COALITION OF BROADBAND USERS AND INNOVATORS

August 28, 2003

FILED ELECTRONICALLY

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

Re: CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 & 95-20;
GN Docket No. 00-185
***Ex Parte* Submission**

Dear Ms. Dortch:

In a recent meeting with the Media Bureau concerning the Commission's pending cable broadband proceeding, the staff indicated that one reason why it might not be necessary to adopt a safeguard ensuring that consumers have unfettered access to Internet content, applications, and services and the right to attach all nonharmful devices to the network in the broadband era, is because the market for the delivery of broadband services is competitive. That statement is demonstrably untrue, as the Commission stated just four months ago: **"[T]he typical broadband internet market is very highly concentrated."**[1] Because the Commission's own analysis demonstrates that the broadband services market is not competitive, and it would be arbitrary and capricious for the Commission now to assume otherwise, prompt action is needed to ensure unimpaired consumer access to the Internet.

During the Coalition of Broadband Users and Innovators' various meetings promoting unfettered consumer access, we have encountered a number of arguments as to why regulatory action is not needed because the broadband market is apparently working. This letter

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[1] *In re* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722, ¶ 123 (2003) (emphasis added) ("*ITFS/MDS/MMDS Order*").

addresses those issues, using the Commission's own analysis to establish that today the broadband market is not competitive and is likely to remain that way for the foreseeable future.

Is there facilities-based competition in the broadband market? The Commission has answered that question "No." The evidence for this comes not from CBUI or its members but from the Commission's own analysis. The market for the delivery of broadband services is dominated by two providers—cable and telco:

> Industry analysts also estimated that . . . 36% of high-speed lines are provided by a Regional Bell Operating Company (RBOC) or other Incumbent Local Exchange Carrier (ILEC), 56% of high-speed lines are provided by cable (non-ILEC), and 7% are provided by other non-ILEC.[2]

The numbers for residential and small business customers only are even more striking. Again, the Commission's own analysis indicates that:

> As of June 30, 2002, national high-speed residential and small business lines consisted of 65% cable lines, 31% ADSL lines, **and 3% other**. . . . In addition, 31% of residential and small business high-speed lines are provided by a RBOC or other ILEC, 65% are provided by cable (non-ILEC), and 4% are provided by other non-ILEC on a national basis.[3]

The Commission has gone further than merely reporting on these data points. It has convincingly used the data to analyze just how non-competitive—and, in fact, "very highly concentrated"—the broadband market is. Applying the Herfindahl-Hirschman Index ("HHI"), the measure for market concentration, the Commission concluded that the broadband services market is highly concentrated by any measure:

> If we assume that a typical market consists of the incumbent service provider, one cable provider, and one other non-ILEC, and assume that the above numbers can be used to represent a typical market, the Herfindahl-Hirschman Index (HHI) is approximately 4500. If we don't allow for an additional non-ILEC and again assuming that the national numbers of ILEC/RBOC and cable non-ILEC can be used to calculate market shares representative of a typical local broadband market, the HHI ranges between approximately 5000 and 5400. **The above figures indicate that**

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[2] *ITFS/MDS/MMDS Order* ¶ 123 (footnotes omitted).

[3] *Id.* at ¶ 124 (emphasis added) (footnote omitted).

> **the typical broadband internet market is very highly concentrated.**[4]

The Commission has previously stated that "[u]nder the *DOJ/FTC Guidelines*, a market with a Herfindahl Hirschman Index ('HHI') that exceeds 1800 is considered highly concentrated."[5] The Commission cannot ignore that the HHI numbers for broadband are thus as much as triple the level the Justice Department considers to be "highly concentrated."

The Commission's assessment of the HHI numbers for residential and small business customers indicate that the market is even more concentrated:

> If we assume that a typical residential (and small business) market consists of the ILEC provider, one cable provider, and one other non-ILEC, and assume that the national figures can be used to represent a typical local market, the HHI is approximately 5200. If we don't allow for an additional non-ILEC and again assuming that the national numbers of ILEC/RBOC and cable non-ILEC can be used to calculate market shares representative of a typical local broadband market, **the HHI ranges between approximately 5500 and 5800**. We note that the residential numbers indicate that the markets are more concentrated than the total numbers indicate.[6]

Are effective alternatives to cable and DSL-delivered broadband services likely to be available to consumers in a timely manner? The Commission has said "No." Meaningful facilities-based competition by way of a viable third mode of delivering broadband to consumers is unlikely to emerge in the near future, as alternative broadband technologies lag well behind cable and telco-provided broadband services. As the Commission found:

> Cable modem access is currently the primary means of accessing the Internet over broadband networks, although cable's share of the broadband Internet access market has decreased over the last several years. DSL remains the most significant broadband competitor to cable modem service. As of year-end 2001, high-speed Internet access services provided over cable were available to more than 50 million homes, and there were between approximately 6.9 and 7.4 million subscribers, whereas there were

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4 *Id.* at ¶ 123 (emphasis added) (footnote omitted).

5 *In re* Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee), *Hearing Designation Order*, 17 FCC Rcd 20559, 20614 (2002) ("*EchoStar/DirecTV Order*").

6 *ITFS/MDS/MMDS Order* ¶ 124 (emphasis added).

> between 3 and 3.3 million residential DSL subscribers. At that same time there were about 200,000 subscribers to other broadband technologies, including satellite and wireless.[7]

Thus, **a mere 200,000 of the approximately ten million broadband subscribers in the country rely on a high-speed alternative to cable modem or DSL service** in their homes. So the "third option," which the members of CBUI strongly hope succeeds, serves a mere 0.02% of the homes in America and just 2% of the broadband market. That is primarily because other technologies have not advanced far enough to represent true options for residential broadband subscribers, and will not for the foreseeable future. Deployment of broadband via satellite, for example, is uncertain, particularly in light of EchoStar's termination of its distribution agreement with satellite broadband provider Starband in April 2002.[8] The Commission reached a similar conclusion.

> [Ka-band-based broadband Internet] services, however, are not only nascent, in nearly every case they are months, if not years, away from public availability. The facilities to provide broadband Internet access service using Ka-band spectrum are not yet deployed. Substantial uncertainties remain as to the likely quality and prices of such service.[9]

Other technologies, such as MMDS and wireless, have yet to take off:

> Americans are increasingly subscribing to broadband Internet access services. Such services today are predominantly provided by cable operators using cable modem technology, and secondarily by telecommunications carriers utilizing DSL. By contrast, current satellite-provided Internet access services constitute only a small percentage of all Internet access service accounts. . . . Although MMDS, third generation wireless (3G) and other wireless technologies have the potential to significantly expand the availability of broadband Internet access to consumers in rural areas, they have yet to do so to any significant degree.[10]

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[7] *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Ninth Annual Report*, 17 FCC Rcd 26901, 26924 (2002).

[8] *See EchoStar/DirecTV Order*, 17 FCC Rcd at 20566 n.27.

[9] *Id.* at 20652. Although most current satellite broadband service is provided in the Ku-band, the Commission has determined "that next-generation Ka-band satellite systems will be better-suited than existing Ku-band systems to provide 'true' broadband Internet access because Ka-band technology will achieve higher bandwidths in both directions." *Id.* at 20643.

[10] *Id.* at 20641-42 (footnotes omitted).

Is there significant intermodal competition in the broadband market? The Commission has found "No." The Commission's own numbers show that competition among different cable operators or telco providers in the same service area is virtually nonexistent.

> [T]here are only approximately 64 cable systems that have overbuilders and 129 cable systems that have a wireless cable provider out of a total of 9667 cable systems.[11]

Has the Commission in the past sanctioned markets with limited competition? No. The Commission has been extremely reluctant to create or endorse markets with limited facilities-based competition. Last fall, for example, the Commission declined to approve the merger of DBS providers EchoStar and DirecTV specifically because:

> [F]or the vast majority of consumers, it would result in a reduction in the number of competitors from three to two or from two to one . . . Such drastic reduction in the number of competitors and concomitant increase in concentration create a strong presumption of anticompetitive effects.[12]

As Chairman Powell explained:

> "At best this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. . . . Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."[13]

In declining to approve the merger, the Commission looked to precedent set by other agencies that have found that duopoly markets are virtually always untenable:

> In *FTC v. H.J. Heinz Co.*, for example, the United States Court of Appeals for the District of Columbia Circuit, reversing a district court's denial of the government's request for a preliminary injunction, rejected the district court's finding that the merger of the second and third largest firms in a three-firm baby-food market would increase the ability of the merged firm to compete with the number one firm. Noting the district court's finding that "there

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[11] *Id.* at 20610 n.348 (citing Warren Communications News, Inc., Data-by-Design).

[12] *Id.* at 20604 (emphasis added).

[13] Frank Ahrens, *Satellite TV Merger Rejected; FCC, EchoStar, Hughes Given 30 Days to Try Again*, Wash. Post, Oct. 11, 2002, at E01 (quoting FCC Chairman Michael K. Powell).

> had been no significant entries in the baby-food market in decades and that new entry was 'difficult and improbable,'" the court of appeals stated that "[a]s far as we can determine, no court has ever approved a merger to duopoly under similar circumstances."[14]
>
> In *FTC v. Staples*, the district court enjoined the merger of two competing office supply superstores where the merger would have left only one superstore competitor in 15 metropolitan areas and only two competing superstores in 27 other areas.[15]

Just as government agencies decline to approve mergers to duopolies, particularly in situations where there are preexisting high HHI scores that will be further increased by the merger and high barriers to market entry, the Commission should not allow the broadband duopoly to persist without safeguards to ensure that broadband providers do not act on their incentive and ability to engage in anticompetitive behavior.

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The Commission's own evidence and analysis clearly establishes that:

- There is not sufficient intramodal competition in the market for the delivery of broadband services, and the amount of concentration in that market far exceeds the level that the HHI deems highly concentrated;
- Viable alternatives to cable and DSL-based broadband services are unlikely to emerge in the near term, so a competitive market for the delivery of broadband services remains a mere glimmer on the horizon;
- There is not sufficient intermodal competition in the market for the delivery of broadband services; and
- Duopoly markets are undesirable, as indicated by the Commission's rejection of proposed transactions that would result in duopoly market concentration and limited facilities-based competition.

In light of these facts, which the Commission itself has placed on the record in other contexts, it would be arbitrary and capricious for the Commission to begin its analysis in the above-captioned proceedings from the premise that the market for the delivery of broadband services to consumers is competitive and that therefore no safeguards are needed. Instead, the Commission should look to its own data and calculations and start with what is plain from the

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[14] *EchoStar/DirecTV Order*, 17 FCC Rcd at 20604 (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001)) (footnotes omitted).

[15] *Id.* (quoting *FTC v. Staples*, 970 F. Supp. 1066, 1081 (D.D.C. 1997)).

evidence before it—there is limited facilities-based competition in the market for the delivery of broadband services to consumers, a market which is already highly concentrated. Until such time as meaningful competition emerges, it is therefore incumbent upon the Commission to preserve the public interest by taking measured steps to ensure the continued right of consumers to access the lawful Internet content, applications, and services of their choice and to attach any nonharmful devices to the network. [16]

Kindly address any questions to the undersigned.

Sincerely,

Gerard J. Waldron

cc: Mr. Paul Gallant
Mr. Chris Libertelli
Mr. Jonathan Cody
Mr. Matt Brill
Ms. Stacy Robinson
Mr. Jordan Goldstein
Ms. Jessica Rosenworcel
Mr. Dan Gonzalez
Ms. Catherine Bohigian
Ms. Johanna Mikes
Mr. Kenneth Ferree
Ms. Barbara Esbin
Mr. Kyle Dixon
Ms. Marjorie Greene
Ms. Mary Beth Murphy
Mr. John Norton
Mr. William Maher
Ms. Michelle Carey
Mr. Thomas Navin
Mr. Brent Olson
Ms. Carol Mattey
Mr. Scott Bergmann
Mr. John Rogovin

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[16] As the Coalition of Broadband and Users and Innovators explained in an earlier filing in these proceedings, limited competition gives broadband providers the incentive and ability to engage in discriminatory behavior, and it is well-established that the Commission can act in anticipation of such future harm. *See Ex Parte* Submission of CBUI in CS Docket No. 02-52; CC Docket Nos. 02-33, 98-10 & 95-20; GN Docket No. 00-185, at 4-11 (July 17, 2003).

Mr. Harry Wingo
Dr. Robert Pepper
Mr. Simon Wilkie
Ms. Jane Mago
Ms. Maureen McLaughlin
Mr. Scott Marcus