

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

In re Consolidated Application of )  
 )  
EchoStar Communications Corporation, )  
General Motors Corporation, ) CS Docket No. 01-348  
Hughes Electronics Corporation )  
 )  
For Consent to Transfer Control. )  
 )  
To: The Commission )

**REPLY**



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February 25, 2002

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## SUMMARY

ACA's Petition asks the Commission to deny the Application because of the substantial public interest harms that would result, including:

- Reducing competition in all smaller markets and eliminating competition in many smaller markets.
- Reducing program diversity in smaller markets.
- Stifling broadband deployment in smaller markets.
- Weakening and eliminating many small, local communications businesses.

The record shows that a diverse array of unaffiliated parties and interest groups corroborate ACA's public interest analysis. In contrast, the Applicants and their supporters fail to substantiate any credible public interest benefits that offset these harms. Consequently, the Commission must deny the Application.

**The DBS monopoly would reduce or eliminate MVPD competition in smaller markets.** As described by many parties on the record, after reducing smaller market MVPD competition from three to two, post-merger EchoStar will use its market power to weaken and eliminate independent cable competitors, leaving just one distributor in many smaller markets: EchoStar. This is not merely a certain consequence of this merger, but a principal strategy. EchoStar has admitted off the record that its plan is to move from small town to small town, leaving small cable companies in its wake.

**The DBS monopoly would reduce program diversity in smaller markets.** As recognized by diverse and often antagonistic interests on the record, the proposed merger presents a fundamental threat to the core Communications Act principals of program diversity and localism. The merger would immediately eliminate any

competing DBS voices, allowing post-merger EchoStar to use its market power to eliminate the multiplicity of speakers delivered by many smaller cable systems. The principal commenter asserting otherwise – Vivendi – confuses preferential DBS distribution of Vivendi programming with program diversity.

**The merger would reduce or eliminate broadband deployment in smaller markets.** Independent cable companies have led the industry in deploying broadband services in smaller markets. As recognized by numerous parties, the proposed DBS monopoly would weaken and then eliminate many of these smaller market cable systems, stalling the delivery of broadband services in those markets.

**The merger would weaken and eliminate many small, local communications businesses.** Congress and the Commission have long recognized the public interest in maintaining a viable independent cable sector that can respond to community needs in smaller markets. As a variety of non-cable commenters explain, the proposed DBS monopoly will squeeze out its smaller market cable competitors. Based on EchoStar's professed strategy of targeting *small towns* and *leaving small cable companies in its wake*, the Commission can conclude that this merger is all about EchoStar gaining and expanding an MVPD monopoly in smaller markets.

A DBS monopoly will irreversibly tilt the competitive playing field in smaller markets, with substantial harm to the public interest. The Applicants offer no credible countervailing public interest benefits for smaller markets. The Commission must deny the Application.

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**REPLY**



**I. INTRODUCTION**

ACA's Petition asks the Commission to deny the Application because of the substantial public interest harms that would result.<sup>1</sup> The proposed DBS monopoly would undercut key policies and goals under the Commission's jurisdiction, including:

- Reducing competition in all smaller markets and eliminating competition in many smaller markets.
- Reducing program diversity in smaller markets.
- Stifling broadband deployment in smaller markets.
- Weakening and eliminating many small, local communications businesses in smaller markets.

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<sup>1</sup> American Cable Association, Petition to Deny (filed February 4, 2002) ("ACA Petition").

The current record contains overwhelming support for ACA's analysis. A diverse array of unaffiliated parties and interest groups corroborate the public interest harms described by ACA. From broadcasters to retail DBS distributors to antitrust experts, all emphasize the same message – in smaller markets, the public interest harms of a DBS monopoly are manifest. In contrast, the Applicants and their supporters offer only road show hype and tenuous rhetoric, failing to demonstrate any credible public interest benefits that offset the harms in smaller markets. The various proposed conditions would not ameliorate the adverse consequences in smaller markets.

To assist the Commission's investigation, this Reply summarizes the principal points of ACA's public interest analysis, followed by key statements of other participants.

**II. THE RECORD VALIDATES THE SUBSTANTIAL PUBLIC INTEREST HARMS DESCRIBED BY ACA.**

**A. The DBS monopoly would reduce or eliminate MVPD competition in smaller markets.**

**What ACA says:**

After reducing smaller market MVPD competition from three to two, post-merger EchoStar will use its market power to weaken and eliminate independent cable competitors. Put another way, in many smaller markets the merger will first reduce MVPD competitors from three to two, then from two to one.<sup>2</sup>

**What other participants say:**

Aiken Electric Satellite TV

[The merger] effectively eliminates, in one felled [sic] swoop, both customer choice and competition.<sup>3</sup>

American Antitrust Institute

Of particular concern is the problem of rural America, where the issue is not duopoly but perfect monopoly. EchoStar's supporters suggest that rural rates could be regulated to reflect the rates charged in competitive markets, positing a national price. It seems, strange, however, to create a regulatory regime, a second-best solution, when a competitive regime already exists.<sup>4</sup>

Carolina Christian Television and LeSea Broadcasting

With the merger, MVPD competition will be either destroyed or severely impaired.<sup>5</sup>

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<sup>2</sup> ACA Petition at v.

<sup>3</sup> Aiken Electric Satellite TV, Inc. Letter (filed February 4, 2002) ("Aiken Letter") at 1.

<sup>4</sup> American Antitrust Institute Letter (filed February 4, 2002) at 3.

<sup>5</sup> Carolina Christian Television, Inc. and LeSea Broadcasting Corporation, Joint Petition to Deny (filed February 4, 2002) at 3.

## NAB

The merger also will create a monopoly MVPD provider for millions of consumers in areas that are currently served by antiquated, one-way analog cable systems.<sup>6</sup>

The proposed merger would harm the public interest by eliminating competition entirely in many local markets and at best creating a duopoly in most other local markets.<sup>7</sup>

## NRTC

The continued viability of many of the existing rural, analog cable systems is very much in doubt. Many, including EchoStar's investment bank, believe that large numbers of rural cable operators will go out of business if they cannot afford to upgrade to digital and compete with EchoStar and DirecTV.<sup>8</sup>

The loss of these analog cable systems... further underscores the loss of competition in rural markets if the Merger were approved.<sup>9</sup>

## Pegasus

One fact is clear and indisputable – this is a merger combining the only two facilities-based DBS providers in the US.<sup>10</sup>

In many rural areas with access to analog cable only, there will be no effective competition to DBS.<sup>11</sup>

As indicated, the record shows that in all markets served by independent cable companies, the merger will decrease MVPDs immediately from three to two, then, in many markets, from two to one as EchoStar uses its monopoly power over DBS to

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<sup>6</sup> National Association of Broadcasters, Petition to Deny (filed February 4, 2002) (“NAB Petition”) at 48.

<sup>7</sup> NAB Petition at 32-56.

<sup>8</sup> National Rural Telecommunications Cooperative, Petition to Deny (filed February 4, 2002) (“NRTC Petition”) at 20.

<sup>9</sup> NRTC Petition at 22.

<sup>10</sup> Pegasus Communications Corporation, Petition to Deny (filed February 4, 2002) (“Pegasus Petition”) at 11.



eradicate small competitors. As described in ACA's Petition, the DBS monopoly would then eliminate many smaller market cable competitors through a combination of: (i) leveraging monopoly control over DBS to extract major programming cost concessions;<sup>12</sup> (ii) pricing services below small competitors' costs;<sup>13</sup> (iii) exercising bottleneck control over program distribution;<sup>14</sup> and (iv) exploiting small cable's disparate regulatory burdens.<sup>15</sup>

The Applicants and their supporters contend that a DBS monopoly is necessary to compete with cable.<sup>16</sup> Overall, this contention cannot be reconciled with the exponential subscriber growth of EchoStar and DirecTV. When applied to the hundreds of smaller cable companies and thousands of smaller systems, this assertion is especially nonsensical. The average ACA member company serves 5,992,000 *fewer* subscribers than EchoStar currently serves and 10,292,000 *fewer* subscribers than DirecTV currently serves. Post-merger, the average ACA member company would serve at least 16,292,000 *fewer* subscribers than the proposed DBS monopoly. In fact, about half of ACA members serve fewer than 1,000 subscribers. The record contains a vacuum of evidence concerning why a DBS monopoly is necessary to compete with these independent cable companies.

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<sup>11</sup> Pegasus Petition at 18.

<sup>12</sup> ACA Petition at 14-16.

<sup>13</sup> ACA Petition at 14-16.

<sup>14</sup> ACA Petition at 16-18.

<sup>15</sup> ACA Petition at 18-20.

<sup>16</sup> Application at 22 (“[T]he MVPD market is still dominated by cable operators.”) and 36 (“All of these synergies will contribute to the creation of a dramatically stronger competitor to cable’s dominance of the MVPD marketplace.”).

In short, the record shows this merger is about dominance of smaller markets and elimination of competition for millions of subscribers, not about fostering competition and benefiting customers.

**B. The DBS monopoly would reduce program diversity in smaller markets.**

**What ACA says:**

[T]he merger immediately eliminates any competing DBS voices, and the post-merger EchoStar would then eliminate a multiplicity of speakers delivered by many smaller market cable systems.<sup>17</sup>

**What other participants say:**

Aiken Electric Satellite TV

Competitive programming options would be eliminated.<sup>18</sup>

Press reports quote EchoStar as saying that if the merger is approved it will serve the top 100 markets with local channel access. How does this help people living in the other 100 smaller markets when you consider that these are also the people who have been made captive customers by the proposed merger?<sup>19</sup>

Eagle III Broadcasting

[G]ranted the Applications would undermine the public interest in strong local television service.<sup>20</sup>

Family Stations and North Pacific International Television

[I]t is unconscionable that [EchoStar] be permitted to peel off and injure those independent and niche audience television broadcast stations that have the least market power – the very segment of the over-the-air television industry that Congress intended to benefit

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<sup>17</sup> ACA Petition at 7.

<sup>18</sup> Aiken Letter at 1.

<sup>19</sup> Aiken Letter at 2.

<sup>20</sup> Eagle III Broadcasting, LLC, Petition to Deny (filed February 5, 2002) at 4.

from the local-into-local satellite carriage requirements. It must not be left to EchoStar to stifle the growth of competitive broadcast services, as EchoStar has consistently sought to do.<sup>21</sup>

#### Johnson Broadcasting

The evidence indicates that New EchoStar would continue to undermine the ability of local television broadcast stations to serve the public by denying or marginalizing their ability to participate in carriage of their television signals on New EchoStar's satellite service.<sup>22</sup>

#### NAB

The incentive to innovate and extend local-to-local services beyond the top 100 DMAs, to areas which are uncabled or have weak cable systems, will vanish with the end of the [DBS] rivalry... - which has seen the two "leapfrogging" on one another into successive markets.<sup>23</sup>

#### Univision Communications

[T]he proposed merger threatens to hinder consumer choice in programming and, more specifically, consumer access to Spanish-language programming.<sup>24</sup>

#### Word Network

The merged entity, New EchoStar, will be the sole gate keeper for non-commercial educational programming on the set-aside channels, an unhealthy situation in its own right, but particularly so in light of its predecessor's record in excluding the Word Network.<sup>25</sup>

As shown, the record reflects sharp concern over the bottleneck control of programming by the DBS monopoly. That, combined with the elimination of competing

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<sup>21</sup> Family Stations, Inc. and North Pacific International Television, Inc., Petition to Deny (filed February 4, 2002) at 3.

<sup>22</sup> Johnson Broadcasting, Inc., Petition to Deny (filed January 28, 2002) at 2.

<sup>23</sup> NAB Petition at 56.

<sup>24</sup> Univision Communications Inc., Petition to Deny (filed February 4, 2002) at 3.

<sup>25</sup> The Word Network, Petition to Deny (filed January 25, 2002) at 7.

MVPDs in many smaller markets, poses a fundamental threat to the core principals of program diversity and localism.

A principal merger proponent, Vivendi, which recently bought its way into the action here, contends that the reduction in competing MVPDs will result in an increase in program diversity.<sup>26</sup> Vivendi confuses preferential distribution of its programming by the DBS monopoly with the widespread dissemination of information from a multiplicity of voices. We are confident the Commission will not be distracted by this mix-up.

**C. The merger would reduce or eliminate broadband deployment in smaller markets.**

**What ACA says:**

[ACA members have led the industry in rolling out broadband services in smaller markets. . . ] [T]he proposed DBS monopoly will first weaken and then eliminate many smaller market cable systems, stalling the delivery of broadband services to many smaller market consumers and businesses.<sup>27</sup>

**What other participants say:**

NAB

The merger would harm competition in the high-speed Internet market.<sup>28</sup>

NRTC

The merger would lessen, if not eliminate, competition in the broadband market.<sup>29</sup>

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<sup>26</sup> Vivendi Universal, S.A., Comments (filed February 4, 2002) at 6-7.

<sup>27</sup> ACA Petition at 8.

<sup>28</sup> NAB Petition at 98-105.

<sup>29</sup> NRTC Petition at 42-56.

Approval of the merger would be inconsistent with the public interest in ensuring competitive access to broadband services.<sup>30</sup>

#### Pappas Telecasting

[O]f special concern is the future of broadband Internet access on the part of rural America.<sup>31</sup>

#### Pegasus

While the widespread availability of broadband and other services is certainly a laudable goal, the transfer applicants have failed to prove that the merger is necessary to achieve it.<sup>32</sup>

The record reflects substantial skepticism in response to Applicants' claim that a DBS monopoly is essential to deploy broadband in smaller markets. ACA members' experiences are especially germane here. As reported to the Commission, ACA members are leading the industry in rolling out broadband services in smaller markets.<sup>33</sup> ACA members are bridging the so-called Digital Divide through innovation, risk-taking, and careful attention to local needs and interests. In short, the Commission has ample evidence that a DBS monopoly is *not* required for the delivery of broadband services to smaller markets.

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<sup>30</sup> NRTC Petition at 47-9.

<sup>31</sup> Pappas Telecasting Companies, Comments (filed February 4, 2002) at 16.

<sup>32</sup> Pegasus Petition at 37.

<sup>33</sup> ACA Petition at 23; *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Docket No. 00-185, Comments of American Cable Association at 3-9 (describing ACA member's progress in updating networks and offering cable modem services).

**D. The merger would weaken and eliminate many small, local communications businesses.**

**What ACA says:**

Congress and the Commission have long recognized the public interest in maintaining a viable independent cable sector that can respond to community needs and interests in smaller markets.<sup>34</sup>

[T]he proposed DBS monopoly will squeeze out its smaller market cable competitors through a combination of price levels below small cable's costs, bottleneck control of programming, and exploitation of small cable's disparate regulatory burdens.<sup>35</sup>

**What other participants say:**

NAB

The merger also will create a monopoly MVPD provider for millions of consumers in areas that are currently served by antiquated, one-way analog cable systems. Because of their limited channel capacity, these systems presently are at best an imperfect substitute for DBS. In the long run, most of these systems cannot justify the investment to compete with DBS by upgrading to high-bandwidth digital cable, and face ultimate extinction.<sup>36</sup>

NRTC

The loss of these analog cable systems is not only relevant in demonstrating that analog cable is not a competitor to DBS, but further underscores the loss of competition in rural markets if the merger were approved.<sup>37</sup>

Pegasus

In many rural areas with access to analog cable only, there will be no effective competition to DBS.<sup>38</sup>

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<sup>34</sup> ACA Petition at 8.

<sup>35</sup> ACA Petition at 9.

<sup>36</sup> NAB Petition at 48.

<sup>37</sup> NRTC Petition at 22.

<sup>38</sup> Pegasus Petition at 18.

WSNet

[I]t is important that the Commission... support the expansion of small cable operators and alternative providers of MVDP into extreme rural markets.<sup>39</sup>

As indicated, many non-cable commenters predict that the approval of a DBS monopoly will result in the widespread failure of local communications businesses. The Commission should not view this as merely a potential consequence of the merger, however. Based on EchoStar's statements off the record, eliminating small cable competitors is a main strategy of the merger. It is difficult to conceive of a more blatant admission of monopolistic intent concerning smaller markets than this assertion by an EchoStar spokesperson:

**We'll start small town by small town...we'll move across the United States leaving cable companies in our wake.**<sup>40</sup>

So far, the Applicants and their supporters have omitted from the record the aim of the DBS monopoly to steamroll from small town to small town leaving ACA members companies in its wake. With this Reply, we remedy that evidentiary oversight.

As stated in ACA's Petition, the rumors of small cable's demise are greatly exaggerated.<sup>41</sup> The Commission should not underestimate the creativity, ingenuity, and viability of small cable businesses in a truly competitive environment. Local businesses that are responsive to local needs and interests can have a fighting chance against national DBS companies, if, and only if, these businesses have access to programming on fair and reasonable prices, terms, and conditions, and the Commission ensures a

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<sup>39</sup> World Satellite Network, Inc., Comments (filed February 4, 2002) at 11-12.

<sup>40</sup> Monica Hogan, *Dish Cleans Out Small Cable Operator*, Multichannel News (June 5, 2000) [http://www.tvinsite.com/multichannelnews/index.asp?layout=print\\_page&doc\\_id=&articleID=CA1871](http://www.tvinsite.com/multichannelnews/index.asp?layout=print_page&doc_id=&articleID=CA1871).

<sup>41</sup> ACA Petition at 22.

reasonably level playing field between cable and DBS. The Commission cannot expect these local businesses to compete against a DBS monopoly.

### **III. CONCLUSION**

In the smaller markets served by independent cable systems, the proposed DBS monopoly will: (1) reduce or eliminate MVPD competition; (2) reduce program diversity; (3) reduce or eliminate broadband deployment; and (4) weaken and eliminate many local communications businesses. The harm to the public interest is manifest. The Applicants offer no credible countervailing public interest benefit. The Commission must deny the Application.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

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February 25, 2002

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**Certificate of Service**

I, Amy Bowin, paralegal with the law firm of Cinnamon Mueller, certify that a true and correct copy of American Cable Association's Petition to Deny was served on the following individuals by either the U.S. postage office, or electronically on this 25<sup>th</sup> day of February 2002.

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