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October 8, 2002

Via Electronic Filing

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
The Portals  
455 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

W. Kenneth Ferree  
Bureau Chief  
Media Bureau  
Federal Communications Commission  
The Portals  
455 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Jack Richards**  
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**Re: Notice of Ex Parte Presentation  
Application of EchoStar Communications Corporation,  
General Motors Corporation and Hughes Electronics Corporation,  
Transferor; and EchoStar Communications Corporation, Transferee,  
For Authority to Transfer Control;  
CS Docket No. 01-348**

Dear Mr. Chairman and Mr. Ferree:

On behalf of our client, the National Rural Telecommunications Cooperative (NRTC), this letter is in opposition to the Ex Parte Notice submitted by EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation (the Applicants) on October 7, 2002 (*Deferral Request*).<sup>1</sup> In their *Deferral Request*, the Applicants urge the Commission to subordinate its review of the proposed Merger to the one being conducted

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<sup>1</sup> Letter to Michael K. Powell, Commissioner, Federal Communications Commission, and W. Kenneth Ferree, Bureau Chief, Media Bureau, Federal Communications Commission, from Pantelis Michalopoulos, Philip L. Malet, Marc A. Paul, Counsel for EchoStar Communications Corporation and Gary Epstein, James H. Barker, Counsel for Hughes Electronics Corporation and General Motors Corporation (dated October 7, 2002) (*Deferral Request*).

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independently by the Department of Justice (DOJ). According to the Applicants, the Commission should defer issuing a decision until after they present a secret, eleventh-hour set of major revisions to the DOJ. In addition, they request an untimely and unnecessary *en banc* hearing or public forum so that the “merits” of the proposed Merger can be further debated.<sup>2</sup>

From the moment the Applicants’ announced their proposed Merger almost one year ago, the public has actively responded by providing detailed legal, technical and economic analyses of the proposed transaction. Overwhelmingly, parties representing broad segments of America sounded the common theme that the proposed Merger would be contrary to the public interest and illegal under the antitrust laws.<sup>3</sup> Virtually all agreed with NRTC that the proposed Merger would create an unacceptable monopoly in rural America, resulting in fewer if any choices in providers, higher prices and lower quality video programming and broadband services.<sup>4</sup> The Commission and the DOJ also have intensely scrutinized the proposed Merger and the numerous submissions by others during the past year.

Now, as a basis for their extraordinary request for deferral and delay, the Applicants claim that they are considering a brand new -- albeit secret -- plan that they will unveil to DOJ on or about October 28.<sup>5</sup> The Applicants do not indicate, however, that DOJ asked for or has any interest in their plan.

The Applicants claim that their *Deferral Request* is motivated by their desire to discuss the “possibility” of “major revisions” to their proposed Merger.<sup>6</sup> Instead, it is likely a desperate reaction to news from the Chairman that a decision by the Commission is “days away.”<sup>7</sup>

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<sup>2</sup> *Deferral Request*, p. 3.

<sup>3</sup> Parties weighing in on the Merger at the Commission represented broad segments of the public and the communications industry -- broadcasters, satellite companies, consumer groups, unions and individuals throughout the country. By the Commission’s February 4, 2002 comment date, Petitions to Deny the Merger Application were filed by NRTC, the National Association of Broadcasters, Pegasus Communications Corporation, the American Cable Association, Paxson Communications, Univision Communications Inc., Carolina Christian TV, Inc. and LeSea Broadcasting Corporation, Johnson Broadcasting, Inc., the Word Network, the Communications Workers of America, Eagle III Broadcasting, LLC, Family Stations, Inc., Northpoint Technology, Ltd., the American Cable Association, and the National Consumers League, National Farmers Union and National Grange. In addition, Comments opposing the merger were filed by the National Rural Electric Cooperative Association, Primetime 24 Joint Venture, Pappas Telecasting Companies, the American Antitrust Institute and more than 40 others.

<sup>4</sup> 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, p. 2, nn. 5, 6 (filed February 25, 2002).

<sup>5</sup> *Deferral Request*, p. 1.

<sup>6</sup> *Id.* Notably, the Applicants still have not disclosed their “major revisions.”

<sup>7</sup> *F.C.C. Says EchoStar-DirecTV Vote Is Near*, N.Y. Times, C-2, October 5, 2002.

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Thanks in large part to delay by the Applicants,<sup>8</sup> the Commission and the public have spent almost one year reviewing, commenting on and analyzing the proposed Merger. The Commission is now poised to render its decision, after lawyers, economists, engineers and staff have spent numerous hours scrutinizing reams of documents. The suggestion at this late date that the Commission should now wait for DOJ to conclude its separate investigation is an affront to the Commission personnel who have made a Herculean effort to resolve this proceeding in a timely fashion.

The Applicants' proposed Merger should be judged on the merits as they exist today, not on the basis of some unrevealed, last minute proposal. At a minimum, any "major revision" of the proposed Merger would amount to a major modification of a pending application and must be treated as such, including the initiation of new Public Notice and Comment periods.<sup>2</sup>

Rather than delay the proceeding further at this late date, the Commission should render its decision on the facts before it and reject the proposed Merger. If they wish, the Applicants may submit any "major revisions" in a new application.

**The Commission and the DOJ  
Are Conducting Entirely Separate Reviews.**

Despite the Applicants' claims to the contrary, there is no legitimate reason for the Commission and the DOJ to act in unison regarding the Applicants' proposed Merger. Their independent analyses are dictated by separate statutory authorities focusing on different legal standards and concerns. While the DOJ's determination rests on whether the Merger is illegal under the antitrust laws, the Commission's determination -- which apparently is almost complete -- is more broadly focused on whether the Merger is in the public interest under the Communications Act.

By urging the Commission to "consider any actions taken on the merger by the DOJ,"<sup>10</sup> the Applicants essentially ask the agencies to coordinate their two separate proceedings into one synchronized regulatory review, with the FCC falling lock-step behind DOJ. How fitting

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<sup>8</sup> Letter to Pantelis Michalopoulos, Counsel for EchoStar Communications Corporation and Gary Epstein, Counsel for Hughes Electronics Corporation and General Motors Corporation, from W. Kenneth Ferree, Bureau Chief, Media Bureau, Federal Communications Commission (dated March 7, 2002).

<sup>2</sup> § 47 C.F.R. 25.116. This rule section states that major modifications to pending applications are subject to public notice requirements.

<sup>10</sup> *Deferral Request*, p. 1.

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(considering the Applicants' long line of "flip flops" in this proceeding<sup>11</sup>) that just over one month ago the Applicants took the exact opposite stance in this same proceeding.

In a letter to the head of the Merger Review Team opposing NRTC's request to discuss already-disclosed Confidential and Highly Confidential information with the DOJ, the Applicants insisted that the Commission and the DOJ reviews are separate, unrelated proceedings. The Applicants asserted -- and the Commission subsequently agreed -- that "the Commission's review of the application here is a distinct 'agency proceeding' under the Administrative Procedures Act, whereas DOJ's review is an entirely different process subject to its own unique statutory procedures."<sup>12</sup> The Applicants went on to argue that "Commission review of mergers is separate and distinct from any HSR Act process," and any broader interpretation of these proceedings should be viewed as "expansive" and "absurd[]." <sup>13</sup>

Absurd indeed. Less than one week ago, the Commission agreed with the Applicants' analysis and determined that the DOJ's antitrust review and the Commission's public interest review are separate proceedings.<sup>14</sup> For this reason alone, there is no basis to approve the Applicants' desperate, eleventh hour reversal that the proceedings are essentially the same.

**The Time For The Applicants' Proposed  
En Banc Hearing Has Long Since Passed.**

The Applicants also seek an untimely *en banc* hearing in order to "aid in the Commission's final deliberations."<sup>15</sup> By all accounts, however, the Commission's deliberations are nearly complete. There is no need for a further public discussion of the Applicants' proposal.

In support of their untimely request, the Applicants point to a March 2000 Commission Memorandum (*Commission Memorandum*) and *en banc* hearings in other merger proceedings.<sup>16</sup> In fact, however, there is no support for the Applicants in the *Commission Memorandum* or any of these other proceedings. While the *Commission Memorandum* noted that *en banc* hearings

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<sup>11</sup> Ex Parte Reply to Opposition of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348, pp. 36-41 (filed April 4, 2002).

<sup>12</sup> Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Pantelis Michalopoulos, Counsel for EchoStar Communications Corporation and Gary Epstein, Counsel for Hughes Electronics Corporation and General Motors Corporation, p. 2 (dated August 22, 2002) (*Applicant DOJ Letter*) (citation omitted).

<sup>13</sup> *Applicant DOJ Letter*, p. 2.

<sup>14</sup> Letter to Jack Richards, Counsel for NRTC, from W. Kenneth Ferree, Chief, Media Bureau, Federal Communications Commission, p. 2 (dated October 2, 2002). As a result, NRTC was prevented from submitting to DOJ a Brief analyzing documents made available to the Commission under Protective Orders.

<sup>15</sup> *Deferral Request*, p. 3.

<sup>16</sup> *Id.*, pp. 2-3.

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“may” be held on applications associated with a complex transaction, it also recognized that “revisions during the review period inevitably cause delays and create a ‘moving target’ problem for the opponents.”<sup>17</sup> Elsewhere it states that “piecemeal revisions are inefficient and undermine the formal pleadings process.”<sup>18</sup>

Clearly, a “major revision” to the proposed Merger -- let alone piecemeal revisions -- would not only create a moving target at this late date, it would change the target altogether. So far, the Applicants have filed more than 77 pleadings.<sup>19</sup> NRTC alone has filed 37 pleadings.<sup>20</sup> Other parties also have commented extensively on the proposed Merger. All of the detailed legal, economic and other analyses conducted to date by the Commission and interested parties would need to be “scrapped” and re-focused on an entirely new proposal if the Applicants’ requested “major revisions” (whatever they may be) are permitted at this point.

While *en banc* hearings have been utilized in other merger proceedings, they were held near the conclusion of the comment period -- not days before a decision was to be rendered. For example, the America Online, Inc. and Time Warner Inc. *en banc* hearing was announced exactly 90 days after both applications were placed on public notice.<sup>21</sup> Even more noteworthy, the MCI WorldCom, Inc. and Sprint Corporation *en banc* hearing was announced just seven days after the formal comment period had closed.<sup>22</sup>

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<sup>17</sup> Issues Memorandum for March 1, 2000 Transactions Team Public Forum on Streamlining FCC Review of Applications Relating to Mergers, <<http://www.fcc.gov/transaction/issuesmemo.html>> (visited October 8, 2002) (*Commission Memorandum*).

<sup>18</sup> *Id.*

<sup>19</sup> The Applicants also filed -- and the Commission, NRTC and others reviewed -- tens of thousands of pages of Confidential and Highly Confidential documents.

<sup>20</sup> See Electronic Comment and Filing System web site, Search For Filed Comments <[http://gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi)> visited October 8, 2002 (*ECFS*). A search of *ECFS* under the Commission’s Merger docket (01-348) with search criteria for “EchoStar” and “National Rural Telecommunications Cooperative” produced the foregoing results.

<sup>21</sup> The Commission released its public notice regarding the America Online, Inc. and Time Warner Inc. application on March 27, 2000. See Public Notice, *America Online, Inc. And Time Warner Inc. Seek FCC Consent For A Proposed Transfer Of Control CS Docket No. 00-30*, DA 00-689 (released March 27, 2000). The public notice for the subsequent *en banc* hearing was released on June 27, 2000. See Public Notice, *Commission To Hold En Banc Hearing On America Online, Inc. And Time Warner, Inc. Applications For Transfer Of Control CS Docket No. 00-30*, DA 00-1432 (released June 27, 2000).

<sup>22</sup> The Commission’s public notice regarding the MCI WorldCom, Inc. and Sprint Corporation application established the conclusion to the comment period as March 20, 2000. See Public Notice, *Commission Seeks Comment on Joint Applications For Consent to Transfer Control Filed by MCI WorldCom, Inc. and Sprint Corporation*, DA 00-104 (released January 19, 2000). The notice for the subsequent *en banc* hearing was released on March 27, 2000. See Public Notice, *Common Carrier Bureau Announces Public Forum On MCI WorldCom, Inc. And Sprint Corporation, Applications For Transfer Of Control*, DA 00-672 (released March 27, 2000).

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The current proceeding, on the other hand, has been pending for almost a year. The Commission's review is nearly complete, and there is no benefit to be gained from further public hearings. The Commission apparently concluded long ago that the record was sufficient for decision without the necessity of an *en banc* hearing.

Although *en banc* hearings can possibly present an opportunity for "give and take among the Commission, the applicants, and other interested parties,"<sup>23</sup> their usefulness in the current proceeding has long since passed. With less than 30 days left on the Commission's Merger Review clock, the Applicants seek to forestall a Commission decision based on the mere "possibility of 'major revisions' to the transaction."<sup>24</sup> As of today, the Commission is on Day 155 of its self-imposed 180 day review period. The Applicants' self-serving offer to accept a "brief stoppage" of the Merger Review Clock should be rejected out-of-hand.<sup>25</sup> At this "penultimate stage" of the process,<sup>26</sup> the Applicants should not be permitted to derail the Commission's decision on the proposed Merger.

The Applicants have done a tremendous disservice to regulators -- and to the public -- by sticking so long with a plan that was unlawful and unpalatable as a matter of policy as soon as it was unveiled. Now, at the last minute, they boldly ask the Commission and the public to further delay this proceeding so that all may consider a new, alternate and as yet undefined plan.

The Commission should not be distracted from its goal of concluding this proceeding and ruling on the proposed Merger in a timely fashion. Nor should the Commission blithely "defer" to DOJ. A far better use of resources would be for the Commission to render its decision on the facts before it, reject the proposed Merger and allow the Applicants -- if they wish -- to submit any "major revisions" in a new application.

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<sup>23</sup> *Deferral Request*, p. 3, quoting *Commission Memorandum*.

<sup>24</sup> *Deferral Request*, p. 1.

<sup>25</sup> *Id.*, p.3.

<sup>26</sup> *Id.*

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Please feel free to contact the undersigned should you have any questions.

Sincerely,

/s/

Jack Richards  
Keller and Heckman LLP

/s/

Steven M. Ryan  
Manatt, Phelps & Phillips, LLP

cc: The Honorable Kathleen Q. Abernathy  
The Honorable Michael J. Copps  
The Honorable Kevin J. Martin  
Matthew Brill  
Stacy Robinson  
Jordan Goldstein  
Alexis Johns  
Daniel Gonzalez  
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