

October 9, 2002

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

Re: Ex Parte Notice – Consolidated Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation for Authority to Transfer Control, CS Docket No. 01-348

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. §1.1206, EchoStar Communications Corporation ("EchoStar"), Hughes Electronics Corporation and General Motors Corporation, Applicants in the above-referenced merger proceeding, submit this letter to report that representatives of the Applicants met with Stacy Robinson, Legal Advisor to Commissioner Abernathy, on October 8, 2002.

At the meeting, the Applicants discussed the degree of competition between EchoStar and DIRECTV. The Applicants have shown that each DBS company competes today with cable to a much greater extent than it does with the other DBS provider, as demonstrated by the very low percentage of departing subscribers who switch to the other DBS company.¹ In response, the merger opponents have relied primarily on selectively quoted, anecdotal evidence from internal documents to show that the Applicants compete against one another.² Ultimately,

¹ See Economists' Presentation to FCC Merger Task Force on Competitive Effects (July 2, 2002) at 7-16; see also Economists' Report on Further Analysis of the Diversion Ratio Between EchoStar and DIRECTV (September 13, 2002); Presentation to FCC Merger Task Force on Further Analysis of the Diversion Ratio Between EchoStar and DIRECTV (September 12, 2002).

² In fact, for each document produced by the Applicants that discusses the other DBS provider, there are *numerous* documents that discuss cable. In the case of EchoStar, a search of the EchoStar document universe submitted to the Department of Justice reveals that references to cable outnumber references to DIRECTV by nearly 5 to 1. Furthermore, even many of the documents cited by NAB and NRTC contain references to competition against cable as well as competition against the other DBS providers and make clear that each company considers cable as its major competitor. From these documents, however, the two merger opponents pick only the parts that suit their thesis and ignore the parts that do not. Cf. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (recalling Judge Harold Leventhal's characterization of reliance on legislative history, material that is similarly subject to selective citation, "as the equivalent of entering a crowded cocktail party and looking

however, the merger opponents are setting up a straw man. The Applicants have never disputed that they do compete with one another – otherwise the competitive inquiry in this proceeding would be at an end -- rather, the Applicants have shown that their primary competitor is cable.³

Precisely because the real question is *how much* the two companies compete, not *whether* they do so, anecdotal evidence based on internal documents carries little weight: an internal document showing that EchoStar competes with DIRECTV and vice versa shows only what the Applicants have already acknowledged and does not speak by itself to the degree of that competition compared to competition against cable. This shortcoming of anecdotal evidence has been recognized by the courts.⁴ Thus, ultimately, where the question is one of degree, the only dispositive proof is quantitative – the story told by the numbers.

over the heads of the guests for one's friends”). It would therefore be a clear mistake to do what NRTC and NAB suggest – rely on selectively chosen anecdotal evidence that presents a picture of competition as distorted as it is incomplete.

³ See, e.g., Opposition and Reply Comments at 38 (Applicants acknowledged that “[t]hey of course compete” with one another, but that “this competition is dwarfed in comparison to DBS competition with cable.”).

⁴ See *Wessman v. Gittens*, 160 F.3d 790, 805-06 (1st Cir. 1998) (“As a general matter, anecdotal evidence is problematic because it does not tend to show that a problem is pervasive. . . . Thus, even though anecdotal evidence may prove powerful when proffered in conjunction with admissions or valid statistical evidence, anecdotal evidence alone can establish institutional discrimination only in the most exceptional circumstances.”) (citations omitted); *Engineering Contractors Ass’n v. Metropolitan Dade County*, 122 F.3d 895, 925-26 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998) (“While such evidence can doubtless show the perception and, on occasion, the existence of discrimination, it needs statistical underpinnings or comparable proof to show that substantial amounts of business were actually lost to minority or female contractors as a result of the discrimination.”) *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994 (deeming anecdotal evidence as “supplementary”), *cert. denied*, 514 U.S. 1004 (1995); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990, 1003 (3d Cir. 1993) (anecdotal evidence, taken alone, would supply evidence as to degree of discrimination “only in the exceptional case, if at all”) (internal quotation marks omitted); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991) (anecdotal evidence alone “rarely, if ever, can . . . show a systematic pattern of discrimination necessary for the adoption of an affirmative action plan.”) (internal quotation marks omitted); *FTC v. Freeman Hospital*, 911 F. Supp. 1213, 1220 (W.D. Mo. 1995), *aff’d*, 69 F.3d 260 (8th Cir.); “[i]nformal, off-the-cuff remarks and anecdotal evidence concerning the marketplace are no substitute for solid economic analysis.”).

The quantitative evidence adduced by the Applicants in that respect has never been rebutted.⁵ It shows that the diversion rate between the two DBS companies is dwarfed by the diversion rate between each DBS provider and cable operators. These conclusions are based on an exhaustive and unassailable analysis of, among other things, the historical subscriber databases of the two companies undertaken by the Applicants' economic experts Drs. Joskow and Willig.⁶ The comparison of the two companies subscriber lists yields the most reliable answers to how many subscribers leaving one company turn up with the other.⁷ Not surprisingly, all of the anecdotal references to churn data in the documents produced by the Applicants are consistent with the economic experts' analyses or, indeed, show that the analyses are conservative. Nor is it true, as NRTC's expert economist claims, that the diversion rates between the two companies do not adequately account for new subscribers -- consumers who are not yet DBS subscribers.⁸ First, the decision profile of DBS subscribers considering an MVPD alternative is exactly the same as that of non-DBS subscribers considering an MVPD service. Second, the actual new subscriber data for the two companies for periods surrounding the few DBS price changes do not support Dr. MacAvoy's supposition.⁹

⁵ The merger opponents have primarily questioned the implications of the diversion data rather than the data themselves. *See, e.g.*, NRTC Ex Parte Comments, CS Docket No. 01-348 (Sept. 4, 2002) at 16-20.

⁶ *See* Economists' Report on Further Analysis of the Diversion Ratio Between EchoStar and DIRECTV (September 13, 2002).

⁷ Applicants' economic experts obtained similar results from a review of survey evidence, even though such data are less reliable since responses can be skewed upwards by inaccuracies, including the significant factor of piracy.

⁸ *See* NRTC Ex Parte Reply to Opposition, CS Docket No. 01-348 (April 4, 2002), Exh. 1 (Declaration of Paul W. MacAvoy) at 6-8.

⁹ If Dr. MacAvoy were correct, one would expect that a price increase by one DBS provider would be followed by a reduction in that DBS provider's new subscribers and an increase in new subscribers joining the other DBS company. The data, however, do not show this to be the case.

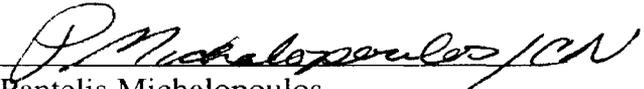
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One copy of this *ex parte* notice is being filed electronically with the Commission. If you have questions concerning this meeting or this notice, please do not hesitate to contact the undersigned.

Respectfully submitted,


Gary M. Epstein
James H. Barker
Latham & Watkins
555 11th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 637-2200

*Counsel for Hughes Electronics
Corporation and General Motors
Corporation*


Pantelis Michalopoulos
Philip L. Malet
Carlos M. Nalda
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6494

*Counsel for EchoStar Communications
Corporation*

cc: Stacy Robinson