These statements about national pricing are not true, and they are disproved by such recent specific examples as DIRECTV's "special offer" to customers of Adelphia's cable systems in the greater Los Angeles area. As revealed in the *DIRECTV Press Release*, on July 1, 2002, just a few days after Adelphia filed for bankruptcy[78] – and one day before its July 2 presentation to the FCC – DIRECTV "launch[ed] a special offer targeted to Los Angeles-area residents . . . who subscribe to Adelphia's cable TV service."[79] New DIRECTV customers committing to a one-year service contract will receive a two-room DIRECTV system and standard professional installation for less than $50 from participating retailers.[80]

By definition, this offer is not available outside of the greater Los Angeles area. As posted on DIRECTV's web site, the identical system would cost $113.95 in all other areas, such as rural America, where the special promotion is not available – $14.95 for the first receiver, shipping and installation, and $99 for the second receiver.[81] This is more than twice the cost DIRECTV charges defecting Adelphia subscribers in the greater Los Angeles area. This price competition is good for Southern California consumers – but does nothing for rural consumers who will never benefit from such competitive prices and promotions.

DIRECTV's monitoring of local cable opportunities has been institutionalized into its marketing techniques. Contained in the confidential documents NRTC's representatives reviewed are **[REDACTED]**

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[78] Adelphia filed for bankruptcy on June 25, 2002. *See* Adelphia Communications Corporation, Case No. 02-41729 (REG) (S.D.N.Y.). There are approximately 1.2 million Adelphia subscribers in Southern California, 250,000 of which are in the City of Los Angeles. *See* Pat Maio, "*DirecTV Launches 'Guerilla' Campaign Versus Adelphia in LA*," July 1, 2002, p. 2.

[79] *DIRECTV Press Release*, p. 1. Adelphia's cable systems are located in Los Angeles and communities in adjacent Ventura, Riverside and Orange Counties.

[80] *Id.* As discussed above, DISH Network retailers have allegedly been targeting Adelphia subscribers in order to compete with the DIRECTV special offer. Some retailers have even been accused of making false statements in an effort to lure customers from the Adelphia cable system. *See* note 57, *supra.*

[82] **[REDACTED]**

[83] **[REDACTED]**

[REDACTED]

[84] **[REDACTED]**

[85] **[REDACTED]**

[86]

[REDACTED]

[81] *See* https://signin.directv.com/DTVAPP/DisplayOffers.do, visited on July 8, 2002.
[82] **[REDACTED]**
[83] **[REDACTED]**

[84] **[REDACTED]**
[85] **[REDACTED]**

[86] **[REDACTED]**

[87]

Let there be no doubt, past is prologue. As Charles Ergen of EchoStar has previously explained, merged EchoStar fully intends to respond to local cable conditions with special deals as needed.[88] **[REDACTED]**

[89] While the Applicants introduced this slide for other purposes, it demonstrates that they are capable of generating tremendous amounts of new business by targeting promotions specifically at certain local cable subscribers – many of whom subscribe to systems with distressed operators or, as the SBCA survey revealed, are either impressed with the quality of DBS or dissatisfied with cable. The Applicants' separate contention that it is "implausible"[90] for them to discriminate by having promotions at the local level that benefit those who have the cable option, at the expense of those who do not, is once again exposed as a false premise. So, too, is the claim that a "national strategy of discriminating against ostensibly non-cabled areas would be costly and unlikely to be profitable."[91] If that were the case, would both companies have consistently marketed against cable when the operator is in trouble or when a new report shows that cable prices have increased?[92]

[87] **[REDACTED]**
[88] *See* NRTC Petition, p. 37 (quoting Mr. Ergen's response to a reporter's question: "I guess if you're saying if the cable company came in and offered a rebate in one city, would you [EchoStar] respond to that? I think you could make allowances for that.").
[89] **[REDACTED]**
[90] *Id.*, p. 61.
[91] *Id.*, p. 66.
[92] Press Release, "*DISH Network Campaign Targets Consumers Facing Rising Cable Rates,*" August 1, 2002.

From these recent and stark examples, three conclusions are readily apparent. First, neither EchoStar nor DIRECTV now maintains a genuine national price, which is contrary to EchoStar's repeated statements made before Congress and the FCC. Second, if the Applicants individually can compete for customers of a given cable company, a monopoly DBS company could just as readily coordinate its behavior with a large but local cable competitor in order to avoid such competition. Third, rural customers are not today, and will not in the future, obtain the advantages of more competitive prices offered in urban areas where cable offers an MVPD alternative. The Applicants have never explained how special price promotions in competitive urban areas like Los Angeles will benefit rural consumers. The answer, of course, is they will not, and any incentive to offer discounts and the like disappears when competition is not present. Given Mr. Ergen's earlier statements that New EchoStar will need flexibility to lower prices to compete with cable systems in local markets, it is obvious that rural Americans, with no choice in MVPD providers, will remain disadvantaged under the illusory "national pricing" concept the Applicants have proposed.

2. The Applicants Have Never Revealed Their National Pricing Plan.

Important questions raised by NRTC more than six months ago remain unanswered. We do not know what the theoretical national price would be. We do not know what programming services would be covered by the national price. We do not know how a national pricing scheme would be implemented. We do not know how national pricing would be enforced. We do not know how and to what extent there would be "exceptions" to the single national price. We do not know how the promise of a single national price would be maintained for other elements of service, such as hardware and installation.

We do not know these answers because, ten months after announcing their proposed Merger, the Applicants still have not yet disclosed their answers. Upon information and belief, not even protected documents available only to outside counsel disclose this information. Only EchoStar and DIRECTV know what is encompassed by their reassuring "promise" of national pricing, and they seem intent on keeping their plan secret. Despite numerous opportunities and an affirmative obligation to provide answers, the Applicants' failure to respond publicly and with clarity shows that national pricing remains a conceptual scheme at best, not a meaningful concession designed to assuage legitimate concerns about the proposed monopoly.

3. The Applicants Can Discriminate in the Provision of Local-Into-Local Services.

Recent trade press has reported that EchoStar will soon initiate local-to-local services in Burlington, Vermont, the 90th largest DMA.[93] The decision to provide local service for Judiciary Chairman Patrick Leahy's home state long before many larger DMAs[94] demonstrates one of the dangers of the monopoly proposal by this Merger – that a monopolist can selectively decide to provide enhanced services, today local-into-local, tomorrow another product, which can be rationed in non-economic ways once there is no competitor. How do we know this is the case?

[93] *See* "DISH and DIRECTV to Add Channels," SKY Report, July 10, 2002. Along with Burlington, trade press indicated that EchoStar would be initiating local-to-local service in Tulsa, Oklahoma (DMA 59) and Tucson, Arizona (DMA 71).

[94] Exhibit M of the NRTC Petition showed that both EchoStar and DIRECTV had initiated local-to-local service in the vast majority of the 40 most populated DMAs, with Austin, Texas (DMA 54) being the only market outside of the top 50 where local channels were available. In an *Ex Parte* Notice filed July 18, 2002, EchoStar reported that it provided local-to-local service to 35 of the top 40 markets and five additional DMAs, with Honolulu (DMA 72) being lowest ranked. *See* letter from Pantelis Michalopoulos, counsel to EchoStar, to Marlene H. Dortch, FCC Secretary, dated July 18, 2002.

EchoStar and DIRECTV have competitively matched each other in initiating local-into-local services in DMAs 1-40. (In a handful of other DMAs, such as DMA 51 (Las Vegas), DIRECTV has extended coverage.) But EchoStar has, for demonstrably political purposes, reached down to DMA 90 to launch services to Burlington. If the two competing platforms are permitted to merge, a politically powerful Member's region may be provided better service and innovation than other areas. Moreover, since many rural areas have no competition from digital cable, there is no alternative for those consumers whose rural Members in Congress have unfortunately not yet risen to the prominence of Chairman Leahy, or worse, whose rural Members may happen to disagree with Mr. Ergen. We are pleased that Chairman Leahy's constituents in Vermont will benefit, but rural Americans in states like Missouri and Montana may not.

We also find it intriguing that DIRECTV appears not to be competing with EchoStar in providing local into local service to Vermont. Upon information and belief, it is very possible that "gun jumping" is taking place – or perhaps it is merely serendipity that what would appear to be non-competitive behavior has developed before the Merger has been approved.

D. The Applicants' Welfare Analysis is Based Upon Flawed Assumptions.

As discussed above, the foundation for the Applicants' consumer welfare analysis is based on a variety of flawed premises: that local cable companies compete only in a national market in which they in fact do not participate; that price discrimination is implausible, even as the Applicants continue to do it; that cable companies, including those that serve only distant geographic territories, are closer substitutes for one DBS company than is the other DBS company. The Applicants now add to their long list of flawed premises an erroneous set of assumptions to create the appearance of extraordinary elasticity of demand for DBS. They also attempt to take credit for claimed efficiencies, which are achievable without the Merger or which represent only the presumed benefits of monopoly power.

1. The Applicants' Elasticity Analysis is Incorrect.

In his earlier Declaration, NRTC's economist Dr. MacAvoy explained how he used price and penetration data to estimate a price elasticity of -1.55 for DBS in the cabled and non-cabled areas he studied.[95] This elasticity estimate then was used in the Lerner Index equation to estimate the consumer welfare losses from the price increase predictable from the Merger in the non-cabled regions.

The Applicants now critique Dr. MacAvoy's work, and pretend to substitute alternative calculations, even as they repeatedly disavow their own calculations as based on inadequate data and leading to absurd results.

The Applicants first contend that had Dr. MacAvoy used data for all 166 available DMAs, rather than 83 DMAs, he would have arrived at an estimated price elasticity of -0.61, rather than -1.55.[96] The Applicants ignore NRTC's May 13, 2002 submission with the FCC, however, in which Dr. MacAvoy estimated price elasticity using all 166 available DMAs, and found that the choice between estimates was –1.55 and -1.44.[97] The latter, in turn, suggests a slightly higher post-merger price increase and greater welfare loss than the initial analysis of 83 DMAs that implied price increases of 50 percent and welfare losses of $700 million for existing rural DBS subscribers.[98]

[95] *See* NRTC Petition, Exhibit I, p. 45.
[96] *See* July 3 *Ex Parte* Notice, p. 87.
[97] For convenience, a copy is attached as **Exhibit D** hereto.
[98] *See* NRTC Petition, Exhibit I, pp. 47-50.

Even assuming for purposes of argument that the Applicants' calculation of -0.61 elasticity were correct, which it is not, they have also failed to point out that this conclusion of far lesser elasticity would lead to a much higher projected monopoly price for the merged DBS company and a far greater welfare loss.[99] Similarly, the Applicants' other criticisms of Dr. MacAvoy's analysis would, ironically, if "corrected" as the Applicants suggest, lead only to further increases in the projected welfare loss.

In their search for statistics capable of supporting unrealistic conclusions, the Applicants proceed through a variety of calculations which they acknowledge are incorrect, each time using the inadequacy of their data as an excuse to default to assumptions that are unsupported by data or logic.[100]

The Applicants commence their June 28 *ex parte* presentation by admitting: "As described later in the presentation, market-level data do not permit reliable econometric analysis of the relevant market."[101] This is a problem of their own creation. Because they incorrectly define the geographic market as "national," and incorrectly define price as the charge for only basic monthly programming without discount or promotion,[102] there is a predictable absence of the price variations required "for reliable econometric analysis." This becomes an excuse to default to subjective and inadequate churn data, the problems of which are discussed above. Even after using assumptions of their own choice to move their analysis along, the Applicants are repeatedly forced to admit it doesn't work, as they state:

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[99] July 3 *Ex Parte* Notice, p. 87.

[100] The Gan/MacAvoy Statement discusses problems with the Joskow/Willig calibration method.

[101] June 28 *Ex Parte* Notice, p. 17. The Gan/MacAvoy Statement states that Joskow/Willig's "divergence between model-based estimates and those based on average revenues and costs outlays casts fundamental doubt on the Bertrand competitiveness assumption that is the basis for their model." Gan/MacAvoy Statement, p. 7. Drs. Gan and MacAvoy point out that this defective analysis precludes the Applicants from predicting the post-Merger price of DBS service. *Id.*, p. 9.

[102] June 28 *Ex Parte* Notice, p. 17.

- "Coefficients on prices often obtain the wrong signs and implausible magnitudes, and vary dramatically across and within models."[103]

- "The comprehensive modeling fails to produce reliable results due to insufficient exogenous price variation."[104]

- " . . . the model produces a *positive* own price elasticity for DIRECTV. . . . The diversion rates also have the wrong sign."[105]

- "We do not have effective instruments. Hence, we cannot econometrically generate consistent estimates of the nested logit parameters."[106]

- "Results: All regressions, with the exception of the regression on changes in ES market shares (or logs of shares) obtain the wrong sign for at least one price coefficient."[107]

While the Applicants thus preserve their deniability by admitting that their analysis has to be arbitrary to lead to consistent results, they then make a selection from among these many different results. In so doing, they recognize that their methods lead to backwards diversion ratios.[108] They claim that their selection of elasticity parameters, however, is validated by a working paper by Goolsbee and Petrin,[109] which is itself based upon notoriously flawed logic. The Goolsbee/Petrin paper is a study that relies on 1998 data, not including DBS prices, to conclude that: (a) the welfare gain to users of DBS is "small," at about $50 per unit per year; (b) cable companies would need to raise prices 17-50 percent in order to fully exploit their existing market power; and (c) while DBS is intended for the high end of the market due to its superior quality and higher price, the entirety of the 40 percent growth of DBS in 1998 can be explained

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[103] *Id.*, p. 29
[104] *Id.*
[105] *Id.*, p. 31 (emphasis in original).
[106] *Id.*, p. 47.
[107] July 3 *Ex Parte* Notice, p. 24.
[108] *Id.*
[109] *See* June 28 *Ex Parte* Notice, p. 50.

as the result of a 4-6 percent price decrease that year (the result of reduced hardware prices), leading to a conclusion of extraordinary own-price elasticity.

Of course, if one believes that DBS would have enjoyed significant growth during 1998 as a result of consumer acceptance of this new and superior product (as the Applicants state),[110] even without a 4-6 percent price break, the Goolsbee/Petrin assumptions must be rejected. Similarly, the Applicants' use of the Goolsbee/Petrin elasticity assumption to validate their conclusions in the absence of valid data must also be rejected.[111]

The Applicants attempt to "prove" that customers who have invested in set top box hardware and had dishes installed at their homes in order to enjoy "a better product" will abandon all of this in response to even a small price increase. This conclusion is not supported by actual data, but rather by excuses that ignore reality and default once again to false assumptions contravened by their own presentation.

2. The Applicants' Efficiency Claims are Erroneous.

The Applicants claim that the Merger will generate efficiencies of three types: (a) greater local-to-local coverage and similar benefits of spectrum savings; (b) cost savings through reduced churn and reduced programming costs; and (c) increased income from higher advertising prices and similar new charges.

No one contests the value of providing local television stations to local markets. NRTC has previously demonstrated, however, that none of the efficiencies or welfare benefits from

[110] *Id.*, p. 55.

[111] Dr. MacAvoy's initial declaration discussed the flaws inherent in the Goolsbee/Petrin analysis. *See* NRTC Petition, Exhibit I, p. 45 n. 91. For instance, Goolsbee/Petrin looked at data only from the top 60 markets, which excluded rural markets where, because of the absence of a cable competitor, elasticity is likely to be lower. Also, Goolsbee/Petrin did not use any DBS price information, relying solely on cable pricing data. Finally, in light of the significant growth of DBS in the last four years, reliance on outdated 1998 cable pricing data is misplaced.

local-to-local service are dependent upon the Merger. Indeed, with expenditures similar to the new spotbeam satellite assumed in the Applicants' synergies analysis, none of the services supposedly made possible by the Merger are in fact dependent upon the Merger.

The Applicants contend they will save money through reduced churn and subscriber acquisition costs. As NRTC has also previously discussed, these claims can be made by virtually any monopolist.[112] When consumers have no place else to go, vendors need not spend significant resources attracting those consumers, nor keeping them.

Reduced programming costs, on which the Applicants place great weight, are not a true economic efficiency and may not even be a function of volume discounting, contrary to the Applicants' contentions. **[REDACTED]**

[113] **[REDACTED]**

[114] **[REDACTED]**

[112] *See* NRTC Petition, pp. 67-68.
[113] **[REDACTED]**
[114] **[REDACTED]**

The Applicants also contend that increased revenues should be counted as a Merger efficiency, ignoring the question of whether such revenue enhancement might more accurately reflect inappropriate fruits of increased power and prices. The contention that the increase in average revenue per unit will be a result of "increased consumer convenience" created by a newfound monopoly[115] suggests that the Applicants have completely abandoned any presumption that competition, not monopoly, is what spurs companies to better serve their customers.

Alleged "synergies" created by increased market power cannot and should not be mistaken for consumer welfare gains. Nowhere is there any explanation of how New EchoStar's cost savings will benefit consumer welfare. Increased market power may benefit executives with stock options. It will not benefit consumers, and certainly not rural consumers.

E. The "Target" Price for Broadband: Another Promise Without Substance.

The Applicants' penchant for making sweeping statements with political and cosmetic appeal, but no substance, has continued recently with a set of statements made to the FCC concerning the Applicants' broadband plans (if the Merger is not approved) and New EchoStar's pricing "target" (if the Merger is approved).[116] As noted above, in the June 13 *Ex Parte* Notice, the Applicants stated that:

> [t]he merger will allow New EchoStar to introduce a truly competitive full-scale consumer broadband service. *Without the merger, neither company is likely to continue to offer such a service.* Equally important, EchoStar and Hughes *expect* that New EchoStar will be able to offer that service at a competitive price point – a target of $35 or lower for *basic* monthly *broadband* service, uniformly applied throughout the nation.[117]

[115] *See* July 5 *Ex Parte* Notice.
[116] *See, e.g.*, NRTC Reply, pp. 4-10 (NRTC's "Flip-Flop" Chart).
[117] *See* June 13 *Ex Parte* Notice, pp. 1-2 (emphases added). *See also* July 30 *Ex Parte* Notice, Tab A, p. 1 (Unredacted).

The Applicants' promise of nationwide "basic" broadband pricing runs counter to DIRECTV's historical analysis of the varying two-way business dynamics in different areas of the country.[118] **[REDACTED]**

[119] **[REDACTED]** [120]**[REDACTED]**

[121] **[REDACTED]**

[122] **[REDACTED]**

[123] **[REDACTED]**

[124] This document should be carefully reviewed because it is so inconsistent with other assertions of the Applicants.

The second, italicized sentence of the above passage contains a "stick" – a threat that has been routinely made – that both EchoStar and DIRECTV will abandon their consumer broadband services if the Merger is not approved. However, EchoStar and DIRECTV have charged approximately $70 for the StarBand and DIRECWAY consumer services they offered[125] or are offering. It has been suggested that there is little demand for "broadband" service at this

[118] **[REDACTED]**

[119] **[REDACTED]**
[120] **[REDACTED]**
[121] **[REDACTED]**
[122] **[REDACTED]**
[123] **[REDACTED]**
[124] **[REDACTED]**
[125] In a much-publicized dispute, EchoStar terminated its relationship with StarBand and stopped marketing that service, precipitating the filing of StarBand's Chapter 11 bankruptcy petition. *See, e.g.*, Press Release, "StarBand Files for Chapter 11," June 3, 2002, http://biz.yahoo.com/bw/020603/32386_2.html.

substantial price point.[126] Second, by failing to timely construct satellites licensed by the FCC, EchoStar recently lost two of its next-generation Ka-band slots that would have provided full-CONUS broadband coverage.[127] Its remaining slot, licensed to 90-percent-owned VisionStar Incorporated ("VisionStar"), is subject to an FCC proceeding and also could be forfeited.[128] All in all, through its own uncharacteristic lack of aggression, EchoStar's satellite broadband assets are becoming tenuous. Using a threat to abandon the consumer broadband business altogether as leverage to gain Merger approval with this record of inaction should be distasteful to policy officials and lead to serious questions about New EchoStar's alleged commitment to such services.[129]

The second part of the Applicants' statement, the "carrot" portion, is noteworthy for its vagueness, lack of commitment and inconsistency with both public filings and internal documents. The Applicants state only that they "expect" New EchoStar "to be able" to offer broadband services at a competitive price – but they stop well short of committing to offer competitive pricing. Moreover, they "target" a $35 monthly charge – but they offer no definition of "target" or any hint of when (or if) they will meet the "target." This number appears to be unsupported and unsupportable, but does perhaps meet the need of creating hope for DOJ and FCC regulators that rural Americans will receive competitively priced broadband products, even if that hope is not based on facts or genuine intentions and is inconsistent with the loss of satellite slots.

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[126] *See* NRTC Petition, p. 51, n. 179.

[127] *See* EchoStar Satellite Corporation, DA 02-1534 (released July 1, 2002).

[128] *See* NRTC's Petition to Deny VisionStar's request to extend milestones, filed June 17, 2002 (copy attached as **Exhibit E** hereto).

[129] In a recent satellite industry presentation, SES' CEO Dean Olmstead was quoted as saying "that while EchoStar and DirecTV had used broadband argument to 'justify merger,' deal would only stifle competition that was 'essential for the satellite broadband market to flourish.'" *Communications Daily*, August 29, 2002, p. 7. NRTC has made the identical argument before the FCC. *See* NRTC Petition, pp. 50-56.

In the July 5 *Ex Parte* Notice, the Applicants' "financial assumptions on broadband revenue" state an average "$50 avg./month for broadband only customers," with a 20 percent "discount when bundled with video service."[130] **[REDACTED]**

[131] **[REDACTED]**

[132] **[REDACTED]** Therefore, we can only conclude the $35 "target" will recede, mirage-like, if the Merger is approved.

Finally, the Applicants propose their target price for "basic monthly broadband service" – but they fail to define what "basic" service is and what kinds of services would constitute "broadband." As NRTC previously asserted before the FCC:

> [basic broadband] may mean the slowest of speeds or a level of service that few would want, leaving the door wide open for price discrimination for "non-basic" broadband service. . . . As a monopolist, New EchoStar would have every incentive to set a high national price for "basic" broadband; it would have a limited desire to compete against DSL and cable modem services in the areas where those services enjoy a huge head start, and instead would have every incentive to overcharge rural Americans who have no other choices.[133]

[130] July 5 *Ex Parte* Notice.
[131] **[REDACTED]**
[132] **[REDACTED]**
[133] NRTC Reply, pp. 15-16.

The Applicants' word games are nothing new, but are nonetheless noteworthy for their continuing frequency some ten months following the announcement of the Merger. That they are unwilling, or perhaps unable, to offer publicly any consistent set of definitions, explanations or details of their national pricing scheme – for video or broadband – demonstrates at this late stage that the Applicants are no closer to making their case now than they were last October.

F. SES Americom is Not a Competitor.

New EchoStar would control every full-CONUS Ku-band slot if the Merger is permitted. This reality has led to at least one attenuated prospect for potential competition, SES, which has filed a petition with the FCC seeking approval to offer capacity on a DBS satellite authorized by the Government of Gibraltar at 105.5° W.L. SES proposes to offer capacity on this satellite to third parties that will provide direct-to-home services in the United States and certain British Overseas Territories in the Caribbean. SES states that it intends to commence construction of its satellite "promptly" after receipt of the requested declaratory ruling, and that if the declaratory ruling is issued in 2002, the satellite "could be launched as early as 2004."[134] Presumably if SES is not granted regulatory approval, all of the full-CONUS Ku-band slots would remain in New EchoStar's hands.

A discussion of the competitive impact of the SES proposal on the Merger analysis necessarily includes the *Merger Guidelines*. Section 3.2 of the *Merger Guidelines* states that only forms of competition that are "within two years from initial planning to significant market

[134] SES Petition, p. 12.

impact" will be considered in a merger review.[135] By its own admission, SES claims that its satellite "*could be launched*" by 2004. Merely launching a satellite within this time period would not rise to the level of "significant market impact" required by the *Merger Guidelines*. In fact, in this best-case scenario, SES would have one satellite with 32 full-CONUS DBS channels and no subscribers; the merged EchoStar would have 15 satellites with 96 full-CONUS DBS channels and about 20 million subscribers – not to mention a two-year monopoly.

Moreover, there are a number of substantial impediments to the FCC's grant of the SES Petition, casting significant doubt on SES' ability to ever offer DBS service, much less within the two-year period stated in the *Merger Guidelines*. Among these are the following:

- The satellite would be located only 4.5° from the U.S.-licensed DBS satellites located at 101° W.L. and 110° W.L. The FCC has never licensed DBS satellites less than 9° from one another, and must be assured that the SES satellite will not cause harmful interference to the existing U.S.-licensed satellites.[136] It is uncertain and indeed unlikely whether the FCC will so authorize.

- Appendices 30 and 30A of the International Telecommunications Union ("ITU") Radio Regulations must be modified to accommodate SES' proposal. It is uncertain when, or if, such modifications can be made.

- The United Kingdom Administration will need to coordinate with affected Administrations to resolve any interference issues. It is uncertain when, or if, successful coordination can be completed.

- The FCC must determine whether the SES Petition satisfies the FCC's test for authorization of a satellite licensed by a foreign government. This test requires the FCC to determine whether U.S.-licensed satellites have "effective competitive opportunities" in the relevant foreign markets (in this case, Gibraltar and certain British territories in the Caribbean).[137] It is uncertain whether the FCC will affirmatively find that SES has satisfied this standard.

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[135] *Id.*, §3.2.

[136] Notably, in its own filings of June 17, 2002, DIRECTV opposed the SES Petition on these grounds. *See* Opposition of DIRECTV, Inc., File No. SAT-PDR-20020425-00071, submitted June 17, 2002 ("DIRECTV Opposition").

[137] *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, 12 FCC Rcd 24094, 24134 (1997).

- Grant of the declaratory ruling will require waiver of FCC Rule Section 100.53(b) because the SES Petition does not propose service to Alaska and Hawaii. It is uncertain whether the FCC would grant such a waiver.

- Launch of a commercial service is dependent upon SES providing satellite capacity to third parties, which would then offer services directly to subscribers. It is uncertain whether SES will be able to contract with third parties capable of providing a service having a "significant market impact."

Based on these impediments, it is no surprise that SES' CEO Dean Olmstead has acknowledged that he is "not convinced it will work."[138]

It is also not surprising that the two companies controlling DBS capacity in the United States – EchoStar and DIRECTV – oppose the SES Petition. EchoStar voiced concerns about the technical compatability of the SES proposal and its effect on existing and planned DBS services.[139] DIRECTV much more strongly urged outright rejection of the SES Petition, calling it "a gerrymandered paper construct specifically intended to avoid triggering international coordination obligations with U.S. DBS satellites."[140] They may even be correct in their claims, but if their Merger is granted their opposition to SES will further preserve their monopoly.[141]

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[138] Mark Holmes, "*SES Americom Head Has Doubts*," Interspace, May 8, 2002.

[139] *See* Comments of EchoStar Satellite Corporation, File No. SAT-PDR-20020425-00071, filed June 17, 2002.

[140] DIRECTV Opposition, p. 2.

[141] SES contends that the Applicants' opposition to the SES Petition uses the "technical red herring of interference" to block entry of SES' planned system. *Communications Daily*, August 29, 2002, p. 7 (quoting Dean Olmstead). SES has apparently become so frustrated with the Applicants' failure to discuss interference and coordination issues that it has been forced to ask the FCC to intervene. In a recent filing, SES noted that "[w]hile touting the [SES Petition] as evidence of the potential for competition in the DBS arena after their proposed merger, and thus a reason to approve the merger, these DBS incumbents nevertheless urged the FCC to deny the [SES Petition] outright, based on purported interference concerns." *See* letter from Phillip L. Spector, counsel to SES, to Donald Abelson, Chief of the FCC's International Bureau, dated August 23, 2002 (copy attached as **Exhibit F** hereto), p. 3. There is little wonder why SES has characterized the Applicants' opposition and failure to negotiate as being "motivated only by a desire to stall the advent of" the SES system." *Id.*, p. 5. *See also Communications Daily*, August 28, 2002, pp. 1-2.

Finally, if EchoStar and DIRECTV actually need access to additional spectrum, as they claim, they could be third parties to which SES makes its DBS capacity available in the unlikely event the SES Petition is approved and the system implemented. The SES platform offers access to an additional full-CONUS slot, with 32 channels available. Such capacity would be from the 105.5° W.L. orbital location situated halfway between the existing DBS satellites at 101° W.L. and 110° W.L., and thus would not require any re-pointing of subscribers' dishes. Moreover, by leasing capacity from SES, EchoStar and DIRECTV likely would not be required to make a significant capital investment in the construction and launch of the satellite itself. The mere possibility that capacity on the SES satellite could be used by the two existing competitors – rather than a new entrant – demonstrates that the Merger is not the only means by which EchoStar and DIRECTV can provide local television signals to all markets.[142]

Though the satellite proposed in the SES Petition may or may not ultimately be launched and placed in operation, such possibility certainly does not exist "within two years from initial planning to significant market impact," as the *Merger Guidelines* require. Moreover, there are a

[142] In their July 11 *ex parte* presentation, the Applicants report on a meeting with FCC staff in which they addressed purported difficulties associated with a joint operating arrangement as a means to more efficiently use spectrum capacity as an alternative to the Merger. They point to technical differences between the EchoStar and DIRECTV systems as well as "operational risks and control-related difficulties." *Id.* Here again, the Applicants completely ignore the fact that these "problems" are self-inflicted and can be resolved by other means. First, to the extent their video architecture is incompatible, this is the result of the failure of the Applicants to adopt a common standard early in their development. (The Applicants cite the disparate technologies of the "Beta vs. VHS" technology battles of the 1980s as support for their position. However, in that case and many others such as the IBM vs. Apple computer standard, the marketplace eventually determined the standard. There is no reason to believe that the marketplace will not continue to work in the selection of a DBS standard.) Had they agreed, pooling spectrum to avoid programming redundancy could be easily accomplished. Second, with respect to broadband, neither company has deployed satellites for this purpose, and thus could develop standards and share spectrum capacity without the need for equipment change-outs at their customers' premises. Third, the operational and control issues are corporate positions, representing decisions made by the Applicants. They do not constitute a legal basis justifying approval of the Merger. In short, the only reason that a joint operating agreement will not work is because the Applicants do not want it to work.

plethora of regulatory, technical and business issues that must be adequately resolved before SES receives its regulatory approval, contracts with a third-party distributor and places the satellite in commercial operation. With the possibility that EchoStar and DIRECTV may themselves become SES' customer, it is readily apparent that the pendency of the SES Petition cannot justify an anti-competitive merger.

Conclusion

Since the Merger was announced in October of last year, the Applicants have attempted to keep the public at bay with a strategy of happy talk and obfuscation. While claiming that the DBS market is "national," they rely on analyses that can only be viewed as wrong and misleading. While discussing competition, they refuse to acknowledge that they are each other's closest competitor, instead using self-serving and inapplicable churn data as a substitute for econometric analysis. While pitching a general notion of "national pricing" for multichannel video services and claiming that they already charge a single price, they very publicly offer deep discounts to subscribers of distressed cable systems in particular local markets but not in rural areas. While arguing that the Merger will bring "efficiencies," they fail to appreciate that the claimed benefits are either not specific to the Merger or will only benefit New EchoStar instead of consumers. While suggesting a "target" price for "basic broadband," they offer no details or definitions, and do not even make a commitment to competitively price. And while the Applicants may speculate that SES Americom would ultimately provide a competitive platform to DBS, they oppose the SES system and cannot show that it is appropriate for consideration in analyzing this Merger.

The unanswered questions continue to mount, but the Applicants remain steadfast in their refusal to provide genuine answers. Having failed for ten months to improve their prospects, the Applicants have not overcome the simple fact that the Merger is unlawful.

Respectfully submitted,

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September 4, 2002

EXHIBIT A

[Latest Headlines | Market Overview | News Alerts | More Business Wire]

Monday July 1, 12:56 pm Eastern Time

Press Release

SOURCE: DIRECTV, Inc.

DIRECTV Launches Special Offer Targeted to Adelphia Cable Customers in Greater Los Angeles Area

Two-Room DIRECTV System, Including Professional Installation, Available for Less Than $50

EL SEGUNDO, Calif.--(BUSINESS WIRE)--July 1, 2002-- DIRECTV, Inc., provider of the nation's leading digital satellite television service, announced today it is launching a special offer targeted to Los Angeles-area residents -- including residents of Ventura, Riverside and Orange Counties -- who subscribe to Adelphia's cable TV service.

Under the limited-time offer, new customers who commit to one year of any DIRECTV® TOTAL CHOICE® programming package, including the TOTAL CHOICE Plus With Local Channels package, which offers all Los Angeles local channels for $39.99 per month, will receive a two-room DIRECTV System and standard professional installation for less than $50 from participating DIRECTV retailers. Participating DIRECTV retailers include Best Buy, Circuit City and Good Guys.

"For cable customers who want a reliable, high-quality, all-digital television service, there is no better time than now to switch to DIRECTV," said Larry Chapman, executive vice president, DIRECTV, Inc. "As a local company we feel compelled to remind Los Angeles-area consumers that they do have a viable, affordable and dependable option to their local cable TV service. While we are targeting Adelphia subscribers, any disgruntled cable customer can take advantage of this offer."

In addition to authorized retail stores, new customers may also purchase DIRECTV Systems through DIRECTV by calling 1-800-990-2333. To support the special offer, DIRECTV has launched an advertising campaign that includes local radio and newspaper buys.

The TOTAL CHOICE Plus With Local Channels package offers customers more than 150 channels, including all Los Angeles local channels, for $39.99 per month.

Adelphia local cable systems serve communities such as Los Angeles, Beverly Hills, Santa Monica, Redondo Beach, Anaheim, Chino, Diamond Bar, Moreno Valley, Sherman Oaks and Moorpark.

DIRECTV recently received the highest score for customer satisfaction among satellite and cable TV companies rated by the American Customer Satisfaction Index in the first quarter of 2002.

DIRECTV is the nation's leading digital satellite television service provider with more than 10.5 million customers. DIRECTV, TOTAL CHOICE and the Cyclone Design logo are trademarks of DIRECTV, Inc., a unit of Hughes Electronics Corp. HUGHES is the world's leading provider of digital television entertainment, broadband services, satellite-based private business networks, and global video and data broadcasting. The earnings of HUGHES, a unit of General Motors Corporation, are used to calculate the earnings attributable to the General Motors Class H common stock (NYSE:GMH - News). For more information, visit www.DIRECTV.com.

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More Quotes and News: Hughes Electronics Corp (NYSE:GMH - News)
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EXHIBIT B