BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In The Matter Of	)	
Application Of	)	
	)	
EchoStar Satellite Corporation,	)	**CS Docket No. 01-348**
And Hughes Electronics Corporation	)	**SAT-LOA-20020225-00023**
	)	**S2435**
Application For Authority To	)	
Launch And Operate	)	
New EchoStar 1	)	

To: The Commission

PETITION TO DISMISS

The National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby petitions to dismiss the joint application of EchoStar Communications Corporation (EchoStar) and Hughes Electronics Corporation (Hughes) (collectively, the Applicants), to launch and operate a spot beam direct broadcast satellite (New EchoStar 1) that would provide additional local service from the 110° W.L. orbital location (*New EchoStar 1 Application*).[1] The *New EchoStar 1 Application* is contingent upon the grant of the Applicants' *Merger Application* currently under review by the Commission.[2]

Despite the Applicants' claims, the New EchoStar 1 Application does not offer benefits specific to the proposed Merger, nor does it redress the harms that would arise from the resulting

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[1] EchoStar Satellite Corporation and Hughes Electronic Corporation, Application for Authority to Launch and Operate New EchoStar 1 (USABBS-16), S2435, File No. SAT-LOA-20020225-00023 (February 25, 2002); *See also* Letter to William F. Caton, Acting Secretary, Federal Communications Commission from Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation and Gary Epstein, Counsel for Hughes Electronics Corporation, providing supplemental Technical Annex, dated March 28, 2002.

[2] Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor; and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control, File Number 01-348 (filed December 3, 2001) (*Merger Application*). *See also* Cable Service Bureau Action, EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control, CS Docket No. 01-348, DA 01-3005 (released December 21, 2001).

monopoly. In earlier filings, NRTC and others explained that the Commission should deny the *Merger Application* due to the Applicants' failure to carry their burden of showing that the claimed benefits of the Merger would outweigh the harms.[3]

First and foremost, the proposed Merger would create a monopoly in much of rural America, depriving tens of millions of consumers of any choice in multichannel video programming distributor (MVPD). As a consequence of the monopoly, NRTC and others demonstrated that prices would rise and service would decline.

As previously discussed by NRTC's technical consultant and others, the so-called benefits that would flow from grant of the *New EchoStar 1 Application* -- local television service to all markets -- can be achieved *without* the proposed merger.[4] As such, it is not a "merger-specific" benefit. Rather, the *New EchoStar 1 Application* is a transparent ploy to garner political and public support for a merger that is -- on all accounts -- illegal under the antitrust laws and contrary to the public interest under the Communications Act.

The Applicants' promise to offer a single national price to counter the harms of the monopoly does nothing to address the lack of competition that the Merger would cause

[3] When the Applicants filed their original Merger Application, Petitions to Deny were filed by NRTC (*NRTC Petition*), the National Association of Broadcasters (*NAB Petition*), Pegasus Communications Corporation (*Pegasus Petition*), 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 approximately 40 others. On February 25, 2002, NRTC filed a Response, showing that certain proposed conditions to approval would be ineffective in remedying the harms of the Merger. On April 4, 2002, NRTC filed an Ex Parte Reply to Opposition of the Applicants (*NRTC Reply*).

[4] The NAB, for example, relying on the Applicants' own assumptions contained in the Joint Engineering Statement, demonstrated that each Applicant could separately use 46 (for DIRECTV) or 50 (for EchoStar) CONUS frequencies to carry all of the eligible local stations in all 210 DMAs, and also carry all of its existing national programming, with ample room to offer still more. *NAB Petition*, pp. 80-82. *See Application*, Joint Engineering Statement in Support of Transfer of Control Application, Attachment B, p. 6 (*Joint Engineering Statement*). Pegasus showed that, by using spot beam technology, either entity on its own could serve all 210 DMAs. *Pegasus Petition*, p. 42.

throughout rural America.[5] Further, a national pricing scheme would be unworkable, ineffective and impossible for any agency to oversee.

The empty nature of the Applicants' promises was recently expressed by the editor of a leading satellite trade publication, as follows:

> the EchoStar and Hughes promises of national pricing, local stations for all, as well as most everything else the companies say they will deliver, are nothing more than that: promises. And at best, they are political promises, the most fleeting and unenforceable.
>
> Simply stated, EchoStar will become an unregulated, and, more importantly, untouchable monopoly if the government blesses its acquisition of Hughes and DirecTV.[6]

As noted in the *SBN Article*, "[a]ny way [the proposed Merger] is viewed, rural Americans will lose. Big time."[7] For these reasons, NRTC urges the Commission to deny the *Merger Application* and to dismiss the *New EchoStar 1 Application* as moot.

I. DISCUSSION

A. The Applicants Each Can Provide Local Television Service To All 210 DMAs Without The Merger.

1. With the filing of their *New EchoStar 1 Application*, the Applicants continue to ignore the technical and economic evidence demonstrating that each company can independently deliver local channels to all 210 DMAs *without* merging. Instead, the Applicants simply repeat their tired mantra, that other competitive approaches are not "technically feasible or commercially viable."[8]

2. The fact remains that the Applicants do not need to launch New EchoStar 1 in order to provide local service to all 210 DMAs. The declarations of NRTC's technical expert, Walter

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[5] *New EchoStar 1 Application*, pp. 2-3.

[6] Bob Scherman, *More Thoughts on the Road to Monopoly*, Satellite Business News, p. 9, May 8, 2002 (*SBN Article*) (copy attached hereto as Exhibit 1).

[7] *SBN Article*, p. 9.

[8] *New EchoStar 1 Application*, p. 3.

L. Morgan, illustrate the existing technical ability of EchoStar and DIRECTV to independently provide local service to 160 and 187 DMAs, respectively, simply by using their existing satellite assets more efficiently and launching one additional satellite each.[9] Mr. Morgan also concluded that:

> It would be reasonable to expect, given the rapid changes in the technologies discussed above that 100% of the DMAs could technically be served. **Accordingly, both companies could cover all 210 DMAs while continuing to provide the hundreds of channels they carry today, simply by using additional spot-beam technology to more effectively utilize the spectrum.**[10]

Where, as here, the means exist for EchoStar and DIRECTV each to provide local television service to all markets, this "benefit" cannot, by definition, be specific to the proposed Merger and should not be considered in evaluating the Merger Application.

3. The proposal set forth in the *New EchoStar 1 Application* is in fact a confirmation that the Morgan analysis is grounded in sound reasoning. When the Applicants originally announced their proposed Merger, they avoided any discussion of providing local service in all 210 DMAs, stating instead that New EchoStar only would be able to provide local service to 100 local markets. They criticized Mr. Morgan and others who said that such service was possible.[11] "Almost as if by magic,"[12] however, the Applicants in a few short months have designed a single satellite to provide local channels to all markets.

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[9] Declaration of Walter Morgan, February 2, 2002 (Exhibit O to the NRTC Petition) (*Morgan Declaration*); Declaration of Walter Morgan, March 27, 2002 (Exhibit 2 to NRTC Reply) (*Morgan Reply*) (attached hereto as Exhibit 2 and Exhibit 3, respectively).

[10] *Morgan Declaration*, p. 23 (emphasis in original). In the Morgan Reply, Mr. Morgan specifically demonstrated that the Applicants' objections to his conclusions were without basis. *See Morgan Reply*, pp. 1-2. For instance, he notes that the Applicants claim that a 12:1 compression ratio is not possible but concede that DIRECTV uses this ratio for local and premium channels. *Id.*, p. 4. In addition, the Applicants misstate Mr. Morgan's analysis regarding the required number of frequencies to be used for local programming. *Id.*

[11] Opposition to Petitions to Deny and Reply Comments of General Motors Corporation and Hughes Electronics Corporation and EchoStar Communications Corporation, CS Docket No. 01-348, pp. 6-20 (filed February 25, 2002) (*Applicant Opposition*).

[12] *Morgan Reply*, p. 2.

4. Likewise, the Applicants' claim that it is not commercially viable for each of them to serve all local markets[13] rings hollow when compared with EchoStar's most recent request for access to broadcasting satellite service (BSS) spectrum.[14] At the same time its economist, Dr. Robert Willig, was opining about the cost-prohibitive nature of a $220 - $300 million investment in a DBS spot beam satellite that he said neither company could afford to pay standing alone,[15] EchoStar was asking the Commission for authority to launch and operate three new satellites for a yet-to-be established service at a potential cost of more than one billion dollars. EchoStar's willingness to commit more than one billion dollars to a service that is not yet available, and its unwillingness to commit less than a third of that to its existing -- and successful -- DBS business, undermines its credibility, to say the least.[16]

5. DIRECTV's sense of economics is no better. As NRTC's distinguished economist Dr. Paul W. MacAvoy pointed out, if the proposed Merger is not consummated and the $600 million breakup fee is paid, DIRECTV will receive enough cash from EchoStar to pay for the equivalent of *two* New EchoStar 1 satellites.[17] As a result -- and as the Applicants' own economist conceded -- DIRECTV would have *twice* the number of satellites needed to provide local service to all 210 DMAs.[18]

6. Additionally, the Applicants' promise to carry all local channels in all markets no sooner than two years following approval of the Merger is really no promise at all and therefore

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[13] *New EchoStar 1 Application*, p. 3.

[14] Application of EchoStar Satellite Corporation For Authority to Construct, Launch and Operate a Direct Broadcast Satellite System in the 17 GHz and 25 GHz Bands, SAT-LOA-20020328-00050, SAT-LOA-20020328-00050, SAT-LOA-20020328-00050 (filed March 28, 2002).

[15] Declaration of Dr. Robert D. Willig, February 25, 2002, p. 10 (Exhibit A to Applicant Opposition) (*Willig Declaration*).

[16] *NRTC Reply*, pp. 36-41

[17] Reply Declaration of Dr. Paul W. MacAvoy, March 26, 2002, p. 24 (Exhibit 1 to NRTC Reply) (*MacAvoy Reply*).

cannot be deemed a benefit of the Merger. Only one day after promising to Congress that "we will comply with must-carry on a single dish and carry all stations in all markets,"[19] in its petition to the U.S. Supreme Court, EchoStar said it "does not intend to carry all channels in every market" unless must-carry is upheld by the Court.[20] EchoStar revealed that it only intended to carry those stations with "meaningful local content."[21] Left unchecked by competition, such subjective evaluation criteria likely would lead to the carriage of only those stations EchoStar deems appropriate in its sole judgment.

7. The Applicants' decision at this point to request authority to launch a satellite to carry more local broadcast channels comes as no great surprise. Local television channels are extremely popular with consumers[22] and their carriage by DBS providers makes good business sense. Consequently, when one DBS provider initiates local television service in a market, the other is quick to follow, demonstrating a choice either to match the competition or suffer

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[18] *Willig Declaration*, p. 10 (stating that for DIRECTV will have the technical capacity to provide service to 103 DMAs following the launch of DIRECTV-7S. In order to provide local service to the remaining 107 DMAs, "DIRECTV would have to launch another spot-beam satellite").

[19] Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002.

[20] Satellite Broadcasting and Communications Association, et al., Petition for Writ of Certiorari, *Satellite Broadcasting and Communications Association v. FCC*, 70 U.S.L.W. 3580, p. 8, n. 2 (U.S., Mar. 7, 2002) (No. 01-1332)

[21] *Id*.

[22] With the passage of the SHVIA, the provision of local broadcast channels in local markets has become extremely popular. For example, the Satellite Broadcasting and Communications Association (SBCA) found that in 13 markets where local-into-local service was introduced via DBS, there was a 43% increase in subscribers. *See* SBCA Comments, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, p. 8 (filed July 2000). On several occasions, the Commission has concluded that the significant recent increase in DBS subscribership can be attributed to the authority in the SHVIA for DBS carriers to retransmit local broadcast signals. *See* Seventh Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 CR 1414, FCC 01-1, ¶13. *See also* Eighth Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-389, ¶8 (*Eighth Video Competition Report*). In fact, DIRECTV informed the Commission that its overall subscriber levels increased by 20 percent due to the provision of local television service. *Eighth Video Competition Report*, ¶59.

declining market share. In a market where EchoStar and DIRECTV continue to compete with one another, both will have a strong incentive to deliver what consumers want most.[23]

B. The New EchoStar 1 Application Does Not Mitigate The Harms That Would Result From The Proposed Merger.

8. With or without New EchoStar 1, the Applicants' proposed Merger is rife with troubling issues. The Applicants' "Local Channels, All Americans" plan, unveiled in the *New EchoStar 1 Application*, does not alter the fact that New EchoStar will be able to isolate for discriminatory treatment large clusters of homes not passed by cable at the local level. As Dr. MacAvoy demonstrated, consumer welfare loss from the Merger would be more than $700 million each year, solely for EchoStar's and DIRECTV's current DBS subscribers.[24] Other expert economists reached similar conclusions regarding the substantial harms related to the Merger.[25]

9. Nor will these harms be checked by the possible emergence of competition to the New EchoStar monopoly. The Department of Justice's Merger Guidelines make clear that only forms of competition that are "within two years from initial planning to significant market impact" will be considered.[26] At present, there are no prospects for any effective MVPD

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[23] The *NRTC Petition* quoted the Applicants' own economist Dr. Willig, who stated that innovations in technology spurred by competition are often reduced as a result of the creation of a monopoly. The quote was referenced by NRTC to show how the proposed merger would hinder the delivery of local channels. *See NRTC Petition*, p. 31. In the Commission's recent wireline broadband proceeding, DIRECTV Broadband, Inc. quoted the identical passage, that "both history and economic theory have taught us [that] deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it already has in place by limiting its use and raising its price." Comments of DIRECTV Broadband, Inc. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, pp. 77-78 (submitted May 3, 2002). This is just another example of the Applicants matching the message to the audience, without regard to the inherent contradiction.

[24] *MacAvoy Reply*, p. 4.

[25] *See* Declaration of J. Gregory Sidak, pp. 28-30 (included as Appendix B to the *NAB Petition*) (concluding that the loss of consumer welfare as a result of the Merger would be more than $3 billion over five years); Affidavit of Daniel L. Rubinfeld, pp. 14-15, n. 59 (included as Attachment A to the *Pegasus Petition*) (predicting consumer losses in the neighborhood of $600 million for new subscribers alone).

[26] U.S. Department of Justice and Federal Trade Commission, *Revisions to Horizontal Merger Guidelines* (1997), reprinted in 4 Trade Reg. Rep., § 3.2 (CCH) (1997).

competition, meaning that New EchoStar would enjoy a long-term monopoly throughout rural America. Nevertheless, the Applicants point to a recent application by SES Americom to provide service from the 105° W.L. orbital position, and the Commission's recent decision to authorize the Multichannel Video Distribution and Data Service (MVDDS), as evidence that the merged entity will face ample competition.[27]

10. Assuming SES Americom's proposed service were technically feasible and could overcome domestic and international regulatory hurdles, it is at best several years from being implemented.[28] A recent comment from SES Americom's CEO Dean Olmstead illustrates his own lack of confidence in his company's proposal, when he stated publicly that he is "not convinced it will work."[29] In the unlikely event that the Merger is approved and SES Americom achieves significant market impact -- with only one DBS satellite operating from only one orbital slot -- it would still be facing an MVPD behemoth operating at least 15 satellites from three full-CONUS orbital slots.

11. Similarly, MVDDS can only be regarded as another phantom MVPD competitor. NRTC and others have previously pointed out that MVDDS will not develop as an effective competitive force to DBS in rural areas due to technical and economic limitations.[30] Certainly, competition from MVDDS operators is extremely unlikely within the next two years. As

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[27] Paige Albiniak, *EchoStar's Chances: Slimmer; Increasingly, Many In Washington Doubt That The DIRECTV Merger Will Be Approved*, Broadcasting & Cable, p. 8, May 6, 2002 (*EchoStar Article*).

[28] To the extent EchoStar and DIRECTV feel as though they are spectrum constrained and require additional capacity for local channels, the proposed SES Americom platform would afford EchoStar and DIRECTV, as competitors, access to a full-CONUS slot. Given the location of the satellite, neither company apparently would need to replace set-tops or make significant capital investment to lease capacity from SES Americom. NRTC recognizes that any such use by EchoStar and DIRECTV is speculative, but the possibility that capacity on the SES Americom satellite could be used by the two existing competitors – rather than a new entrant – further demonstrates that the Merger is not the only means by which EchoStar and DIRECTV could provide local television channels to the entire country. The *SBN Article* predicts that "there is no doubt that if their deal is blocked, EchoStar and DirecTV could still find a way to share some spectrum to offer local channels in smaller markets, assuming of course, they can put the companies' egos aside." *SBN Article*, p. 11.

[29] Mark Holmes, *SES Americom Head Has Doubts*, Interspace, May 8, 2002.

Chairman Powell recently noted with regard to the inability of MVDDS to compete with DBS, "Are they in the market? Are they really a disciplining component? I suspect that the merger is too far ahead of it as a service for competitive analysis."[31] As with SES Americom, MVDDS does not qualify as a competitor that should be considered under the Merger Guidelines.

12. When the Applicants discuss the proposed Merger in the context of the MVPD market, they argue out of both sides of their mouths. On the one hand, DIRECTV and EchoStar tell the Commission that they -- currently the 3rd and 6th largest MVPD providers, respectively[32] -- must merge in order to compete effectively with cable.[33] At the same time, they attempt to soothe regulators' well founded antitrust concerns by pointing to non-existent MVPD providers as sources of future competition for the merged entity. The Applicants cannot have it both ways. These alternate forms of MVPD service -- SES Americom, MVDDS, C-band, MMDS, etc. -- which are not effectively competing in the market today, cannot be considered tomorrow's 'solution' to the proposed Merger.

13. EchoStar and DIRECTV are in fact flourishing as independent competitive forces *without* the Merger. In its most recent earnings report, EchoStar disclosed -- yet again -- another phenomenal quarter.[34] The steady stream of sensational earnings reports shows that the grim predictions contained in the *New EchoStar 1 Application* are without foundation. Clearly, the Applicants are already competing aggressively against cable -- and against each other -- *without* the Merger.[35]

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[30] *NRTC Petition*, pp. 27-28.

[31] *EchoStar Article*, p. 8.

[32] *Eighth Video Competition Report*, ¶ 57.

[33] *New EchoStar 1 Application*, p. 22.

[34] SEC Form 10Q, filed by EchoStar Communications, Inc., May 2, 2002. *See also*, SEC Form 425, filed by EchoStar Communications, Inc., *Transcript Of The First Quarter 2002 Earnings Call Of EchoStar Communications Corporation*, May 6, 2002.

[35] *NRTC Reply*, pp. 36-41.

II. CONCLUSION

The *New EchoStar 1 Application* does not and cannot cure the basic ills that afflict the proposed Merger: the creation of an anticompetitive monopoly. Nor does the application propose benefits that cannot be achieved though other means, including the competitive development of satellite technology that will bring local television channels to all markets. Here again, the words of the *SBN Article* provide an accurate summary:

> Any way the numbers are crunched on this deal, any way the math is done, any way the industry or local market is defined, allowing EchoStar and DirecTV to become one service will dramatically reduce the 'viable choices' for every American TV consumer. It will cut those choices from three to two in most areas, and from two to one in other areas. Competition gets cut by 33 percent or 50 percent.
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> There is just no other way to look at it.[36]

The *Merger Application* should be denied, and the *New EchoStar 1 Application* dismissed as moot.

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May 20, 2002

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[36] *SBN Article*, p. 9.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In The Matter Of Application Of EchoStar Satellite Corporation, And Hughes Electronics Corporation Application For Authority To Launch And Operate New EchoStar 1	)))))))))	CS Docket No. 01-348 SAT-LOA-20020225-00023 S2435

To: The Commission

AFFIDAVIT OF STEVEN T. BERMAN

Steven T. Berman, having first been duly sworn, does hereby attest and affirm as follows:

1. I am the Senior Vice President, Business Affairs and General Counsel for the National Rural Telecommunications Cooperative (NRTC).

2. I am familiar with the application of EchoStar Communications Corporation, General Motors Corporation (GM) and Hughes Electronics Corporation, a subsidiary of GM, to transfer control of their satellite, earth station and other related authorizations to New EchoStar.

3 I further declare that NRTC is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity.

4. I have personal knowledge of the assertions of fact presented in the foregoing Petition to Dismiss of NRTC and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on 5/17/2002.

FURTHER AFFIANT SAYETH NOT.

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Exhibits

Exhibit	Description
1	*More Thoughts on the Road to Monopoly*, Satellite Business News, May 8, 2002.
2	Declaration of Walter Morgan, February 2, 2002.
3	Reply Declaration of Walter Morgan, March 27, 2002.