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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

electronically filed

**RE: Response to ex parte presentation filed June 28, 2002, by
EchoStar Communications Corp., General Motors Corp., and
Hughes Electronics Corp. ("Applicants") in CS Docket No. 01-348**

Dear Ms. Dortch:

I submit this letter on behalf of the American Cable Association ("ACA") to reply briefly to an ex parte presentation filed by the Applicants in CS Docket No. 01-348.¹

In support of the EchoStar-Hughes merger, Applicants' Ex Parte Presentation makes a number of inaccurate claims regarding the state of competition in the MVPD market. Specifically, the Applicants claim:

¹ *Analysis of the EchoStar-Hughes Merger: Competitive Effects and National Pricing*, EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp., CS Docket No. 01-348 (filed June 28, 2002) ("Ex Parte Presentation").

- Digital cable is becoming “ubiquitous.”²
- Approximately 80% of housing units in the bottom 20 DMAs are passed by digital cable.³
- DBS will not be able to constrain cable without the merger.⁴

When applied to ACA members and the smaller markets they serve, these statements squarely conflict with the record and other data before the Commission. ACA’s members include more than 930 independent cable companies that serve about 7.5 million cable subscribers, primarily in smaller markets and rural areas. On average, ACA members serve about 8,000 subscribers. Virtually all of these smaller market cable systems have substantially less capacity than that reported by major MSOs.

The Applicants’ statements overlook the great disparity between the systems and markets of major MSOs and those of ACA members. More disturbingly, the Applicants’ statistics on digital cable are entirely inconsistent with those cited in Applicants’ recently filed Ex Parte Notice.⁵

When the Commission evaluates the Applicants’ statements in the context of smaller markets, it will see that the Applicants’ smaller market competition is far from the 50% digital claimed in the Ex Parte Notice (much less 80% digital, as claimed in the Ex Parte Presentation), and that the Applicants therefore do not need a DBS monopoly to compete with smaller market cable companies. Moreover, DBS already has a competitive advantage over small cable systems, which lose customers to DBS every day. Applicants have provided no credible support for their position that a merged entity with 16 million subscribers is necessary to compete with companies that serve only 8,000 customers.

Digital cable is not widely available in smaller markets; the percentage of homes passed by digital cable in these markets is less than 80%.

The Applicants’ “digital advantage” arguments do not apply to small cable. In ACA’s Reply Comments in the DTV Must Carry inquiry,⁶ we addressed smaller system capacity data based on responses to a questionnaire distributed to about

² Ex Parte Presentation at 64.

³ Ex Parte Presentation at 70.

⁴ Ex Parte Presentation at 55.

⁵ Ex Parte Notice, EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp., CS Docket No. 01-348 (filed May 16, 2002) at 3.

⁶ See ACA Reply Comments, CS Docket No. 98-120 (filed August 16, 2001).

280 ACA members serving more than 210,000 customers in about 20 states. The survey showed that about 50% of the systems are below 500 MHz, 75% are at or below 550 MHz, and only about 25% are at 750 MHz or above. In contrast, major MSO data showed a nearly reverse distribution of system capacity.⁷

The results of these surveys prove incorrect the claim in Applicants' Ex Parte Presentation that 80% of housing units in the bottom 20 DMAs are passed by digital cable. Further refuting this statistic is Applicants' recent Ex Parte Notice, which cited a much lower percentage of homes passed by digital cable – 50%.⁸ When evaluating the Applicants' Ex Parte Presentation, the Commission must take notice of the conflicting statistics cited by Applicants and of the distinction between large and small MSOs.

The Applicants do not need a DBS monopoly to constrain smaller market cable companies.

DBS growth in smaller markets shows that the Applicants are at no competitive disadvantage. In fact, just the opposite is true – DBS has substantial advantages over small cable.

First, the average ACA member company serves only 8,000 customers. In contrast, post-merger EchoStar would serve more than 16 million subscribers. Applicants cannot seriously contend that they require a 16 million subscriber DBS monopoly to compete with companies that serve only 8,000 customers.

Second, as ACA explains in detail in its Petition to Deny, the DBS monopoly will have at least three means to weaken and eliminate competition from smaller market cable systems: use of monopoly control over DBS to extract major programming cost concessions; bottleneck control over program distribution; and exploitation of small cable's disparate regulatory burdens.⁹

Tellingly, the Applicants themselves assert that they already compete very effectively with cable, stating: "Cable subscribers are generally less satisfied – and thus an easier target [for DBS providers] – than DBS customers."¹⁰

⁷ ACA Reply Comments, CS Docket No. 98-120, at pp. 4-5 (While 75% of the smaller systems are at 550 MHz and below, about 75% of the major MSO systems are at 750 MHz or above. Similarly, about 50% of the smaller systems are at 500 MHz or below, while only 15% of the major MSO systems are projected to be at this capacity by year-end 2001.).

⁸ See Ex Parte Notice at 3.

⁹ See ACA Petition to Deny, CS Docket No. 01-348 (filed February 4, 2002).

¹⁰ Ex Parte Presentation at 15.

Inaccurate and inconsistent, the Ex Parte Presentation should not distract the Commission from the almost certain effect the satellite monopoly created by this merger would have on small markets – competition would be eliminated and hundreds of small, local communications businesses could be destroyed. No public interest is served by these results. The Commission should deny the Applications.

With best regards, I remain

Yours sincerely,



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