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September 11, 2002

VIA HAND DELIVERY

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

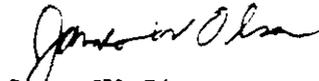
Dear Ms. Dortch:

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  
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**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

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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.

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

_____	)	
<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.	)	
_____	)	

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.<sup>1</sup>

<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>2</sup> *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 request<sup>3</sup> flatly contradict each of these arguments. The reality is that EchoStar and DIRECTV monitor each

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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

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<sup>3</sup> 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”<sup>4</sup> and has been chastised by the Commission for its “disingenuous’ behavior and lack of candor.”<sup>5</sup>

**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”<sup>6</sup> and, while conceding that they compete against one another, “this competition is dwarfed in comparison to DBS competition with cable.”<sup>7</sup> 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.”<sup>8</sup> 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.”<sup>9</sup> 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

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<sup>4</sup> *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).

<sup>5</sup> *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).

<sup>6</sup> 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”).

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

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

<sup>9</sup> 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.<sup>10</sup>

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

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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.”

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<sup>10</sup> Opposition, Declaration of Dr. Robert Willig at 39-40, 48.

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

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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,

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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.<sup>40</sup> This focus also is demonstrated by an

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

**REDACTED**

**REDACTED**

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**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.

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