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September 4, 2002

VIA HAND DELIVERY

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

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SEP - 4 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REDACTED – FOR PUBLIC INSPECTION

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

Dear Ms. Dortch,

On behalf of the National Rural Telecommunications Cooperative (“NRTC”), transmitted herewith are its Ex Parte Comments (Redacted) (“Comments”) in connection with the above-referenced proceeding. This redacted version may be placed in the Commission’s files and made available for public inspection.

The Comments respond to certain matters included in the Applicants’ recent *ex parte* presentations to the Commission. The Comments address, in part, information deemed by the Applicants to be Confidential and Highly Confidential, which was made available for review pursuant to the Commission’s February 4, 2002 Initial Information and Document Request. Those pages of the text of the Comments that contain or disclose such Confidential and Highly Confidential Information, as well as Confidential and Highly Confidential Information contained or disclosed in the Technical Statement of Drs. Li Gan and Paul W. MacAvoy (Exhibit C), have been redacted accordingly.

Counsel to NRTC has been advised by Commission staff to refrain from filing with the Commission copies of the unredacted version of this filing until procedures for the acceptance of such documents have been further clarified.¹ Please note that NRTC is simultaneously providing the Applicants with both redacted and unredacted versions of the Comments.

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¹ Telephone conference between Jack Richards, counsel to NRTC, and Barbara Esbin, Media Bureau, Federal Communications Commission (August 30, 2002).

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Marlene H. Dortch, Secretary
Federal Communications Commission

September 4, 2002

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Please contact undersigned counsel to NRTC if any questions arise concerning this matter.

Respectfully submitted,



Stephen E. Coran

cc: Service List

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter Of)
Application Of)
EchoStar Communications Corporation,)
General Motors Corporation, And Hughes)
Electronics Corporation)
For Consent For A Proposed Transfer)
Of Control)
To: The Commission)

CS Docket No. 01-348

EX PARTE COMMENTS
(Redacted)

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September 4, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CS Docket No. 01-348

EX PARTE COMMENTS
(Redacted)

The National Rural Telecommunications Cooperative (“NRTC”), by its attorneys, hereby submits these Ex Parte Comments providing information responsive to certain *ex parte* filings and documents submitted by EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (collectively, the “Applicants”)¹ in connection with the proposed transfer of control of their satellite, earth station and other related authorizations to New EchoStar (the “Merger”).²

¹ 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 December 3, 2001) (“Application”).

² On February 4, 2002, NRTC filed a Petition to Deny the Application. 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”). On February 25, 2002, NRTC filed a Response to certain of the petitions, comments and other filings submitted to the Commission prior to such date. See Response 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

Summary

In recent months, EchoStar and DIRECTV have made several recent *ex parte* presentations to the Commission in an attempt to provide some detail concerning their position on a variety of issues, including market definition, subscriber churn, presumed synergies and alternatives to the Merger.³

In these Comments, NRTC demonstrates that the Applicants' *ex parte* presentations contain inaccurate information and rely on flawed analyses. They do not justify approval of the proposed Merger. Indeed, for the last few months, the Applicants have staked positions before the Commission that do not withstand scrutiny and are inconsistent with statements made by the Applicants themselves in various confidential documents that belatedly have been made available for review under the *Protective Orders* in this proceeding. The confidential documents raise continued concerns about the accuracy and veracity of the Applicant's central and most important themes in "selling" the Merger.

The Applicants premise their arguments on five myths:

- *Myth #1:* EchoStar and DIRECTV do not compete in local markets. Rather, they compete in a "national" market.

Reality: Competition for MVPD services takes place in local markets, where consumers currently have a choice between providers but would no longer have choices if the Merger is approved. In many local rural markets, the only choice is between EchoStar and DIRECTV – a choice the Merger would eliminate.

(filed February 25, 2002) ("NRTC Response"). On April 4, 2002, NRTC filed an Ex Parte Reply to the *Opposition* ("NRTC Reply").

³ According to public filings, the Applicants met with FCC staff on June 12, July 3, July 10 and August 9. They filed both redacted and unredacted versions of documents supporting these presentations on June 13, June 28, July 3, July 5, July 11, July 25, July 30 and August 12. The redacted versions omitted documents (or portions thereof) deemed by the Applicants to be "Confidential" or "Highly Confidential" under Protective Orders adopted by the FCC. See *Order Adopting Protective Order*, CS Docket No. 01-348, DA 02-27 (released January 9, 2002); *Order Adopting Second Protective Order*, CS Docket No. 01-348, DA 02-964 (released April 25, 2002) ("*Protective Orders*"). Authorized representatives of NRTC have reviewed certain of the non-confidential, Confidential and Highly Confidential documents provided to the FCC in connection with its February 4, 2002 Initial Information and Document Request and the above-referenced presentations.

- *Myth #2:* EchoStar and DIRECTV do not compete fiercely against each other.

Reality: Many of the confidential documents that NRTC's representatives have reviewed show that each DBS company does, in fact, view the other as its closest competitor in all phases of business – pricing, promotion and obtaining new subscribers, to name a few. The data the Applicants use is unreliable and, more importantly, contradicted by their own internal documents. Their churn analysis is misguided, and ignores perhaps the most critical area of competition between them – for new customers.

- *Myth #3:* The merged company will find it “implausible” to price discriminate in different regions post-Merger.

Reality: EchoStar and DIRECTV have historically charged different prices for installation, customer premises equipment and program packages in different local markets where cable competes. This price discrimination will continue following the Merger, but will never benefit rural areas where there is no competition. To cite one recent example, DIRECTV's aggressive pursuit of Adelphia Communications (“Adelphia”) cable subscribers in the greater Los Angeles area with special offers of lower pricing than subscribers in other areas of the country⁴ shows that DIRECTV's claim that it now charges a single national price is patently false and that rural Americans continue to be disadvantaged when no such price reductions are made available to them. The Applicants' confidential documents reveal numerous other instances of targeting specific local markets where cable is considered weak for one reason or another. In light of the Applicants' demonstrated ability to price discriminate, and their expensive development of the capacity to do so, EchoStar's “national pricing” promise is meaningless and evasive.

- *Myth #4:* “Efficiencies” of a DBS monopoly will increase consumer welfare rather than the welfare of the monopolist.

Reality: The claimed efficiencies are not Merger specific, provide benefits only to EchoStar shareholders, or reflect only the presumed benefits of increased bargaining power resulting from a monopoly. The Applicants' criticisms of NRTC's economic analysis are unfounded, and do not refute evidence showing that there will be substantial consumer welfare losses (up to \$700 million a year in rural areas alone) resulting from the Merger.

- *Myth #5:* The Applicants will abandon their broadband plans if the Merger is not permitted, but they promise to initiate new services and lower prices for basic broadband service if the Merger is approved.

⁴ See Press Release, “DIRECTV Launches Special Offer Targeted to Adelphia Cable Customers in Greater Los Angeles Area,” July 1, 2002 (“DIRECTV Press Release”) (copy attached as **Exhibit A** hereto).

Reality: In typical fashion, the Applicants fail to define what constitutes “basic broadband” service or make any specific binding commitment that New EchoStar actually will offer the service. Without these explanations, the threat to discontinue service and the promise to offer a single price for basic broadband service are meaningless. EchoStar, in fact, has dragged its feet in implementing broadband service, as evidenced by its recent loss of two of its Ka-band satellite slots for failure to meet construction milestones.

- *Myth #6:* Allowing the proposed DBS monopoly to hold all of the CONUS Ku-band orbital slots should be acceptable, because future facilities-based competition may emerge.

Reality: Speculative competition is not considered under the *Merger Guidelines*⁵ and cannot justify this anticompetitive Merger.⁶ No competition to the merged company is reasonably foreseeable – except from digital cable. In particular, the Petition for Declaratory Ruling (“SES Petition”) filed with the FCC by SES AMERICOM, Inc. (“SES”) on April 25, 2002 does not propose competition that can be considered under the *Merger Guidelines*, and has been opposed by both EchoStar and DIRECTV.

The following discussion exposes these myths and the flawed data, assumptions and analyses that underlie the Applicants’ conclusions. NRTC also provides a reality check to show that, as was the case when the Merger was first proposed, it is, in the words of DIRECTV itself, “[REDACTED].”⁷ The Merger should be denied.

⁵ U.S. Department of Justice and Federal Trade Commission, *Revisions to Horizontal Merger Guidelines* (1997), reprinted in Trade Reg. Rep. (CCH) (1997) (“*Merger Guidelines*”).

⁶ On June 17, 2002, NRTC filed Comments with the FCC addressing the issues raised in the SES Petition (copy attached as **Exhibit B** hereto).

⁷ [REDACTED]

Discussion

A. The Applicants Misrepresent the Relevant Geographic Market, Both in its Definition and its Scope.

1. EchoStar and DIRECTV Compete in Local Markets.

The Applicants are well aware that cable operators serve defined local areas, beyond which they do not and cannot compete for customers. EchoStar and DIRECTV face competition only for homes actually passed by a cable system within a given cable franchise area (usually by a single cable provider, but on rare occasions, by more than one). In many rural areas, they face no cable competition whatsoever.

In recognition of the fact that the relevant geographic market is the area where consumers have similar choices regarding a defined product or service, the FCC has consistently rejected the notion of a national MVPD market in favor of a local market analysis. In the NRTC Petition, NRTC cited numerous FCC decisions, in the DBS context and otherwise, holding that “any MVPD market analysis must be conducted *at the local level*.”⁸ These decisions are consistent with the *Merger Guidelines*, which hold that the appropriate definition of the geographic market relies on the “‘smallest market’ principle.”⁹

The Department of Justice (“DOJ”) followed this doctrine in the Primestar complaint, where the market was defined as follows:

Consumers purchasing MVPD services select from among those companies that can offer such services directly to the consumer’s home.

⁸ NRTC Petition, p. 16 (emphasis in original). *See id.*, p. 4 n. 15; Exhibit I, pp. 7-10. *See also* Application of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries, Memorandum Opinion and Order, 12 FCC Rcd 19,985 (1997) (stating that a single relevant geographic market is “an area in which all consumers in that area will likely face the same competitive alternatives”); *AOL Time Warner*, 23 CR 157, 179 (2001) (in finding the relevant geographic markets for residential broadband services to be local, the Commission held that “a consumer’s choices are limited to those companies that offer high-speed Internet access services in his or her area, and the only way to obtain different choices is to move”).

⁹ *Merger Guidelines*, § 1.21.

*The set of MVPD providers able to offer service to individual consumers' residences will generally be the same throughout each local community, but will differ from one local community to another. For ease of analysis, therefore, it is useful to aggregate consumers who face the same competitive choices in MVPD providers for example by specific zip codes or local cable franchise areas.*¹⁰

The Applicants' June 28 *ex parte* presentation, however, ignores these uncontroverted facts and prevailing law, and instead relies upon the false premise that cable companies compete nationally.¹¹ This conclusion appears to be based solely on the "fact"¹² that "each [DBS] firm prices nationally – and New EchoStar has committed to continue that practice."¹³ This cursory misstatement – that merely promising a base national price for video programming means the relevant market is also national – allows the Applicants to create a concentration chart based on an aggregate of the small "national market" share of local cable companies.¹⁴ This, in turn, leads to the Applicants' remarkable conclusion that a merger reducing the number of competitors in each affected area of the country from three to two, or in many rural areas two to one, falls into a "safe harbor" for concentration index purposes.¹⁵ As stated in the attached Gan/MacAvoy Statement:¹⁶

This could only be correct if arbitrage by DBS providers – selling more service at one location and less service at another location – caused the service charges of cable providers to converge to the same level throughout the country. Joskow/Willig provide ample evidence . . . that

¹⁰ *U.S. v. Primestar, Inc.*, Civ. No. 1:98CV01193 (JLG) (D.D.C. Complaint filed May 12, 1998), ¶ 70 (emphasis added).

¹¹ See June 28 *Ex Parte* Notice, p. 17. The Applicants also suggest that a large number of consumers without access to cable live near DIRECTV retailers. *Id.*, p. 75. This fact, even if true, does not show the presence of a national market, but rather the post-Merger power of the monopoly to attract potential subscribers that do not have a cable alternative.

¹² As discussed below, even this basic statement is false: EchoStar and DIRECTV do not offer a national price, but rather offer promotions and discounts to target customers.

¹³ June 28 *Ex Parte* Notice, p. 17.

¹⁴ *Id.*, pp. 18-19.

¹⁵ *Id.*

¹⁶ National Rural Telecommunications Cooperative Response to the Applicants' Technical Analysis of the EchoStar-Hughes Merger, by Dr. Li Gan and Dr. Paul W. MacAvoy ("Gan/MacAvoy Statement") (attached as **Exhibit C** hereto).

there are wide variations in cable service prices, showing that DBS has not been of sufficient impact on cable prices to bring about such price parity. Without price convergence, which is required by market definition, the geographic market cannot be the entire country with all cable service providers competitive with each other.¹⁷

However, if market shares are calculated the way EchoStar's economist Dr. Robert Willig recommends in his own published writing¹⁸ and as the *Merger Guidelines* also recommend (based on capacity for homogenous products rather than sales), then the post-Merger HHI ranges from 5,000 to 10,000.¹⁹

The Applicants are well aware that individual cable operators compete only for homes actually passed by cable within their franchise areas. These local markets are the largest sections of the country where meaningful market concentration can be measured. In a glaring contradiction to their own argument, the Applicants expressly recognize the existence of local cable markets in order to support other aspects of their *ex parte* presentations:

- “Cable firms set price on a local franchise-by-franchise basis, and prices can differ depending on many factors.”²⁰
- “Each cable operator chooses price for its local market.”²¹

¹⁷ *Id.*, p. 1.

¹⁸ See Robert D. Willig, “Merger Analysis, Industrial Organization Theory, and Merger Guidelines,” Brookings Papers: Micro Economics, pp. 281-285 (1991).

¹⁹ *Id.* The Applicants claim that the post-Merger HHI would be below 1,000. See June 28 *Ex Parte* Notice, pp. 18-19.

²⁰ *Id.*, p. 20.

²¹ July 3 *Ex Parte* Notice, p. 4.

- “Cable has MC [marginal cost] specific to each market.”²²

Moreover, the Applicants’ documents demonstrate that the Applicants themselves perceive the appropriate geographic market as local. For instance, [REDACTED]

²³ [REDACTED]

24

[REDACTED]

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ [REDACTED]

28

As discussed below, the decision by the Applicants to incorrectly define the relevant geographic market corrupts the remainder of their analysis and prevents a valid assessment of competitiveness.

²² *Id.*, p. 13.

²³ [REDACTED]

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ [REDACTED]

²⁸ [REDACTED]

2. The Applicants Adopt Incorrect Accounting Methods To Inflate The Number Of Homes With Access To Cable.

On August 23, 2001, DIRECTV reported to the FCC that a survey of its own customers demonstrated that only 71 percent of DIRECTV's customers live in areas able to receive cable television service.²⁹ Moreover, data from the Applicants' own internal documents show that cable pass rates are nowhere near the percentages they recently claimed. As one example,

[REDACTED]

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This single document indicates that EchoStar may be appropriately accused of making representations to regulators that they do not believe are accurate. Based on this information derived from the Applicants themselves, 29 (DIRECTV) to **[REDACTED]** (EchoStar) of their subscriber base can choose only between the two existing DBS companies for MVPD services, which provides corroboration for the findings of NRTC and its expert economists. In addition, NRTC provided uncontroverted Warren Communications data which, when mapped in great detail by Dr. MacAvoy, depict 14 large, distinct contiguous clusters of Census Blocks where cable service is not available.³¹

²⁹ See Comments of DIRECTV, Inc., CS Docket No. 01-129 ("DIRECTV Comments"), p. 13.

³⁰ **[REDACTED]**

³¹ See NRTC Petition, Exhibit I, pp. 10-29.

Conveniently, however, the Applicants now ignore DIRECTV's own survey, EchoStar's conclusions and the detailed Census Block information, and instead attempt to grossly exaggerate the availability of cable in rural areas by using *zip codes rather than Census Blocks* to create the appearance that their data is inaccurate. In fact, however, it is the Applicants' purported data that is grossly incorrect, and it may well be viewed as intentionally misleading.

Among other things, the Applicants make the incredible claim that Idaho, Iowa and North Dakota all have cable pass rates of 90 percent or more, and that even the bottom 20 DMAs have *digital* cable pass rates of approximately 80 percent.³² These numbers are woefully inaccurate, to the point where the Applicants must have known they were making misrepresentations when they put forth such data.

In arriving at their misleading 90 percent pass rate for these three rural states, the Applicants confuse and misuse different data sources, including [REDACTED]

³³ Their aggregation of housing units in so-called "cabled" areas, however, is nothing more than an inaccurate assumption that radically inflates cable pass rates.

³² June 28 *Ex Parte* Notice, p. 70.

³³ [REDACTED]

[REDACTED]

Using Census Bureau data and homes passed statistics from the National Cable & Telecommunications Association (“NCTA”), the actual cable pass rates for Idaho, Iowa and North Dakota are between 63 percent and 78 percent:

State	Homes Passed³⁴	Housing Units³⁵	Homes Passed Using Housing Units³⁶
Idaho	333,398	527,824	63.16%
Iowa	827,390	1,232,511	67.13%
North Dakota	226,062	289,677	78.04%

More sleight of hand is apparent in the Applicants’ methods used to achieve their 80 percent digital cable passage rates for the bottom 20 DMAs. [REDACTED]

³⁴ NCTA web site, <http://www.ncta.com/industry_overview/indStats.cfm?statID=16> (visited August 8, 2002) (reporting state data as of October 2001).

³⁵ U.S. Census Bureau, *Profiles of General Demographic Characteristics, 2000 Census of Population and Housing*, 1026 - 1076 (released May 2001).

³⁷ [REDACTED]

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Data from the Applicants’ own reports and records indicate that cable pass rates in general and digital cable pass rates in particular are nowhere near the percentages they recently presented to the FCC. The record at the FCC is replete with compelling and substantiated evidence that easily refute the Applicants’ latest “finding” that cable service is available throughout rural America.³⁹

NRTC has already shown that the use of zip codes not only leads to inaccurate conclusions, it is not the most detailed unit that can be measured. In the NRTC Petition, Dr. MacAvoy relied on much smaller units of measure – Census Blocks – to determine the presence or absence of cable.⁴⁰ With this higher power lens, a much more realistic view of the geographic marketplace emerges, one that clearly shows large, contiguous rural areas of the country where

³⁶ Determined by dividing the number of Homes Passed by the number of Housing Units.

³⁷ [REDACTED]

³⁸ [REDACTED]

³⁹ See, e.g., Comments of NRTC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132 (submitted September 8, 2000); Comments and Reply Comments of NRTC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (submitted August 3 and September 5, 2001); NRTC Petition; Declaration of Dr. Paul W. MacAvoy, *The Effects of the Proposed EchoStar – DIRECTV Merger on Competition in Direct Broadcast Satellite Rural Markets Where Cable Is Not Available* (February 1, 2002) (Exhibit I to the NRTC Petition); NRTC Reply; Comments of NRTC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 02-145 (submitted July 29, 2002) (NRTC 2002 Cable Comments) (the NRTC 2002 Cable Comments contain a detailed matrix listing *some* of the numerous reports regarding the cable industry’s flawed homes passed statistic).

⁴⁰ As NRTC previously indicated, there are eight million census blocks and 42,193 zip codes, a ratio of 190:1.

only EchoStar and DIRECTV provide MVPD service.⁴¹ Tellingly, the Applicants have never effectively rebutted this compelling analysis, apparently believing that repeating their own flawed argument somehow affords it credibility.

In a recent speech, Deputy Assistant Attorney General William J. Kolasky spoke of the importance of having valid “detailed information about the structure and operation of markets Over our more than 100 years of experience enforcing antitrust laws, we have learned that we cannot rely on the representations of parties to a transaction or of complainants seeking to block it without thoroughly investigating the underlying factual basis for these representations.”⁴² The Applicants’ continuing reliance on false information can only be viewed as a transparent attempt to deceive those regulators who must pass judgment on the Merger.

B. EchoStar and DIRECTV are Each Other’s Closest Competitor.

In their recent *ex parte* notices, the Applicants continue to claim that they are not close competitors. For example, the July 3 *Ex Parte* Notice states: “The Applicants’ economic experts, Drs. Joskow and Willig, confirmed that the *principal* source of competition for Hughes and EchoStar are cable providers, not each other.”⁴³ In so stating, they ignore the Applicants’ own statements, the evidence and explanations submitted by the opponents of the Merger, and, most of all, common sense. They are, after all, the only two providers of nearly identical products, selling in the same geographic markets to potential customers who often have no other choice in provider.

⁴¹ See NRTC Petition, Exhibit 1, pp. 10-29.

⁴² William J. Kolasky, “*Sound Economics and Hard Evidence: The Touchstones of Sound Merger Review*,” June 14, 2002, p. 8.

⁴³ July 3 *Ex Parte* Notice, p. 2 (emphasis added).

The Applicants' public position is severely contravened by their own internal documents.

[REDACTED]

⁴⁴ [REDACTED]

45

[REDACTED]

[REDACTED]

⁴⁶ [REDACTED]

47

[REDACTED]

⁴⁴ [REDACTED]

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

⁴⁷ [REDACTED]

⁴⁸ [REDACTED]

⁴⁹ [REDACTED]

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In their critical dealings with Wall Street analysts, the Applicants have definitively contradicted their “we don’t compete” assertion. On July 15, 2002, DIRECTV announced its second-quarter 2002 earnings.⁵¹ After an initial presentation, Karim Zia of Deutsche Bank asked: “Could you talk about the Radio Shack environment from a marketers [*sic*] standpoint versus EchoStar?” Roxanne Austin, DIRECTV’s President and Chief Operating Officer responded: “We continue to feel strongly that we will be able to compete in Radio Shack along with EchoStar side by side.”⁵² There is, of course, no way to reconcile this statement with the lack of competition the Applicants have asserted elsewhere.

In the same conference call, analyst John Stone asked the following question: “Does DIRECTV plan on offering a leasing plan?” Ms. Austin’s answer states in pertinent part: “Actually, we offer a leasing plan in our direct channel and very few customers elect to take it. And if you look at what I believe competitively, *our competition* has offered a multi-room solution.”⁵³ EchoStar is, of course, the “competition” indicated by this reference.⁵⁴

⁴⁸ [REDACTED]

⁴⁹ [REDACTED]

⁵⁰ [REDACTED]

⁵¹ See Hughes Electronics Corporation, SEC Form 425, July 17, 2002.

⁵² *Id.*, p. 20.

⁵³ *Id.*, p. 33 (emphasis added).

⁵⁴ NRTC will not repeat here the numerous instances of competition between the two. The “ping-pong” chart in the NRTC Petition contained many examples and, of course, EchoStar’s federal antitrust lawsuit against DIRECTV stated that “EchoStar is DIRECTV’s closest competitor.” See NRTC Petition, pp. 31-35.

[REDACTED]

⁵⁵ They ignore the equally obvious and very basic fact that these two sellers of a superior new technology are competing against each other to attract these cable customers. Their argument is akin to the early car manufacturers discovering that most of their customers previously rode horses, and therefore concluding that horses, not each other, were their closest competition.

One need only look as far as last month to see a textbook example of this attempt to attract subscribers from cable. On the heels of Adelphia's bankruptcy, DIRECTV immediately rushed in with a special offer designed to churn Adelphia cable subscribers in Southern California to its DBS service.⁵⁶ EchoStar's retailers apparently got in on the act by allegedly making false statements to Adelphia subscribers in an effort to convert them to the DISH Network.⁵⁷ The Applicants cannot contend, in good faith, that they are not significant competitors.

Unfazed by reality, the Applicants reject accepted methods of analysis in favor of "churn data" to define the relevant market, ostensibly showing that customers leaving one DBS provider most often turn to cable or over-the-air broadcast television.⁵⁸ At best, this data is a red herring because its emphasis is on churn away *from* DBS, not *to* DBS. Simply stated, the Applicants choose to ignore the data showing competition between them to attract cable subscribers (or new

⁵⁵ [REDACTED]

⁵⁶ See Exhibit A.

⁵⁷ See Reuter's Business Report, "DISH Retailer Marketing Practices Probed," <http://biz.yahoo.com/rb/020805/media_echoStar_adelphia_1.html> (August 5, 2002).

⁵⁸ June 28 *Ex Parte* Notice, p. 17.

. See also Gan/MacAvoy Statement, p. 2.

subscribers who have not previously subscribed to cable). When looking at the Applicants' own figures of churn from cable to DBS, the numbers are quite revealing: [REDACTED]

⁵⁹ Not bad for two companies that say they need to merge in order to compete with cable.

A recent survey commissioned by the Satellite Broadcasting and Communications Association (“SBCA”), a trade association representing satellite interests, reached the same conclusions. From a telephone survey of more than 1,000 randomly-selected households, 57 percent of the respondents reported that they had subscribed to cable in the past.⁶⁰ According to SBCA President Andy Wright, “[t]he research also shows that consumers migrate to DBS because they believe that cable, including digital cable, cannot match the quantity and quality of programming offered by satellite television providers.”⁶¹ This data shows that DIRECTV and EchoStar vigorously compete against each other to attract subscribers from cable.⁶²

The Applicants also appear to understate the amount of customer churn between them with respect to customers that switch providers for competitive reasons. [REDACTED]

⁵⁹ [REDACTED]

⁶⁰ SBCA Press Release, “*New Study Confirms: DBS Beats Digital Cable on Value, Quality and Consumer Satisfaction*,” May 23, 2002. The survey also revealed why new customers subscribed to DBS: more channels (38 percent); high cost of cable (39 percent); better quality picture and sound (18 percent); and dissatisfaction with cable (13 percent). In each case, the new subscribers had compared cable to DBS and found that DBS offered a superior product.

⁶¹ *Id.*, p. 1.

⁶² [REDACTED]

[REDACTED]

⁶³ [REDACTED]

⁶⁴ [REDACTED]

⁶⁵ [REDACTED]

⁶⁶ [REDACTED]

⁶⁷

In applying the Applicants' data used in the June 28 *Ex Parte* Notice, Drs. Gan and MacAvoy measured the cross elasticity of demand to determine the extent of competitiveness between the two DBS providers. They calculated that the cross elasticity between DIRECTV and EchoStar is [REDACTED] percent higher than that between EchoStar and cable, and that the cross elasticity between DIRECTV and EchoStar is [REDACTED] percent higher than that between DIRECTV and cable.⁶⁸ Drs. Gan and MacAvoy thus conclude that "these [cross elasticity] estimates from

⁶³ [REDACTED]

⁶⁴ [REDACTED]

⁶⁵ [REDACTED]

⁶⁶ [REDACTED]

⁶⁷ [REDACTED]

⁶⁸ See Gan/MacAvoy Statement, p. 3.

Joskow/Willig sources indicate much higher substitutability of each other than of cable services, and therefore much greater competitiveness with each other than with cable.”⁶⁹

That said, there are many reasons why churn from one DBS provider to the other may occur as described by the Applicants. First, when disconnecting from one of the DBS providers, the installed “default” technology is over-the-air broadcast television. This is often an interim step a consumer takes before subscribing to a replacement MVPD service. Second, those who can no longer afford MVPD may abandon that product market altogether in favor of broadcast television. Third, those who invested in the hardware necessary to subscribe to one DBS provider may be reluctant after a bad experience to invest in yet more hardware that would be necessary to receive service from the other DBS provider. Fourth, some subscribers may churn because the provider terminated service for failure to pay monthly invoices. Fifth, subscribers may have terminated service because they relocated and have not arranged for new service. Sixth, some customers undoubtedly terminate their subscription but continue to receive pirated signals.

Undaunted, the Applicants use their churn data to support their “nested logit” analysis, by which they subjectively pick a group of presumed substitutes (the “nest”) and assume that consumers churning from one product in the nest will substitute others proportionate to market shares (logit demand). [REDACTED]

⁷⁰ As the Applicants’ own supporting materials acknowledge, where (as here) substitution to a product exceeds its market share, the products in question “may be viewed as closer substitutes than

⁶⁹ *Id.*

⁷⁰ [REDACTED]

others.”⁷¹ The cross elasticity estimates measured by Drs. Gan and MacAvoy confirm that this is true.

Throughout their *ex parte* presentations, the Applicants use convoluted calculations to support absurd conclusions. For instance, the Applicants assume that EchoStar and DIRECTV compete in the nested logit analysis, but do not compete in their churn analysis. Why the inconsistency? As stated in the Gan/MacAvoy Statement, “[w]hat Joskow/Willig intend to ‘prove’ in their analysis of the churn data is contradictory” to the theory upon which the nested-logit model rests.⁷²

Plainly, though they seek to have the Commission and the public believe otherwise, EchoStar and DIRECTV could not really believe that they are not each other’s closest competitor. Their own statements and documents, in numerous contexts, present a diametrically opposite point of view. Their economic analysis, such that it is, is premised on contrived predicates – that the geographic market is national, and that churn data is the appropriate measuring stick for defining competition.

C. The Merged Company Will be Able to Price Discriminate, Even Under a “National Pricing” Scheme.

1. The Applicants Engage in Price Discrimination at the Local Level.

The Applicants contend that their “national pricing” plan will not be compromised by local price discrimination in response to competition from local cable companies, because such

⁷¹ Werden and Froeb, “The Effects of Mergers on Differentiated Products Industries: Logit Demand and Merger Policy,” *Journal of Law and Economic Organization*, V10 N2, 407, 420 (1994) (included in June 28 *Ex Parte* Notice, Volume II, Tab 34).

⁷² Gan/MacAvoy Statement, p. 4.

“price discrimination would continue to be implausible.”⁷³ The entirety of their subsequent consumer welfare analysis depends upon this conclusion. They further contend that their local promotions do not produce much new business anyway,⁷⁴ and that, in any event, uncabled areas are too small to worry about and may not exist at all.⁷⁵ Once again, the Applicants have ignored history and facts that are inconvenient but uncontrovertible.

As an early tacit acknowledgment that the Merger was inherently offensive to public policy and would not otherwise receive governmental approval, the Applicants promised to charge a single “national price” for video programming services that the surviving monopoly would offer to subscribers. Much has been written about this still empty promise – its potential for resulting higher prices, particularly in rural areas, the impossibility of implementing and enforcing a national pricing scheme and the Applicants’ own statements that New EchoStar will need flexibility to compete with cable in local markets.

In statements made before Congress and the FCC, the Applicants have stated that they now charge a single national price for their video offering. For instance, in written testimony before the U.S. House of Representatives Judiciary Committee presented on December 4, 2001, EchoStar’s President and CEO Charles Ergen stated that “[w]e offer nationwide pricing today and we’re willing to commit to this going forward so that rural areas will get the advantages of competitive prices occurring in urban areas.”⁷⁶ Similarly, in an opposition pleading filed with FCC on February 25, 2002, the Applicants refer to their “past practice of national pricing.”⁷⁷

⁷³ June 28 *Ex Parte* Notice, p. 61.

⁷⁴ *Id.*, p. 65.

⁷⁵ *Id.*, p. 66.

⁷⁶ *Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution market, Oversight Hearing Before the House Committee on the Judiciary, 107th Congress, Serial No. 50, p. 13 (December 4, 2001) (statement of Charles Ergen, President and CEO, EchoStar Communications Corporation).*

⁷⁷ Opposition, p. 136.