

EX PARTE OR LATE FILED



1299 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004-2402
PHONE 202.783.0800
FAX 202.383.6610
A LIMITED LIABILITY PARTNERSHIP

JAMES W. OLSON
PARTNER
202.383.7246
olsonj@howrey.com

September 11, 2002

VIA HAND DELIVERY

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

RECEIVED

SEP 11 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REDACTED FOR PUBLIC FILE

Re: Ex Parte Analysis of Echostar and DIRECTV Confidential Documents (Redacted), CS Docket No. 01-348

Dear Ms. Dortch:

The National Association of Broadcasters submits an original and one copy of the attached *Ex Parte* Analysis of Echostar and DIRECTV Confidential Documents (Redacted) to CS Docket No. 01-348. This redacted analysis may be placed in the Commission's files and made available for public inspection.

The unredacted version, containing information provided by the Applicants and designated as Confidential or Highly Confidential under the Media Bureau's Protective Orders in this proceeding, is also being provided under separate cover to the Commission and the Applicants according to the terms of those Orders.

Please feel free to contact me if you have any further questions or require any additional information.

Sincerely,

James W. Olson

Counsel to the National Association of Broadcasters

cc: Gary M. Epstein
Pantelis Michalopoulos
W. Kenneth Ferree
James Bird
Barbara Esbin
Marcia Glauberman

Julius Knapp
JoAnn Lucanik
Royce Dickens Sherrod
Douglas W. Webbink
Simon Wilkie
Qualex, Inc.

No. of Copies rec'd 011
List ABCDE

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

SEP 11 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of

ECHOSTAR COMMUNICATIONS CORPORATION,
GENERAL MOTORS CORPORATION,
HUGHES ELECTRONICS CORPORATION,

Transferors,
and

ECHOSTAR COMMUNICATIONS CORPORATION,

Transferee,

For Authority to Transfer Control.

CS DOCKET No. 01-348

To: The Commission

**EX PARTE ANALYSIS OF ECHOSTAR AND DIRECTV
CONFIDENTIAL DOCUMENTS (Redacted)**

Edward P. Henneberry
James W. Olson
Dylan M. Carson
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 783-0800

*Counsel for National Association of
Broadcasters*

Date: September 11, 2002

SUMMARY

The proposed merger of EchoStar and DIRECTV, Inc. (the “Applicants”) is anticompetitive on its face. For many millions of consumers, particularly in rural areas, it would be a merger to monopoly, eliminating all competition in local Multichannel Video Programming Distribution (“MVPD”) markets. In most of the rest of the country it would, at best, reduce the number of MVPD competitors from three to two. The consumer welfare loss resulting from the merger would be \$3 billion over five years.

In an unsuccessful attempt to overcome these stark anticompetitive realities, the Applicants make several unpersuasive arguments:

First, they claim that they barely compete with one another and that cable and even antenna service are closer substitutes for one DBS provider than is the other DBS company.

Second, they claim that cable passes all but an insignificant percentage of the U.S. population.

Third, they argue that there is a single, national MVPD market within which they currently charge a uniform price and will continue to do so post-merger.

Unfortunately for the Applicants, their own documents are not consistent with these implausible claims. EchoStar and DIRECTV are close and obsessive rivals, tracking and responding to every competitive tactic attempted by the other. In particular, the evidence shows that the prices charged by one DBS carrier respond to and are constrained by prices charged by the other DBS carrier both on a national level and in local markets.

The documents also make it clear that many millions of EchoStar and DIRECTV’s own subscribers (as well as millions of other consumers) live in local markets without access to cable. For these Americans, this would be a merger to monopoly.

Most specious of the Applicants’ claims are those relating to the “national” market. As the documents make clear, and in conformity with economic and antitrust precedent, MVPD

consists of a series of local markets. Within those local markets, EchoStar and DIRECTV compete fiercely against one another and, to a lesser extent, with cable operators. The

REDACTED

Thus, both the claims of a single national market and of a uniform national price lack any credibility.

In addition, the documents show that a significant element of localized competition between EchoStar and DIRECTV consists of competition to offer carriage of local broadcast stations before the other DBS company does so. This evidence buttresses NAB's position that the best way to assure the spread of local-to-local is through the rivalry of the two DBS companies rather than the alleged "promise" of a would-be DBS monopolist.

Because the key factually-based arguments of the Applicants are contradicted by their own documents, their justifications for this anticompetitive merger disappear. The Applicants are left advocating a two-to-one merger in much of the country and what is, at best, a three-to-two merger in the rest of the country. Such a merger fails both public interest and antitrust tests. Therefore, EchoStar and DIRECTV's transfer of control application should be denied by the Commission.

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	CONTRARY TO THE APPLICANTS’ RHETORIC, THEY COMPETE INTENSIVELY AGAINST ONE ANOTHER.	4
A.	The Applicants’ Unpersuasive Attempt to Minimize Their Competition.....	4
B.	EchoStar and DIRECTV are Close and Obsessive Rivals	5
1.	DIRECTV Saw EchoStar not Cable as its Key Rival From the Start	5
2.	EchoStar Focuses on DIRECTV	11
3.	Further Representative Examples of Competition Between EchoStar and DIRECTV	13
III.	FOR MILLIONS OF CONSUMERS WITHOUT ACCESS TO CABLE THIS WOULD BE A MERGER TO MONOPOLY	16
IV.	THE APPLICANTS’ CLAIM OF A NATIONAL MARKET IS NOT CREDIBLE NOR IS THEIR PROMISE OF A UNIFORM NATIONAL PRICE	19
A.	What The Applicants Claim: A National Market.....	19
B.	What The Applicants’ Documents Show: Local MVPD Markets	21
1.	The Applicants Have the Capability to Target Local Markets	21
2.	Both DIRECTV and EchoStar Increasingly Are Targeting Local Markets.....	21
V.	LOCAL-TO-LOCAL CARRIAGE IS OF VITAL IMPORTANCE TO BOTH DBS COMPANIES AND IS A KEY ELEMENT OF THEIR RIVALRY	27
A.	EchoStar’s Push for Local-to-Local and DIRECTV’s Need to Respond.....	28
B.	The Economic Benefits to the DBS Companies of Local-to-Local Carriage.....	29
C.	Competition for Local-to-Local Carriage Is a Key Ingredient in the Existing DIRECTV-EchoStar Rivalry	30
VI.	CONCLUSION	32

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

<hr/>)	
<i>In re Application of</i>)	
)	
ECHOSTAR COMMUNICATIONS CORPORATION,)	
GENERAL MOTORS CORPORATION,)	
HUGHES ELECTRONICS CORPORATION,)	
)	
Transferors,)	CS DOCKET NO. 01-348
and)	
)	
ECHOSTAR COMMUNICATIONS CORPORATION,)	
)	
Transferee,)	
)	
For Authority to Transfer Control.)	
<hr/>)	

To: The Commission

**EX PARTE ANALYSIS OF ECHOSTAR AND DIRECTV
CONFIDENTIAL DOCUMENTS (Redacted)**

The National Association of Broadcasters (“NAB”), by its attorneys, hereby submits this Ex Parte Analysis of the Confidential and Highly Confidential documents submitted to the Commission by EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (collectively, the “Applicants”) in connection with their Application for Authority to Transfer Control.¹

¹ Consolidated Application of EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp., Transferors; and EchoStar Communications Corp., Transferee, For Authority to Transfer Control, CS Docket No. 01-348 (filed Dec. 3, 2001) (“Application”).

I. INTRODUCTION

The proposed merger of EchoStar and DIRECTV, Inc. (the “Applicants”) is anticompetitive on its face. For many millions of consumers, particularly in rural areas, it would be a merger to monopoly, eliminating all competition in local Multichannel Video Programming Distribution (“MVPD”) markets. In most of the rest of the country it would, at best, reduce the number of MVPD competitors from three to two. The total consumer welfare loss resulting from the merger would be approximately \$3 billion over the next five years.² Mergers that would so concentrate markets and cause such a level of consumer welfare loss are routinely challenged by antitrust authorities and condemned by courts. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

To counter the overwhelming antitrust and public interest precedent prohibiting mergers such as the one EchoStar and DIRECTV propose, the Applicants make arguments based on several key factual assertions:

First, they claim that each of them competes intensively against cable but that they barely compete with one another. Thus, they hope to overcome the strong presumption against two-to-one and three-to-two mergers by arguing that there really is no diminution of competition or that it is so slight as to be insignificant.

Second, and related to the first point, the Applicants claim that virtually every household in the U.S. is passed by cable, so that there is no merger to monopoly for any significant number of people.

² See Petition to Deny of National Association of Broadcasters, Declaration of J. Gregory Sidak ¶¶ 49-51 CS Docket No. (filed Feb. 4, 2002).

Third, presumably because they realize the second argument is unsupportable, the Applicants argue that the appropriate geographic market within which to evaluate the merger is national and promise a uniform national pricing plan. As a necessary element of this argument, the Applicants argue that such a national pricing plan cannot be eroded by localized discounts and other localized promotional activity. In fact, they claim that today their advertising and other promotional activity is done on a national basis with trivial exceptions.

Both the Applicants' pleadings and the declarations of their economic experts make these arguments time and again. This is not surprising because if these factual assertions are wrong, the merger cannot be justified. Unfortunately for EchoStar and DIRECTV, however, the documents they finally supplied in response to the Commission's information request³ flatly contradict each of these arguments. The reality is that EchoStar and DIRECTV monitor each

REDACTED

making any promise of national pricing illusory. Because their own documents contradict claims which are essential to their arguments that the merger is not anticompetitive, the Applicants' case for the merger collapses.

The Applicants' documents also support NAB's previous explanation that local-to-local service is of vital economic importance to each DBS company and is a key aspect of the rivalry between the two. Therefore, the documents reinforce NAB's argument that one can best

³ Initial Information and Document Request, attached to February 4, 2002 letter from W. Kenneth Ferree to Pantelis Michalopoulos and Gary M. Epstein ("Information Request"). All documents provided by the Applicants that are cited and quoted in this Ex Parte Analysis contain information deemed by the Applicants to be either Confidential or Highly Confidential under the Protective Orders adopted by the Media Bureau in this Proceeding.

rely on competition between the rival DBS companies to extend local-to-local service, rather than on a “promise” from a monopoly DBS provider, particularly given that the acquiring party, EchoStar, has already tried to wriggle out of the “promise”⁴ and has been chastised by the Commission for its “disingenuous” behavior and lack of candor.”⁵

II. CONTRARY TO THE APPLICANTS’ RHETORIC, THEY COMPETE INTENSIVELY AGAINST ONE ANOTHER.

A. The Applicants’ Unpersuasive Attempt to Minimize Their Competition

The Applicants claim that they “compete primarily against cable operators”⁶ and, while conceding that they compete against one another, “this competition is dwarfed in comparison to DBS competition with cable.”⁷ At their July 2, 2002 *ex parte* presentation, the Applicants’ economic experts, Drs. Willig and Joskow claimed that the “principal source of competition for Hughes and EchoStar are cable providers, not each other.”⁸ Earlier, Dr. Willig had written that “DBS pricing decisions appear to be driven by competition with cable companies”, relying on the assertions of EchoStar and DIRECTV executives, that while they did “monitor” the pricing of the other firm “such pricing plays little (if any) role in their own pricing decisions.”⁹ Dr. Willig also discounted as “flawed” the evidence presented by the National Rural Telecommunications Cooperative (“NRTC”) and NAB that EchoStar and DIRECTV compete vigorously, concluding

⁴ Satellite Broadcasting and Communications Ass’n *et al.*, Petition for Writ of Certiorari, at 8 n.2 (filed Mar. 7, 2002), *Satellite Broadcasting and Communications Ass’n v. FCC*, 122 S. Ct. 2588 (2002).

⁵ *In re National Association of Broadcasters and Association of Local Television Stations*, DA 02-765, CSR-5865-X, at 19 n.116 (Media Bureau Apr. 4, 2002).

⁶ Opposition to Petitions to Deny and Reply Comments of General Motors Corp., Hughes Electronics Corp. & EchoStar Communications Corp., CS Docket No. 01-348, at 33 (filed Feb. 25, 2002) (“Opposition”).

⁷ *Id.* at 38. See also Declaration of Dr. Robert D. Willig attached to Opposition at 5.

⁸ Ex parte letter of EchoStar Communications Corp., General Motors Corp. & Hughes Electronics Corp. to Marlene H. Dortch, CS Docket No. 01-348, at 2 (July 3, 2002).

⁹ Application, Declaration of Dr. Robert D. Willig at 6 & n.5.

not only that “DBS’ primary competitor is cable”, but that the data suggest that broadcast television received via antenna is a closer substitute for DIRECTV than is EchoStar.¹⁰

As discussed below, these arguments are not supported by the record.

B. EchoStar and DIRECTV are Close and Obsessive Rivals

As common sense would suggest, the Applicants’ confidential business documents demonstrate in great detail that the two DBS rivals intensively monitor every aspect of each other’s business and constantly attempt to counter strategies implemented by the other, including

REDACTED

documentary evidence of intense head-to-head competition is simply overwhelming.

1. DIRECTV Saw EchoStar not Cable as its Key Rival From the Start

Throughout the period covered by the Commission’s Information Request, DIRECTV and EchoStar’s documents show that they scrutinized each other’s businesses at a level of depth far beyond that which they accorded to the cable industry, which the Applicants would have the Commission believe is their “primary competitor.”

REDACTED

¹⁰ Opposition, Declaration of Dr. Robert Willig at 39-40, 48.

REDACTED

However, the two DBS companies do much more than examine each other's behavior.

REDACTED

In addition, EchoStar and DIRECTV attempt to match each competitive thrust made by the other with a parry of their own.

DIRECTV's documents, for example,

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

Instead of competing with EchoStar for leadership of the DBS industry, DIRECTV apparently decided that it would be easier to merge.

2. EchoStar Focuses on DIRECTV

For its part, EchoStar focuses heavily on DIRECTV. In fact, EchoStar's focus on DIRECTV led it to file an antitrust suit alleging monopolization by DIRECTV of the DBS industry due to DIRECTV's alleged exclusionary distribution practices.⁴⁰ This focus also is demonstrated by an

REDACTED

⁴⁰ *EchoStar Communications Corp. v. DIRECTV Entertainment Corp.*, No. 00-K-212 (D. Colo. 2000).

REDACTED

REDACTED

REDACTED

**3. Further Representative Examples of Competition
Between EchoStar and DIRECTV**

One must read through all of the Applicants' documents to get the full flavor of how intensely they track and react to one another. Below we briefly describe a limited number of additional documents of this type.

REDACTED

REDACTED

REDACTED

REDACTED – VERSION FOR PUBLIC FILE

REDACTED

•

REDACTED

•

**III. FOR MILLIONS OF CONSUMERS WITHOUT ACCESS TO
CABLE THIS WOULD BE A MERGER TO MONOPOLY**

In their Application, EchoStar and DIRECTV claimed that “over 96 percent” of television households were passed by cable.⁶⁴ When NRTC pointed out the implausibility of this figure,⁶⁵

REDACTED

⁶⁴ Application at 39-40.

the Applicants attempted to discredit the NRTC’s analysis and dismissed it as a “red herring that is not decisionally significant.”⁶⁶

Contrary to the DBS companies’ attempts to minimize the number of homes not passed

REDACTED

⁶⁵ Petition to Deny by The National Rural Telecommunications Cooperative at 6-16, CS Docket No. 01-348 (filed Feb. 4, 2002).

⁶⁶ Opposition at 60-66.

REDACTED

DIRECTV itself reported to the Commission in 2001 that 29% of its subscribers did not have cable access.⁷¹

The picture that emerges is clear. While, over time, as they have grown into a stronger competitive force, the two DBS companies have increased the number of new subscribers they obtain from cabled areas a very large proportion of their subscribers by their own count (29% for DIRECTV; **REDACTED** for EchoStar) are not passed by cable. In fact, a study submitted to the Commission as part of an EchoStar and DIRECTV ex parte filing reports that only 64% of DBS households have cable access and that for the U.S. as a whole the figure is 87%.⁷² Thus, the “over 96 percent” figure originally cited by the Applicants is wrong by their own admission. The correct number may well be as low as the 81% cited by the National Telecommunications and Information Administration and Rural Utilities Service.⁷³ Further, approximately 15 million of those with cable access are passed by antiquated analog cable systems that are likely to go extinct in the next few years.⁷⁴ Overall, one can assume conservatively that more than 20 million households⁷⁵ will ultimately be subject to an MVPD monopoly if this merger proceeds.

⁷¹ DIRECTV, Inc. Comments, *In The Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, at 13 (filed Aug. 23, 2001).

⁷² Taylor Research & Consulting Group, Inc. study attached to (May 3, 2002) Ex Parte Notice of EchoStar Communications Corp., General Motors Corp. & Hughes Electronics Corp., in CS Docket No. 01-348 (filed May 3, 2002).

⁷³ National Telecommunications & Information Administration, United States Department of Commerce & Rural Utilities Service, United States Department of Agriculture, *Advanced Telecommunications in Rural America: The Challenge of Bringing Broadband Service to All Americans*, at 19 & n.62 (Apr. 2000).

⁷⁴ See NAB Comments, *In The Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, at 7-8 & n.28 (filed Aug. 30, 2002).

⁷⁵ *Id.*

IV. THE APPLICANTS' CLAIM OF A NATIONAL MARKET IS NOT CREDIBLE NOR IS THEIR PROMISE OF A UNIFORM NATIONAL PRICE

A. What The Applicants Claim: A National Market

The Applicants make the truly audacious claim that the relevant geographic market is national:

Since each firm prices nationally – and New EchoStar has committed to continue that practice – the appropriate geographical market is national.⁷⁶

Within the “national” market they find the concentration level to be so low as to be within the Merger Guidelines “safe harbor.”⁷⁷ However, the proposition that the MVPD market is national actually flies in the face of the Merger Guidelines, which define the boundary of a market as the smallest region in which a hypothetical monopolist could profitably impose a “small but significant and nontransitory” price increase.⁷⁸ In a previous matter involving a satellite MVPD, the Department of Justice explained that:

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.⁷⁹

⁷⁶ Ex Parte filing of EchoStar Communications Corp., Hughes Electronics Corp. & General Motors Corp., in CS Docket No. 01-348, at 17 (filed June 28, 2002).

⁷⁷ *Id.* at 18-19.

⁷⁸ Department of Justice & Federal Trade Commission, 1992 *Merger Guidelines* §1.21.

⁷⁹ Complaint ¶ 70, *United States v. Primestar, Inc.*, No. 1:98CV01193 (D.D.C. filed May 12, 1998).

The Applicants can only reach the conclusion that there is a single, national MVPD market if they assume that a cable company operating in Washington, D.C. is a viable alternative to one franchised in Los Angeles for Los Angeles consumers. This assumption is absurd on its face and, as shown below, is contradicted by the Applicants' own voluminous documents which analyze competition in local markets in minute detail.

REDACTED

Of course, the reason the Applicants wish to avoid admitting that MVPD markets are local is because if they do, they would have to admit that the HHI's in virtually all local markets would be in the highly concentrated category pre-merger and in many local markets would reach a perfectly concentrated 10,000 post-merger due to the elimination of all competition.⁸¹

⁸⁰ See *Merger Guidelines* § 1.22.

⁸¹ A market with an HHI over 1800 is considered to be "highly concentrated." Where a merger in such a market increases the HHI by over 100 points, as this merger would in virtually all local markets "it will be presumed" that the merger is "likely to create or enhance market power or facilitate its exercise." *Merger Guidelines* § 1.51.

B. What The Applicants' Documents Show: Local MVPD Markets

1. The Applicants Have the Capability to Target Local Markets

There is no question but that both DIRECTV and EchoStar are capable of targeting virtually any segment of the population they choose.

REDACTED

2. Both DIRECTV and EchoStar Increasingly Are Targeting Local Markets

While the Applicants have only produced for inspection a limited number of marketing documents, it seems clear not only that they target local markets, but that they do so increasingly.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

What one can be certain of is that if it makes economic sense for a DBS monopolist to charge more where it faces no competition than it charges where it faces at least one competitor, it will find a way to do so, as certainly as water seeks its own level. For the Commission or any other governmental body to try to enforce a national pricing promise would be not only totally unworkable but also a regulatory disaster – particularly given that it would be trying to enforce a national price on EchoStar, a company that has violated even clear Commission rules with impunity.

V. LOCAL-TO-LOCAL CARRIAGE IS OF VITAL IMPORTANCE TO BOTH DBS COMPANIES AND IS A KEY ELEMENT OF THEIR RIVALRY

In earlier filings, NAB provided evidence that carriage of local stations by DIRECTV and EchoStar was more likely to be advanced by the competitive rivalry of the two DBS companies than by a merged DBS monopolist, whatever the promises it might make to get its merger approved.

The EchoStar and DIRECTV documents supplied to the Commission support NAB's reliance on competition as the best assurance of the carriage of local stations by satellite. Such carriage had its inception in EchoStar's drive to overcome its underdog status as the second DBS provider; the spread of local carriage since the passage of SHVIA has been due to the rivalry between the two, in addition to the economic benefit each obtains from carrying the local stations in a market.

REDACTED

REDACTED

B. The Economic Benefits to the DBS Companies of Local-to-Local Carriage

The drive of each DBS company to be the first to carry local stations in a market arises from the economic benefits to be gained from such carriage: increased subscribership or “lift” in a locality whose local channels they carry; additional revenues from those subscribers who take the local channels; and decreased churn.

REDACTED

REDACTED

industry's 40% growth in 2000 was primarily the result of SHVIA's passage¹²⁵ and local carriage has continued to be a catalyst for DBS growth.

REDACTED

C. Competition for Local-to-Local Carriage Is a Key Ingredient in the Existing DIRECTV-EchoStar Rivalry

The desire to be first into a local market and to carry stations in more local markets than the other DBS company has accelerated the proliferation of local market carriage, as has the fear of not carrying local stations in a market where the other DBS company does so, as DIRECTV and EchoStar's documents show.

REDACTED

¹²⁵ SBCA Comments, *In Re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 11-132 (filed July 2000).

REDACTED

REDACTED

REDACTED

It is this rivalry among DBS competitors, combined with the economic gain they obtain from local carriage, both demonstrated by their own documents, that is the best assurance that satellite carriage of local broadcast stations will continue to spread. Such market-based incentives are much more to be trusted than the dubious promises of a would-be monopolist.

VI. CONCLUSION

The Applicants realized from the start that under any standard antitrust or public interest analysis their merger would stand condemned. Therefore, they resorted to a series of implausible arguments to save their merger: (1) the competition between them is insignificant, in fact less than each faces from antenna service; (2) in any event, nearly all Americans are served by cable, so that even if the first argument fails, hardly anyone would be subject to a monopoly; (3) there is a single, national MVPD market, not a series of local markets; and (4) the Applicants charge a uniform national price now and their promise to do so in the future can be trusted.

However, an examination of the Applicants' own documents shows these claims to be without basis in fact. The two DBS companies react constantly to each other's competitive activity and constrain each other's pricing behavior, the most basic measure of competition. The degree of competition between EchoStar and DIRECTV is far greater than either has with cable (much less antenna). Many millions of their own customers without access to cable, as well as millions of other Americans, would be subject to a monopoly if this competition were lost.

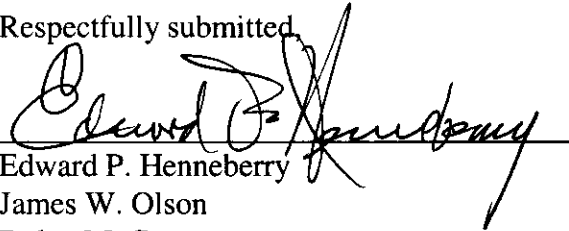
The Applicants' claim of a single, national MVPD market is the least credible of all. Not only does it run counter to all legal and economic precedent, but EchoStar and DIRECTV's documents are replete with discussions of local markets and local promotional activities,

REDACTED

including price discounts in all shapes and sizes. It is also the rivalry to gain subscribers in localized markets that will lead to the further spread of local-to-local carriage by the DBS companies.

An analysis of the Applicants' documents strips aside the layer of flimsy arguments they have put forth to hide the blunt reality that has been evident from the beginning: this is a merger to monopoly for millions of consumers and, at best, a merger to duopoly for nearly all other Americans. Its consummation would cause prices in MVPD markets across the country to rise and quality to decline. For these reasons, the Commission should deny the Application for Authority to Transfer Control.

Respectfully submitted,

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

Edward P. Henneberry

James W. Olson

Dylan M. Carson

HOWREY SIMON ARNOLD & WHITE, LLP

1299 Pennsylvania Avenue, N.W.


Washington, DC 20004

(202) 783-0800

September 11, 2002

CERTIFICATE OF SERVICE

I, Dylan M. Carson, do hereby certify that on the 11th day of September, 2002, I caused true and correct copies of the foregoing Ex Parte Analysis of EchoStar and DIRECTV Confidential Documents (Redacted) to be served by hand upon the parties on the attached service list.


Dylan M. Carson

SERVICE LIST

W. Kenneth Ferree
Media Bureau
445 Twelfth Street, SW
Room 4-A737
Washington, DC 20554

Julias Knapp
Engineering and Technology
445 Twelfth Street, SW
Room 7-B133
Washington, DC 20554

JoAnn Lucanik
International Bureau
445 Twelfth Street, SW
Room 6-C416
Washington, DC 20554

James Bird
Office of General Counsel
445 Twelfth Street, SW
Room 8-C824 Washington, DC 20554

Marcia Glauberman
Media Bureau
445 Twelfth Street, SW
Room 3-A738
Washington, DC 20554

Barbara Esbin
Media Bureau
445 Twelfth Street, SW
Room 3-C458
Washington, DC 20554

Douglas Webbink
International Bureau
445 Twelfth Street, SW
Room 6-C730
Washington, DC 20554

Royce Sherlock
Media Bureau
445 Twelfth Street, SW
Room 3-A729
Washington, DC 20554

Simon Wilkie
Office of Plans and Policy
445 Twelfth Street, SW
Room 7-C452
Washington, DC 20554

Pantelis Michalopoulos
Steptoe & Johnson
1330 Connecticut Avenue, NW
Washington, DC 20036

Gary M. Epstein
Latham & Watkins
555 11th Street, NW
Washington, DC 20004

Qualex International, Portals II
445 Twelfth Street, SW
Room CY-B402
Washington, DC 20554