FCC Local and State Government Advisory Committee
Advisory Recommendation Number 27:

In the Matter of Echostar Communications Corporation, General Motors Corporation, And Hughes Electronics Corporation, CS DOCKET NO. 01-348

1. **Introduction**. The Local and State Government Advisory Committee ("LSGAC") submits this Recommendation in regard to the Federal Communication Commission's review of the application of Echostar Communications Corporation ("Echostar'), General Motors Corporation ("GM"), and Hughes Electronics Corporation ("Hughes") for Commission approval of the transfer of control of Hughes from GM to Echostar, CS Docket No. 01-348. Hughes owns and operates the DIRECTV direct broadcast satellite ("DBS") service and provides broadband Internet access service via satellite.

2. **Background**. The two major forms of delivery of multiple channels of video programming to consumers across the nation are cable television and DBS. This proposed transfer of control would result in the consolidation of the only two major DBS service providers in the nation – Echostar and DIRECTV.

3. In many rural areas of the country, there are either no cable television systems or older cable systems with very limited channel capacity and no plans for upgrades that would increase that capacity. In these areas, this proposed transaction would eliminate all meaningful competition in multichannel video programming distribution.

4. In most other areas of the country, there is only one cable television system. In these areas, this transaction would reduce competition from three distributors of multichannel programming to two distributors of multichannel programming.

5. Echostar and DIRECTV both offer some form of broadband Internet access service (either by themselves or in conjunction with affiliated companies). They are increasingly being considered as competitors to cable modem broadband services offered by cable television companies and digital subscriber line ("DSL") service offered by telephone companies. Echostar and DIRECTV have plans to launch and operate a new generation of DBS broadband service, such as DIRECTV's planned SPACEWAY service.

6. As the applicants acknowledge, there are rural areas in which no cable system exists. There are also many rural areas in which no telephone company offers high-speed digital subscriber line ("DSL") service. In these areas, DBS may be the only broadband service available, and this transaction would reduce competition from two to one.

7. The LSGAC has previously adopted a recommendation addressing, in its view, the appropriate principles the Commission should apply in reviewing applications related to the transfer or assignment of FCC licenses in connection with a merger or acquisition. *LSGAC Advisory Recommendation 17.* Among other things, we recommended that the Commission not approve applications relating to mergers or acquisitions that adversely affect competition in state or local communities. We also recommended that "[I]n the era of fast-paced technological advancement and convergence, the merger should advance the utilization of all technologies and their equitable deployment."

8. **Arguments by the Parties.** The parties to the transaction generally claim that there are many public interest advantages created by the proposed transaction and that they are willing to make certain commitments to protect competition in rural areas. Among the public interest advantages the parties claim are (a) the ability to use spectrum more efficiently so that the post-merger firm will be able to provide "local into local" programming in many more areas of the country than each firm could do by itself without the merger; and (b) the ability to compete more vigorously against cable television services, including in the provision of broadband services. They also claim that rural consumers will be protected because the post-merger firm will offer the same prices across the country. Therefore, they claim, DBS customers will be charged the same price for service, regardless of whether they live in a rural area that is not served by a cable television system or an urban or suburban area that is served by a cable system.

9. **Concerns.** As a committee comprised of state, local, and tribal officials from various portions of the country, the LSGAC has several concerns about the proposed transaction.

10. Generally, competition in the market or markets served by Echostar and DIRECTV are very concentrated, regardless of whether one views the relevant video market as comprising DBS services or multichannel video programming services. Of course, transactions that reduce competition from two to one require the closest possible scrutiny. For good reason, governmental authorities are also wary of mergers or acquisitions that reduce the key number of players in a market from three to two. (For example, the Department of Justice brought suit to enjoin the merger of MCI WorldCom and Sprint because, in part, of the view that there were telecommunication services markets in which competition would be reduced from three to two.)

11. In many areas of the Nation, including Alaska, Hawaii, and rural areas of southern and western states, the quality of service provided by DBS firms today is uneven. The merger would eliminate competition between these firms and may further reduce service quality. This effect could be felt in both video and broadband services.

12. In accordance with accepted principles of antitrust law and FCC policy and precedent, the claimed public interest benefits of this transaction must be analyzed very carefully. (*See, e.g., Ameritech Corp., Transferor and SBC Communications Inc., Transferee*, 13 FCC Rcd 14,508 (1999), at paragraph 256.) One important issue to consider is whether these asserted benefits could be implemented without a merger or acquisition. The applicants state that uniform nationwide pricing for the same service is more efficient than geographically specific pricing. Uniform pricing, therefore, is likely even without this transaction. Similarly, a careful analysis of the internal documents of the parties may reveal that one or both of the parties is committed to launching and operating satellites to provide a next generation satellite broadband service, even in the absence of the merger. In addition, the proposed benefits relating to "local into local" programming may be accomplished by means other than a merger, possibly including, for example, a joint venture or other agreement to coordinate spectrum to facilitate the most efficient use of the spectrum used to provide that service.

13. A promise of national pricing alone does not eliminate concerns about anti-competitive effects or public interest harms in rural areas. Despite equal prices, consumers in those areas could suffer because of, among other things, less competitive prices for equipment or ancillary services (such as installation) or unequal (as compared to urban or suburban areas) service quality.

14. The parties assert generally that this transaction will benefit residents of Alaska and Hawaii, who to date have not had the same access to DBS services as other Americans. Yet, it also appears that the merger might result in key programming being shifted eastward, from satellites positioned at 119 degrees W.L.[1], to satellites positioned at 101 degree W.L. (*Joint Engineering Statement in Support of Transfer or Control Application,* at page 6 ("Under another possible scenario, most national programming could be placed on the 32 DBS frequencies at 101 [degrees] W.L. . . . "). Such eastward shifts may well harm residents of these western-most states.

RECOMMENDATIONS: The Local and State Government Advisory Committee recommends:

a. That the Commission give very careful attention to the critical competition and other public interest issues raised by the application;

b. That the Commission not approve the application unless it is convinced, after the most careful review, that the transaction (i) will enhance competition (*see Applications to Consent to the*

[1] Most of Echostar's national programming today is on satellites located at 119 degrees W.L. *Joint Engineering Statement*, at page 4.

Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc, Transferors, to AOL Time Warner, Inc., Transferee, 16 FCC Rcd. 6547 (2001), at paragraph 21); and (ii) not diminish competition in any area of the country (*see LSGAC Recommendation 17*);

c. That the Commission not approve the application without attaching conditions that ensure that a combined Echostar-Hughes-DIRECTV (i) provides more extensive coverage and better quality service to Alaska, Hawaii, and other rural areas of the U.S.; and (ii) offers all services (including monthly video service, monthly broadband service, and related support and installation services) at the same prices at which those services are offered in other parts of the U.S.;

d. That the Commission not credit claimed public interest benefits unless they are demonstrable, verifiable, and "are achievable only as a result of the merger" (*see SBC/Ameritech, supra*); and

e. That the Commission carefully consider whether this transaction would advance Congress's goal of "promot[ing] competition in the delivery of diverse sources of video programming" (47 U.S.C. § 532(a); *see AOL-Time Warner, supra,* at paragraph 22).

f. If the Commission approves the application for license transfer, the Commission should (i) recognize the importance to the public of the public, education and government (PEG) access channels; (ii) require the merged entity to make space available for PEG access on its channel system; and (iii) require the merged entity to contribute support for PEG capital comparable to that supplied by cable operators to assist in the provision of PEG access programming.

g. If the Commission approves the application for license transfer, in order to ensure that the all conditions of transfer are met, the Commission should impose *specific* enforcement mechanisms with clearly defined actions the Commission can take, and penalties that can be imposed if the conditions of the merger are not met.

Adopted by the LSGAC on April 12, 2002.

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Kenneth S. Fellman
Chairman