

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of)
)
EchoStar Communications Corporation. (a Nevada)
Corporation), General Motors Corporation. and)
Hughes Electronics Corporation (Delaware)
Corporations))

CS Docket No. 01-348

(Transferors)

and)
)

EchoStar Communications Corporation (a)
Delaware Corporation))

D.

(Transferee)

To: Chief Administrative Law Judge Richard L. Sippel

**OPPOSITION TO REQUEST TO CERTIFY QUESTION
AS TO WHETHER A HEARING SHOULD BE HELD**

The Word Network (hereinafter ‘-Word’), by and through counsel and pursuant to Section 1.106 (a)(?) of the Commission’s Rules, 47 CFR § 1.106(a)(2), hereby files an Opposition to Request to Certify Question as to Whether a Hearing Should Be Held. In support, the following is shown:

1. By Hearing Designation Order, (FCC 02-284, released October 18, 2002) (hereinafter “HDO”), the Commission designated the above-captioned matter for hearing on the following issues:

Issue 1: Whether the proposed transaction is likely to cause anticompetitive harm. In reaching a determination on this issue, as outlined above, the following should be

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considered:

- (a) the product market (e.g., whether the relevant market is MVPD service, DBS service, or some other subset of MVPD service) (see paras. 106-116);
- (b) the geographic market (e.g., whether the proper geographic market is local; and whether, for purposes of analysis, the relevant geographic markets should be aggregated into three categories - markets not served by any cable system; markets served by low-capacity cable systems; markets served by high-capacity cable systems; and the relative number of households in each of these categories) and the number of subscribers per market (see paras. 117 - 125);
- (c) the market participants, market shares and concentration (see paras. 126 - 139);
- (d) the timeliness, likelihood, and sufficiency of entry to offset any potential adverse competitive effects that may result from the proposed transaction (see paras. 140 - 150);
- (e) the effects of the proposed transaction on price, quality and innovation (considering the likelihood of coordinated behavior among competing firms and the ability of the Applicants to unilaterally take anticompetitive actions) (see paras. 151 - 177);
- (f) the efficacy, potential harms, and potential benefits of Applicants' proposed national pricing plan (see paras. 178 - 187);
- (g) the proposed transaction's effect on the ability of multichannel video programmers to reach certain niche audiences (see paras. 248 - 256); and
- (h) any conditions proposed by the Applicants.

Issues 2: Whether the proposed transaction *is* likely to cause other public interest harms. **In** reaching a determination on this issue, the following should be considered:

- (a) the proposed transaction's effect on viewpoint diversity (see paras. 42 - 43, 49 - 51 and 55); and
- (b) the proposed transaction's effect on the Commission's spectrum policies (see paras. 83 - 96).

Issue 3: Whether the proposed transaction is likely to yield any public interest benefits. **In** reaching a determination on this issue, as outlined above, the following should be considered:

(a) whether the cost savings and other benefits claimed by Applicants are non-speculative, credible and transaction-specific and are likely to flow through to the public (*see* paras. 188 - 217); and

(b) whether the proposed transaction's impact on the provision of Internet access service via satellite is likely to be beneficial or harmful. (*see* paras. 218 - 247).

Issue 4: On balance, whether the public interest, convenience and necessity would be served by a grant of the above-captioned application and the joint application submitted by EchoStar and Hughes requesting authority to launch and operate NEW ECHOSTAR 1, a direct broadcast satellite that would be located at the 110° W.L. orbital location.

HDO, ¶ 289

2. On November 18, 2002, EchoStar Communications Corporation ("EchoStar") General Motors Corporation ("GM") and Hughes Electronics Corporation ("Hughes") (collectively the "Applicants") filed a Request to Certify Question As to Whether Hearing Should be Held pursuant to Section 1.106(a)(2) of the Commission's Rules, 47 CFR § 1.106(a)(2). The Applicants contend that the Presiding Judge should certify to the Commission the question as to whether a hearing should be held in this case based upon the Commission's policies, including its broadband promotion policy and its policy vis-a-vis merger synergies, as these policies are reflected in the Commission's recent approval of the AT&T/Comcast merger.¹

The Applicants also contend that the Commission misapplied its policy of promoting the interest of rural consumers. Consequently, according to the Applicants, based on the proper application of these policies and "undisputed facts," the need for a hearing is obviated, or at least there is *substantial* doubt *as* to whether a hearing should be held and, therefore, in their view, the merger

¹ See *In the Matter of Applicants for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, MB Docket No. 02-70, FCC 02-310 (rel. Nov. 14, 2002) (hereinafter "AT&T/Comcast Merger").

application should be granted without a hearing.

3. As an initial matter, pleadings challenging the validity of a Hearing Designation Order are generally unauthorized and are typically dismissed as such. *Family Broadcasting, Inc.*, 16 FCC Rcd 12,801 (2001); *James A. Kay*, 14 FCC Rcd 1291 (1998), *WWOR-TV, Inc.*, 6 FCC Rcd 4878, ¶ 3 (1991); and *Communications Satellite Corp.*, 49 FCC Rcd 221 ¶ 6 & n. 2 (1974). A limited exception to the general rule is provided by Section 1.106 (a)(2) pursuant to which a party may request the Presiding Judge to certify a question to the Commission "... whether, on policy in effect at the time of designation or adopted since designation, and undisputed facts, a hearing should be held." 47 CFR § 1.106(a)(2) In adopting this provision, the Commission set forth the following caveat:

However, we are not prepared to provide for reconsideration of any "question of policy." Access to the Commission prior to hearing should be limited to circumstances involving an apparent policy error or change and should not, ... encompass the presentation of arguments favoring a change in policy which would obviate the need for hearing,

In the Matter of Summary Decision Procedures, 34 FCC Rcd 485 ¶ 13 (1972)(emphasis supplied). "The Commission also stated:

While affording access to the Commission in a limited number of circumstances where a hearing may be wasteful, the procedure should limit access, as intended, to a small number of unusual cases.

*Id.*² Thus, in order to prevail, the Applicants must show that there has been an apparent policy error or a change in policy since the HDO and undisputed facts which would obviate the need for hearing. The Applicants have failed to meet this difficult burden and the request to certify should

² The Commission also observed that "The presiding officer does not make policy but rather implements policies made by the Commission. Nor is he authorized to terminate a hearing ordered by the Commission on the ground that it is not required by Commission policy." *Id.*

be denied.

5. First, the foundation upon which the Applicants' contentions rest is flawed. In contending that the Commission has treated their merger differently than the AT&T/Comcast merger, the Applicants have ignored the fact that these two transactions are vastly different. The AT&T/Comcast merger involved combining the nation's largest cable operator with the nation's third largest, serving, in combination, 28.9% of all MVPD subscribers in the country. *AT&T/Comcast Merger*, at ¶ 3. The instant merger involves concentrating ownership of all satellites in the full-CONUS orbital locations in one entity; the concentration of key DBS spectrum licenses in a single licensee. *HDO*, ¶ 3.

6. In addition. Applicants do not claim that new policy has been created in the subsequent AT&T/Comcast merger, but that existing policy has been misapplied. 'rhus, they argue that the Commission. while basing approval of the AT&T/Comcast merger primarily on the broadband benefits to be gained thereby, completely ignored the same benefits which would flow from the instant merger. The Applicants also contend that the Commission failed to recognize, as it did in the AT&T/Comcast case. that the synergies resulting from a merger are difficult to estimate and are fundamentally uncertain. They claim that the much higher, and impossible to meet standard,' imposed upon them in this proceeding is another example of an existing policy which has been misapplied. Again, this approach is flawed. As the Commission stated in both of these cases, after determining whether the proposed transactions comply with specific provisions of the Act. other applicable statutes, and the Commission's Rules, the

³ Request to Certify, pp. ii and iii. If this standard is impossible to meet, as the Applicants claim, there is presumably no genuine issue of fact for hearing and Summary Decision, pursuant to Section 1.251, should be granted on this matter adverse to the Applicants.

Commission must then engage in a balancing process that weighs the potential public interest harms of the proposed transactions against the potential public interest benefits.¹ This balancing process takes into account a number of factors and both of the factors cited by the Applicants, impact on broadband and merger synergies, were considered by the Commission.⁵ Moreover, isolating two factors out of many which are considered by the Commission in this balancing process, and claiming that more or less weight was given to them in another merger proceeding, does not demonstrate that the Commission committed an apparent policy error. Rather, the Applicants had the burden of convincing the Commission that no substantial and material questions of fact remained regarding the relative benefits and harms of the merger and they, at least initially, failed to meet this burden.

7. The final policy error which is claimed by the Applicants, involves the misapplication of the policy of promoting the interest of rural consumers. This purported error is not evidenced by the AT&T/Comcast merger, but according to Applicants, if this factor were properly weighed, it would tip the balance benefit/harm balance in favor of a grant. Again, the Commission's policy is to weigh many factors in making its public interest determination and this factor was not ignored. HDO, ¶ 78

8. Finally, even if it were determined that apparent policy errors were committed by the Commission regarding the above matters, the need for a hearing would not be obviated since substantial and material questions of fact remain. As noted above, the Applicants have limited their claim of policy errors to only a few of the factors to be considered by the Commission in its

¹ AT&T/Comcast Merger, at ¶ 26; HDO, at ¶ 25.

⁵ Impact on broadband, HDO, ¶¶ 218 - 247; merger synergies, HDO, ¶¶ 188-217.

balancing test. The matters relate to Issue 3. above, likely public interest benefits. Questions remain as to whether the proposed transaction is likely to cause anticompetitive harm (Issue 1, above) and whether the proposed transaction is likely to cause other public interest harms (Issue 2. above). The purported apparent errors of policy based upon undisputed facts do not address these other issues.

9. In conclusion, the Applicants have not met the difficult burden of showing that a hearing is obviated because of apparent errors of policy based upon undisputed facts and the Request to Certify should be denied

Respectfully submitted,
THE WORD NETWORK



By: /s/ **William D. Silva**

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CERTIFICATE OF SERVICE

I, William D. Silva, hereby certify that true and correct copies of the foregoing
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