on its way to meeting analysts’ projections that it will end 2002 with approximately 20 million subscribers.”²² The cable industry’s answer to the DBS onslaught appears to be the deployment of digital cable. Yet despite its roll-out, digital cable has shown no tangible effect on the astounding DBS growth rates.²³

16. This analysis should not necessarily be read to suggest that certain types of MVPD providers are “winning” (e.g. DIRECTV and EchoStar) while others are “losing” (e.g. AT&T, Comcast). Rather, the comments reveal that *every* MVPD provider is *competing*: cable MVPDs

¹⁹ *SBCA Comments*, pp. 8-11.

²⁰ *AT&T Comments*, p. 5; *NCTA Comments*, pp. 25-36; *Comcast Comments*, pp. 3-8.

²¹ *NCTA Comments*, p. 15.

²² *AT&T Comments*, p. 4.

²³ *DIRECTV Comments*, p. 11 (discussing a 15% increase in revenues and the addition of 1.1 million subscribers between June 2001 and June 2002); *SBCA Comments*, pp. 5-6 (discussing the 1.4 million net new subscribers for the (continued . . .))

are being forced to respond to intense competition from both EchoStar and DIRECTV. AT&T, Comcast and other cable operators are each striving to compete with the two existing DBS providers. Clearly, DIRECTV and EchoStar are competing fiercely with cable MSOs -- and with each other.

17. As noted by AT&T, both DIRECTV and EchoStar price their services “with the objective . . . to gain market share by luring away consumers from the leading cable providers.”²⁴ But while DIRECTV and EchoStar are competing with each other for dissatisfied cable customers, they are also fiercely competing for non-cable subscribers in countless other markets -- representing tens of millions of consumers -- where digital cable is unavailable and consumers must rely upon satellite distribution technology to receive MVPD services.

18. The real winners in today’s intensely competitive MVPD environment are the consumers who continue to reap the rewards of competition in terms of lower prices, better services and more advanced products. The Commission’s goal of fostering the emergence of a competitive MVPD market is succeeding.

C. DBS Is Thriving Without The Merger Of EchoStar And DIRECTV.

19. The comments submitted by both EchoStar and DIRECTV provide no new arguments to support their claim that only through their unprecedented Merger will DBS survive in the MVPD market. Far from painting a picture of two weakened competitors, the comments confirm the existence of a thriving DBS industry.

20. The SBCA Comments tout the recent results of its “2002 Consumer Market Research.” Among the findings: DBS outscores digital cable for customer satisfaction “in a

satellite industry in a nine month period).

²⁴ *AT&T Comments*, p. 6 (citing Declaration of Robert Willig, *Consolidated Application of EchoStar Communications Corp. General Motors Corp. and Hughes Electronics Corp. for Authority to Transfer Control*, CS Docket No. 01-348, ¶10 (December 3, 2001) (emphasis added).

number of specific performance measures.” For example, on value for the money, DBS earns a 68% approval rating compared to digital cable’s 36%. On signal transmission quality, DBS earns a 79% approving rating compares to digital cable’s 66%.²⁵

21. DIRECTV notes in its comments that far from losing subscribers to cable, “over half of DIRECTV customers were cable subscribers at the time they first subscribed to DIRECTV.”²⁶ Elsewhere, DIRECTV modestly notes that its earnings before interest, taxes, depreciation and amortization (EBITDA) for the second quarter of 2002 (\$148 million), “nearly doubled last year’s second quarter EBITDA of \$75 million.”²⁷

22. Only EchoStar submitted comments that read like a premature obituary for the entire DBS industry.²⁸ Nevertheless, EchoStar reported earnings for the second quarter 2002 that were astounding in this “down” market. EchoStar’s total revenues for this period were \$1.169 billion, reflecting a staggering 21% increase over the corresponding period in 2001. Its EBITDA was reported as \$237 million, an improvement of \$103 million compared to \$134 million for the corresponding period in 2001.²⁹

23. The increase in EBITDA “resulted primarily from increased subscribers, resulting in revenue sufficient to support the cost of new and existing subscribers.”³⁰ EchoStar reported

²⁵ *SBCA Comments*, p. 11. SBCA also notes that the same survey concluded “digital cable is far more susceptible to consumer defection than DBS, with 21 percent of digital cable subscribers expressing an interest to switch to DBS” while only 5% of DBS subscribers would consider switching to digital cable. SBCA then goes on to tout new services that are being proposed by EchoStar and DIRECTV, including satellite broadband, digital/HDTV, Video on Demand (VOD) and Subscription VOD and various interactive services. *Id.*, pp. 8-11.

²⁶ *DIRECTV Comments*, p. 11.

²⁷ *Id.*

²⁸ Despite EchoStar’s explosive subscriber growth throughout the years, it bemoans its “limited success” in acquiring subscribers. *EchoStar Comments*, p. i. Completely ignoring its own robust economic growth, EchoStar states that DBS must be “allowed to grow stronger.” *Id.*, p. 2. Perhaps most fantastic is EchoStar’s claim that despite an increase in MVPD market share for DBS from only 6.8% in 1997 to almost 20% in 2002, “market share statistics [remain] essentially unchanged over a period of years.” *Id.*, p. 3.

²⁹ Press Release of EchoStar Communications Corporation, August 15, 2002, *EchoStar Reports Second Quarter 2002 Financial Results*.

³⁰ *Id.*

approximately 7.46 million subscribers as of June 30, 2002, an increase of approximately 23 percent over June 30, 2001, with 295,000 net new subscribers added during the quarter ended June 30, 2002.

24. If any one industry is hurting in the MVPD market, it would not seem to be DBS. While EchoStar and DIRECTV are flourishing, NCTA, AT&T and Comcast all pointed to the significant expenditures for system upgrades they have been forced to make as a result of the fierce competition from EchoStar and DIRECTV.³¹ Other cable providers are facing such hard times that they did not even submit comments responsive to the NOI: Adelphia (8th largest MVPD provider) has declared bankruptcy and its corporate leaders are facing criminal charges; AOL Time Warner (2nd largest MVPD provider) is in a financial freefall; Charter Communications has experienced declines in subscriber growth;³² and Cablevision Systems Corporation recently announced a total two-quarter decline of 17,000 cable subscribers.³³ The Merger of the only two, highly successful DBS providers clearly is not necessary in order for DBS to compete effectively against cable.

II. Conclusion.

Due to the presence of two fiercely competing DBS providers, today's MVPD market is thriving and benefiting American consumers. The result has been lower prices, better service and additional technical innovation. Nevertheless, there are still as many as 25 million households that have no access to cable and must choose between EchoStar and DIRECTV to

³¹ *AT&T Comments*, p. 5 (stating that DBS's substantial growth has continued even after the cable industry's broad deployment of digital video technology, cable Internet service, and other advanced offerings); *NCTA Comments*, p. 25 (stating that in response to the "unabated growth of DBS" the cable industry has invested \$65 billion in private capital since 1996 to provide advanced services); *Comcast Comments*, p. 3 (discussing its \$5 billion in capital improvements over the last several years, in response to the "array of competitive alternatives.").

³² David Lieberman, *Cable Waits On Large Tech Investments To Pay Off*, USA Today, May 12, 2002. A full text of the article is available at <<http://www.usatoday.com/money/covers/2002-05-13-cable.htm>> (*USA Today Article*).

³³ Press Release, *Cablevision Systems Corporation Announces August 8th In Person Investor Meeting and Reaffirms 2002 Cash Flow Guidance*, July 26, 2002.

receive MVPD services. In assessing the competitive environment for MVPD services, the Commission should take affirmative steps to promote the benefits of competition and, as a timely manifestation of its policies, prevent these benefits from being eliminated through the Merger to monopoly proposed by EchoStar and DIRECTV.

Respectfully submitted,

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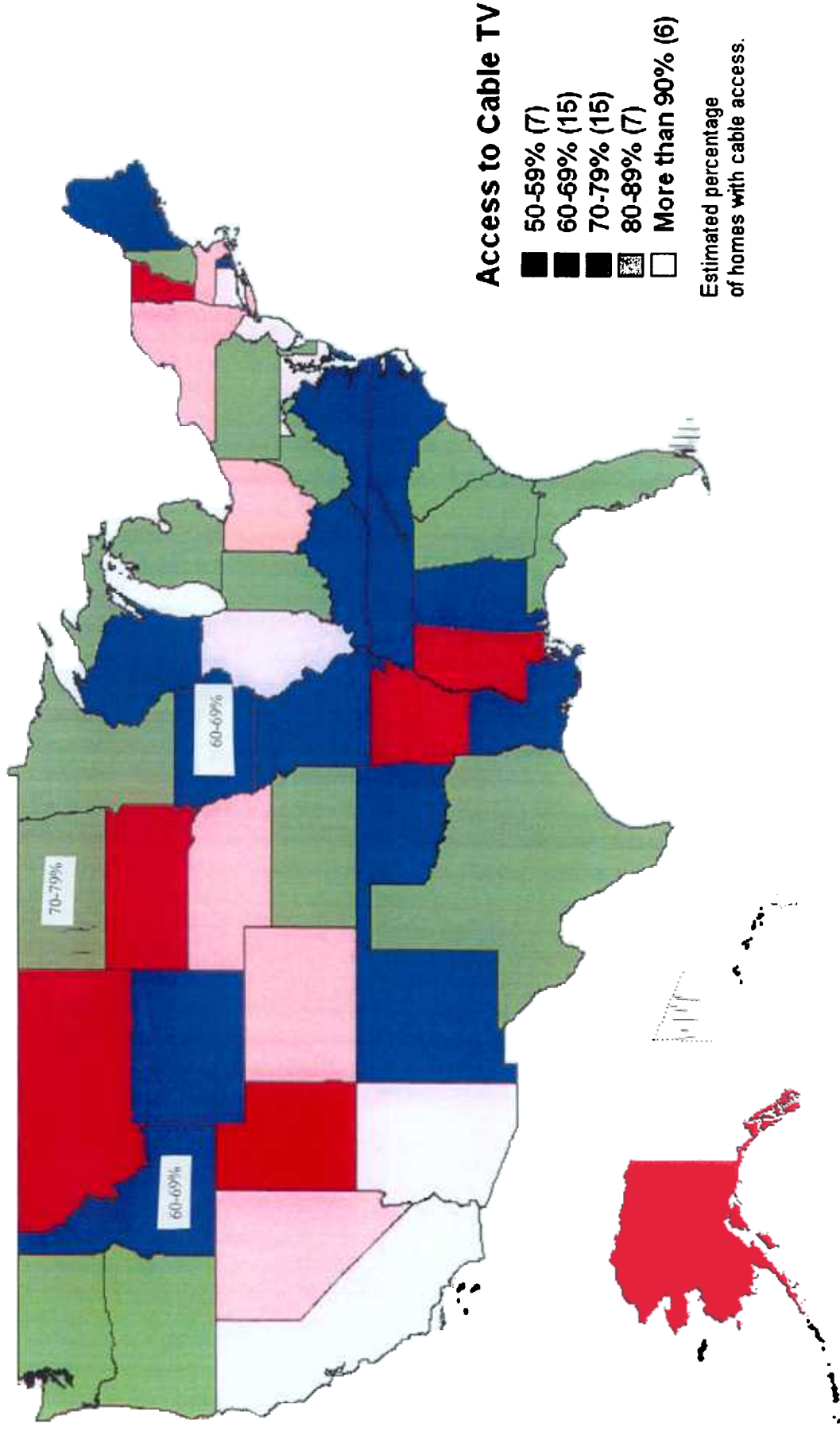


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August 30, 2002

Housing Units with Access to Cable

Leaving Over 22 Million Homes with DBS as Only Choice



Sources: The New York Times (National Cable and Telecommunications Association, Census Bureau, SkyRESEARCH, Satellite Broadcasting and Communications Association of America, Kagan World Media)

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 30th day of August, 2002, a true and correct copy of the foregoing Reply Comments of the National Rural Telecommunications Cooperative in the Matter of the Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming (MB Docket No. 02-145) was submitted via hand delivery to the Federal Communications Commission and served via courier, First Class Mail or electronic mail upon the following:

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