

**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	)	

**PETITION TO DENY**



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## SUMMARY

ACA petitions to deny the Application because the proposed DBS monopoly would:

- Reduce or eliminate MVPD competition in smaller markets.
- Reduce program diversity in smaller markets.
- Reduce or eliminate broadband deployment in smaller markets.
- Eliminate many small, local communications businesses.

In smaller markets, the proposed DBS monopoly threatens to substantially reduce and eliminate MVPD competition and cause substantial harm to important policies and objectives under the Commission's jurisdiction. The Applicants offer no credible countervailing public interest benefits. And for good reason – none exists. The Commission must deny the Application.

**The merger will substantially reduce MVPD competition in smaller markets.** A fundamental fact of the merger is that competition between EchoStar and DirecTV will cease. In nearly all markets served by ACA members, this will immediately reduce the number of MVPD competitors from three to two a substantial reduction in competition.

**EchoStar does not need a DBS monopoly to compete effectively in smaller markets.** The Applicants' principal justification for creating a satellite monopoly serving more than 16 million customers is that it is necessary to compete against "dominant cable operators." This argument collapses under scrutiny. It is contradicted by EchoStar's court filings in litigation against DirecTV. This argument also conflicts with both companies' reports of exponential subscriber growth. And when extended to smaller market cable competitors, the argument is nonsense.

The average ACA member company serves 8,000 subscribers, more than 16,292,000 *fewer* subscribers than the post-merger EchoStar would serve. EchoStar cannot seriously maintain that it needs a DBS monopoly to compete against smaller market cable companies.

**The merger threatens to eliminate competition in many smaller markets.**

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. The DBS monopoly will have at least three principal means to weaken and eliminate competition from smaller market cable systems: (i) use of monopoly control over DBS to extract major programming cost concessions; (ii) bottleneck control over program distribution; and (iii) exploitation of small cable's disparate regulatory burdens.

**Use of monopoly control over DBS to extract programming cost concessions.**

Post-merger EchoStar, the largest MVPD, plans to extract major concessions from programmers. This will enable the DBS monopoly to price its services below the cost of those services for smaller market cable providers. In this way, the DBS monopoly will obtain structural cost advantages that will enable it to price its smaller market competition out of business.

EchoStar's "promise" of nationwide pricing is a clever misdirection. This would only ensure that EchoStar would lock in prices below smaller competitors' costs, accelerating its monopoly over smaller markets.

**Bottleneck control over programming distribution.** The DBS monopoly will continue EchoStar's pattern of exerting bottleneck control over broadcast and satellite programming distribution. No technological or economic barriers exist to the wholesale distribution of programming to small cable systems via DBS. In some markets, DBS would provide the best source for broadcast and satellite programming for smaller cable systems. Invariably, EchoStar refuses to negotiate.

DirecTV has dealt with small operators on a limited basis through dish-overlay transactions. The principal incentive for DirecTV to enter into dish-overlay transactions with small cable companies is to better compete against EchoStar for DBS customers. This incentive will evaporate post-merger.

**Exploitation of disparate regulatory burdens.** Independent cable systems bear many more regulatory obligations than DBS – local franchise requirements, PEG programming obligations, restrictions on programming placement, the tier buy-through prohibition, EAS – just to name a few. These obligations increase costs and decrease flexibility to respond to DBS competition. The DBS monopoly will take full advantage of the lack of regulatory parity through pricing and program offerings that smaller market cable operators cannot meet.

In these ways, the DBS monopoly will exploit its market power and regulatory advantages to extinguish competition in smaller markets. The unavoidable consequences: less competition, reduced program diversity, faltering broadband deployment, and widespread failure of local communications businesses.

**EchoStar and DirecTV are already having a serious competitive impact on smaller markets and are contributing to business failures.** The public interest consequences detailed in this Petition are not conjecture. They are already occurring. The record will show that many smaller market systems are in difficult straits, and some have sought Chapter 11 protection. A significant factor is the loss of subscribers to the two existing DBS providers. Allowing a DBS monopoly will irrevocably accelerate this trend.

**The Commission cannot expect smaller market cable companies to compete against a DBS monopoly.** ACA must emphasize this: Rumors of the death of small cable are greatly exaggerated. The Commission should not underestimate the creativity, ingenuity, and viability of small cable business in a truly competitive environment. Local businesses responsive to local needs and interests can have a fighting chance against DBS, if, and only if, small cable has fair access to programming and the Commission ensures a reasonably level playing field between cable and DBS.

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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**PETITION TO DENY**



**I. Introduction**

On behalf of more than 930 independent cable companies located in smaller markets and rural areas in all 50 states, the American Cable Association (“ACA”) submits this Petition to Deny in response to the Consolidated Application of EchoStar Communications Corporation (“Echostar”), General Motors Corporation, and Hughes Electronics Corporation (“DirecTV”) (collectively, “Applicants”). In short, the Commission should deny the Application because the proposed DBS monopoly would:

- Reduce MVPD competition in smaller markets.
- Reduce program diversity in smaller markets.
- Reduce or eliminate broadband deployment in smaller markets.
- Weaken and eliminate many small, local communications businesses.

These consequences conflict with well-established goals and objectives under the Communications Act and Commission policies. On these points, the Applicants offer no

credible countervailing public interest benefits. And for good reason – none exist.

EchoStar's intent to monopolize smaller markets and eliminate competition from independent cable systems is transparent. As separate, unaffiliated MVPDs, EchoStar and DirecTV are already extremely powerful, and increasingly dominant, competitors in smaller markets. Each company boasts exponential subscriber growth. Each company continues to impose relentless competitive pressure on smaller cable systems. As a result of this competition, independent cable systems have lost, and continue to lose, customers to EchoStar and DirecTV.

If the Commission approves the Application, it will authorize a DBS monopoly with overwhelming market power and resources dwarfing those of independent cable systems. The post-merger EchoStar will serve at least 16.3 million subscribers. The average ACA member company serves about 8,000 subscribers. Many ACA members serve far fewer subscribers. The differences in economies of scale, resources, and market power speak for themselves.

The DBS monopoly will have every incentive to force its small cable competitors out of business. Capital will shun the sector. Small system insolvencies and failures will increase. The services and benefits that smaller market cable consumers enjoy will be lost, only to be replaced by a sole satellite provider with no local presence, no local obligations, and no local competition.

The Commission has ample authority to deny the Application in the face of the substantial public interest harm that would result in smaller markets. The Applicants offer no credible public interest benefits to offset the harm. The Commission must deny the Application.

**The American Cable Association.** ACA represents 930 independent cable companies. Together, ACA members serve 7.5 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. ACA members range from family-run cable businesses serving a single town to multiple system operators that focus on smaller systems and smaller markets. About half of ACA's members serve less than 1,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets. All ACA members already face intense competition from EchoStar and DirecTV.

**II. The Commission must deny the Application if the proposed DBS monopoly will eliminate competition and cause substantial public interest harm in smaller markets.**

**A. Section 310(d) obligates the Commission to deny an application that fails public interest scrutiny.**

The Commission's authority to deny proposed transfers under Section 310(d) is well settled.<sup>1</sup> In recent orders, the Commission has thoroughly explained its four-part public interest analysis under Section 310(d).<sup>2</sup> This Petition focuses on the third prong of that test:

Whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act and/or other related statutes, or would interfere with the objectives of the Communications Act and/or other related statutes.<sup>3</sup>

Under this prong, the Commission will evaluate threats to competition and a range of communications policy goals and objectives. The Commission will assess the potential competitive effects of the transaction, as informed by traditional antitrust principals, and the merger's likely effect on future competition.<sup>4</sup> To find that a merger is in the public

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<sup>1</sup> See 47 U.S.C. §§ 214(a), 310(d). See also *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, FCC 01-12, Memorandum Opinion and Order ("AOL Time Warner Order"), 2001 WL 55636, ¶¶ 1, 19 (rel. Jan. 22, 2001) (Section 301(d) requires the Commission to determine whether the Applicants have demonstrated that the public interest would be served by transferring control of license authorizations); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, FCC 00-202, Memorandum Opinion and Order ("AT&T-MediaOne Order"), 15 FCC Rcd 9816, ¶ 1 (2000); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, FCC 98-225, Memorandum Opinion and Order ("WorldCom-MCI Order"), 13 FCC Rcd 18025, ¶¶ 1, 8-10 (1998).

<sup>2</sup> See *AOL Time Warner Order* at ¶ 20; *AT&T-MediaOne Order* at ¶ 9.

<sup>3</sup> *AOL Time Warner Order* at ¶ 20.

<sup>4</sup> *AOL Time Warner Order* at ¶ 21.

interest, the Commission must “be convinced that it will enhance competition.”<sup>5</sup>

Beyond competitive effects, the Commission will evaluate public interest issues encompassing “the goals, policies, and broad aims of the Communications Act.”<sup>6</sup> In the face of public interest harms, the Commission will reject an application unless the applicants prove that the public interest benefits outweigh the potential harms.<sup>7</sup>

**B. The proposed DBS monopoly implicates fundamental goals and objectives of the Communications Act and Commission policy.**

In the markets served by independent cable operators, the proposed DBS monopoly implicates several fundamental goals and objectives of the Communications Act and Commission policy. Concerning smaller markets, we identify four principal public interest issues:

- Promoting MVPD competition.
- Promoting program diversity and a multiplicity of MVPD speakers.
- Promoting deployment of facilities-based broadband services.
- Maintaining a viable independent cable sector to serve local community needs and interests.

As summarized below, the importance of these public interest objectives is well established. The Commission’s authority to protect them in this proceeding should pose no legitimate controversy.

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<sup>5</sup> AOL Time Warner Order at ¶ 21; *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order (“*Bell Atlantic-NYNEX Order*”), 12 FCC Rcd 19985, ¶ 2 (1997).

<sup>6</sup> AOL Time Warner Order at ¶ 22; *AT&T-TCI Order* at ¶ 14; *WorldCom-MCI Order* at ¶ 9.

<sup>7</sup> AOL TW Order at ¶ 1; *WorldCom-MCI Order* at ¶ 10.

**1. The public interest in promoting competition in smaller markets.**

The public interest in promoting competition forms the core of the 1984 Cable Act, the 1992 Cable Act, the 1996 Telecommunications Act, and hundreds of Commission decisions implementing those statutes. In the context of license transfers, the Commission has repeatedly affirmed its authority and obligation to assess the potential competitive effects of a transaction.<sup>8</sup>

The Commission's role in promoting competition extends to all regulated communications markets, large and small. At the same time, both the Communications Act and Commission policy recognize that smaller markets and smaller market providers face different circumstances that should be considered separately from large markets and large market providers.<sup>9</sup> To evaluate fully the competitive harms of the proposed satellite monopoly, the Commission must assess separately the significant competitive effects in smaller markets. As discussed in Sections III. A. and III. B. below, the DBS monopoly would reduce and eliminate MVPD competition in many smaller markets.

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<sup>8</sup> *AOL Time Warner Order* at ¶ 21 (the Communications Act requires the Commission to evaluate the merger's likely effect on future competition); *WorldCom-MCI Order* at ¶¶ 12-13 ("there can be no doubt that competition is a relevant factor in weighing the public interest") (quoting *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953)); *Bell Atlantic-NYNEX Order* at ¶ 2.

<sup>9</sup> See, e.g., 47 USC § 543(m) (additional rate regulation relief for small companies); Implementation of Sections of the Cable Television Consumer Protection Act of 1992, Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration* ("Small System Order"), 10 FCC Rcd 7393, ¶ 25 (1995).

**2. The public interest in promoting program diversity and a multiplicity of speakers in smaller markets.**

The Commission's analysis must also encompass fundamental First Amendment principals underlying the Communications Act. As stated in the *AOL Time Warner Order*:

The Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices. It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."<sup>10</sup>

Smaller market program diversity concerns are especially sharp in this case. As discussed in Sections III. A. and III. B. below, the 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.

**3. The public interest in promoting the delivery of broadband services in smaller markets and rural areas.**

Since at least 1996, a key element of the Communications Act and Commission policy has been the rapid development of advanced services in smaller markets and rural areas.<sup>11</sup> ACA member companies have responded and are leading the industry in delivering broadband services to smaller markets. The Commission has received

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<sup>10</sup> *AOL Time Warner Order* ¶ 23, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

<sup>11</sup> See e.g., Telecommunications Act of 1996 § 706, Advanced Telecommunications Incentives; *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Second Report*, CC Docket No. 98-146, FCC 00-290, 15 FCC Rcd 20913 (2000).

substantial data on ACA members' broadband deployment in response to the *High-Speed Access NOI*.<sup>12</sup> A recent report by Independent Cable News describes continuing progress by smaller systems.<sup>13</sup> Especially noteworthy for this proceeding, ACA members are bridging the "Digital Divide" without the need for mega-mergers or monopoly control over a national communications medium.

As discussed in Section III. B. below, the 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.

**4. The public interest in maintaining viable 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 and interests in smaller markets. Through family-owned, small town cable providers and small market MSOs, millions of rural subscribers receive the benefits of a multiplicity of broadcast and satellite programming and, increasingly, advanced services like cable modem service. Moreover, independent cable businesses epitomize the principles of localism. Most smaller cable companies are operated by businesspeople that are directly responsive to local cable-related needs and interests. To protect this public interest, Congress and the Commission have repeatedly acted to alleviate undue

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<sup>12</sup> *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and other Facilities*, GN 00-185, 15 FCC Rcd 19287 (2000), American Cable Association Comments (filed Dec. 1, 2000) and Reply Comments (filed Jan. 10, 2001).

<sup>13</sup> Independent Cable News, "Smaller Operators Evaluations," December 2001 (reporting on the growth of high-speed data services provided by smaller cable operators).

regulatory burdens that threaten the viability of this sector.<sup>14</sup> As discussed in the next section, the 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. Widespread failure of smaller market cable systems and the concomitant public interest harm are the predictable consequences.

**III. Because the proposed DBS monopoly will eliminate competition and cause substantial public interest harm in smaller markets, the Commission must deny the Application.**

The proposed satellite monopoly would cause serious public interest harm in smaller markets for two principal reasons. First, it would eliminate competition among DBS providers, thus substantially reducing MVPD competition. In most smaller markets, the number of MVPD competitors will immediately decrease from three to two. Considering only this, the threat to competition is substantial. But it gets worse.

The proposed DBS monopoly would also have a 16 million subscriber advantage over most independent cable companies. Post-merger EchoStar will wield enormous market power over its small competitors. It will have every incentive to use this market power to weaken and eliminate independent cable competitors. The result? A reduction in MVPD competition in many small markets first from three to two, then from two to one. EchoStar would become the sole MVPD provider in many smaller markets. The competitive implications are self-evident. The results are antithetical to the public

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<sup>14</sup> See, e.g., 47 USC § 543(j) and (m); *Small System Order*, 10 FCC Rcd at 7401-7402 and 7420; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Leased Commercial Access, Second Report and Order and Second Order on Reconsideration*, 12 FCC Rcd 5267 at 5331-5332, 5333 (1997) (small system leased access rules); *AOL Time Warner Order* at ¶¶101 – 103 (acknowledging and resolving small cable company public interest concerns in that merger).

interest – smaller market consumers would lose sources of diverse programming, broadband deployment by small cable systems would falter, and local business responsive to local needs and interests would fail.

**A. The Applicants' competition arguments do not justify creating a DBS monopoly.**

A fundamental fact of the merger is that competition between EchoStar and DirecTV will cease. In nearly all markets served by ACA members, this will immediately reduce the number of MPVDs from three to two. The Applicants' principal justification for creating a satellite monopoly that serves more than 16 million customers is that it is necessary to compete against "dominant cable operators."<sup>15</sup>

This argument should collapse under Commission scrutiny. The argument is contradicted by EchoStar's court filings in litigation against DirecTV. It also conflicts with both companies' reports of exponential subscriber growth. And when extended to smaller market cable competitors, which on average would serve 16,292,000 *fewer* subscribers than the post-merger EchoStar, the claim is pure fiction.

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<sup>15</sup> Application, p. 22 ("[T]he MVPD market is still dominated by cable operators,"); p. 36 ("All of these synergies will contribute to the creation of a dramatically stronger competitor to cable's dominance of the MVPD marketplace.").

**1. EchoStar admits elsewhere that a DBS monopoly will cause serious public interest harms.**

EchoStar's litigation against DirecTV provides an excellent starting point for evaluating the impact of a DBS monopoly on competition.<sup>16</sup> In sworn pleadings, EchoStar states the following:

- DirecTV's efforts to monopolize high-powered DBS service violate federal and state antitrust laws.<sup>17</sup>
- The relevant market for antitrust analysis is high-powered DBS service, not all MVPDs.<sup>18</sup>
- Consumers suffer because of DirecTV's efforts to monopolize high-powered DBS service.<sup>19</sup>
- Virtually insurmountable entry barriers exist to high-powered DBS service.<sup>20</sup>
- DirecTV seeks to control high-powered DBS service, hurting EchoStar's ability to compete.<sup>21</sup>
- Because of market power, DirecTV is able to charge monopoly prices for exclusive sports programming.<sup>22</sup>

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<sup>16</sup> *EchoStar Communications Corporation, et. al. v. DirecTV Enterprises, Inc.*, No. 00-CV-212 (Colo. Dist. Ct., filed 02/01/00) ("*EchoStar v. DirecTV*").

<sup>17</sup> *EchoStar v. DirecTV* Complaint, p. 2 (dated February 1, 2000) ("Complaint").

<sup>18</sup> *EchoStar v. DirecTV*, EchoStar's Response to DirecTV's and Hughes' Motion to Determine the Sufficiency of EchoStar's Response to Request for Admission No. 2, p. 3 (dated Nov. 13, 2000) ("Response").

<sup>19</sup> Complaint, pp. 3, 24.

<sup>20</sup> Complaint, p. 9.

<sup>21</sup> Complaint, p. 32.

<sup>22</sup> Complaint, p. 32.

When facing head-to-head competition from DirecTV, EchoStar bemoans a litany of competitive harms. Inexplicably, EchoStar now says that all competitive harms will be cured, not by more balanced DBS competition, but by a DBS monopoly. The record of the EchoStar/DirecTV litigation provides ample grounds to doubt any alleged competitive benefits of the proposed combination. The Commission should incorporate the relevant filings from that case into the record of this proceeding.

**2. The Applicants' impressive subscriber growth belies a need to form a DBS monopoly to compete.**

The Applicants' argument that they need a DBS monopoly to compete does not square with EchoStar's and DirecTV's exponential subscriber growth. Hardly languishing in cable's shadow, national DBS growth far outstrips that of cable, with the disparity greatest in small cable markets. Recent DBS growth is nearly two and a half times the cable subscriber growth rate.<sup>23</sup> Last year alone, the number of DBS subscribers increased by 24%.<sup>24</sup> Every day, DBS gains more than 8,500 subscribers.<sup>25</sup> In other words, there are more new DBS subscribers in one day than the number of subscribers served by the average ACA member company.

On a national scale, no legitimate question can be raised concerning EchoStar's and DirecTV's ability to compete with cable. In smaller markets, the impact of EchoStar and DirecTV is even more profound. ACA members report losing 15% - 25% or more of

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<sup>23</sup> See Eighth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-389, 2002 WL 47062, ¶ 8 (rel. January 14, 2002) ("*Eighth Video Competition Report*"). Moreover, as recently as late October, 2001, when News Corp. was poised to acquire DIRECTV, EchoStar made clear that it was poised for growth and "well positioned regardless of the outcome." (Business Brief, EchoStar Communications Corp: Third-Period Profit Is Posted As Revenue Jumps by 46%, *The Wall Street Journal*, C-14 (October 24, 2001)).

<sup>24</sup> *Eighth Video Competition Report* at ¶ 13.

<sup>25</sup> *Eighth Video Competition Report* at ¶ 58.

their subscribers to DBS. In this light, the proposed merger is not about competition, but about market dominance through monopoly control of distribution.

**3. EchoStar and DirecTV do not need a DBS monopoly to compete against smaller market cable systems.**

When considering smaller markets, the Applicants' competition arguments become nonsensical. The Commission is familiar with the company characteristics of ACA's 930 member companies. More than half of the members serve less than 1,000 subscribers. Only a handful of ACA members serve more than 100,000 subscribers. ACA members serve communities spread throughout predominantly high cost rural markets. Taken together, 930 separate companies serve about 7.5 million subscribers. On average, each ACA member serves about 8,000 subscribers company-wide.

Currently, EchoStar serves more than 6 million customers.<sup>26</sup> Put another way, EchoStar serves 5,992,000 subscribers more than the average ACA member company. Similarly, DirecTV serves about 10.3 million customers, more than 10,292,000 subscribers more than the average ACA member company.<sup>27</sup> Concerning smaller markets then, the Commission must pose the following question:

To compete in smaller markets, does EchoStar need a DBS monopoly with a combined subscriber base of at least 16,292,000 *more* subscribers than the average small market cable company?

We await with interest the Applicants' answer.

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<sup>26</sup> Application, p. 10

<sup>27</sup> Application, p. 13.

**B. The proposed DBS monopoly will weaken and eliminate MVPD competition in many smaller markets.**

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 in many markets. The results? No MVPD competition in many smaller markets, the loss of program diversity, the reduction in broadband deployment, and the failure of local communications businesses.

The DBS monopoly will have at least three principal means to weaken and eliminate competition from smaller market cable systems. These are:

- Use of market power to lower programming costs, enabling EchoStar to price services below the cost of service for independent cable operators.
- Bottleneck control of programming and refusal to distribute programming to smaller market cable systems.
- Continued exploitation of the disparate regulatory burdens borne by independent cable companies.

As explained below, by monopolizing DBS service, post-merger EchoStar will gain the market power necessary to squeeze out smaller market cable competition.

**1. Market power over programmers will enable the DBS monopoly to price services below independent cable's cost of service.**

The proposed DBS monopoly will gain overwhelming market power over programmers. Post-merger Echostar will control far more video customers than any other current MVPD, and a core component of the merger plan is to extract major concessions from programmers. EchoStar touts its ability to save billions in programming as a result of the merger.<sup>28</sup> Through monopoly power over programmers,

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<sup>28</sup> *Consumers Worry about TV Programming after Merger of Satellite Providers*, <http://detnews.com/2001/technews/0111/03/technology-334421.htm>.

the DBS monopoly will attain the ability to price its services below its small competitors' cost of service.

The Commission has acknowledged that the principal challenges facing the small cable sector are access to programming and high programming costs.<sup>29</sup> The satellite monopoly's ability to extract price concessions from programmers will give DBS an overwhelming structural cost advantage over smaller market cable systems. Separately, EchoStar and DirecTV already compete very aggressively on price with rural cable systems, and with each other. For example, last year EchoStar began offering new customers its Dish Network Top 100 programming package for \$9 a month.<sup>30</sup> At this rate, ACA members could not even cover their costs of programming. As a direct result, EchoStar has accelerated the subscriber loss reported by ACA members. Members report subscriber loss of 15% to 25% or more due to offers like this.

If allowed to merge, EchoStar will have monopoly control over programming distribution to more than 16 million customers and will be able to further drive down programming costs, along with its prices.<sup>31</sup> On the other hand, the prices charged by EchoStar's small cable competitors will be constrained by substantially higher programming costs, plus higher costs due to disparate regulatory burdens.<sup>32</sup> In this way, the DBS monopoly will create the structural inability for small cable to compete on

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<sup>29</sup> *Small System Order* at ¶¶ 17, 56.

<sup>30</sup> *Dish Kicks off \$9 Monthly Plan*, Multichannel News (Aug. 6, 2001).

<sup>31</sup> Richard A. Posner, *Economic Analysis of Law*, 299 (5<sup>th</sup> ed 1998) (a reduction in a monopolist's costs will reduce optimum monopoly pricing).

<sup>32</sup> Posner at 295 (in a competitive market, a distributor's price choice is constrained by demand and costs of production).

price. Failure of smaller cable systems will increase, and the public interest benefits of facilities-based competition and local MVPD services will be lost.

The Applicants have floated a “promise” of nationwide pricing for rural areas.<sup>33</sup> The Commission should see through this clever diversion. If the Application were approved on the condition that EchoStar charges a fixed price in smaller markets, EchoStar would have every incentive to fix those prices below small cable systems’ costs of providing similar services. In this way, a merger conditioned on national pricing will only strengthen EchoStar’s ability to extinguish smaller market cable companies by setting prices below its competitors’ costs.

**2. The DBS monopoly will exert bottleneck control over programming.**

To further increase the competitive advantage over smaller market cable systems, the DBS monopoly will continue EchoStar’s pattern of exerting bottleneck control over broadcast and satellite programming. Currently EchoStar refuses to transact with small cable operators. DirecTV has dealt with small operators on a limited basis through “dish-overlay” transactions. Post-merger, EchoStar will have every incentive to continue its refusal to distribute programming to small cable and to cease any dish-overlay deals inherited in the merger.

No technological or economic barriers exist to the wholesale distribution of programming to small cable systems via DBS. Currently, EchoStar and DirecTV distribute programming to SMATV’s and other cable-like distributors. In some markets, DBS offers the clearest source of network programming as well as satellite services and

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<sup>33</sup> Application, p. 42 (New EchoStar is committed to pricing its DBS services on a uniform, nationwide basis.)

national network feeds. ACA members and their representatives have made repeated requests to obtain satellite or broadcast programming from EchoStar and DirecTV. Invariably, EchoStar refuses to negotiate. Outside of limited dish-overlay transactions, the same is true for DirecTV.

On a limited basis, DirecTV has agreed to distribute satellite programming to some small cable systems. One form of transaction is a “dish-overlay” arrangement.<sup>34</sup> This involves an agreement between DirecTV and a small cable company where the small cable company installs DBS dishes on subscribers’ homes. The subscriber then receives broadcast signals and some satellite signals via cable and a wide array of satellite services via a dish. In markets where DBS does not deliver broadcast signals and where the low density of cable subscribers cannot support a system rebuild, this type of transaction has enabled thousands of rural consumers to receive greatly expanded programming choices.

An obvious incentive for DirecTV to enter into a dish-overlay transaction with a small cable company is to compete against EchoStar for DBS customers. This type of transaction serves the public interest in many ways, including promoting MVPD competition and program diversity, and maintaining viable, local communications businesses. The incentive for these transactions disappears when EchoStar gains monopoly control over DBS distribution.

Beyond dish-overlay transactions, EchoStar and DirecTV carry a wide range of programming services that many smaller market cable systems desire to distribute. The

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<sup>34</sup> Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report, 13 FCC Rcd 24284 (1998), ¶ 74 (discussing dish-overlay trials between three smaller market cable operators and DirecTV).

programming includes national feeds from the four major broadcast networks, local broadcast signals in some markets, and diverse satellite programming. Particularly on the edges of some DMAs, satellite distribution would provide the clearest source of local broadcast signals for cable systems. In the face of the obvious public interest benefits of distributing this programming to smaller market cable systems, as well as the potential marginal revenue, EchoStar continues to stonewall.

**3. The DBS monopoly will exploit the disparate regulatory burdens borne by smaller market cable companies.**

The proposed DBS monopoly will exploit to even a greater degree the current disparate regulatory burdens borne by independent cable systems. In evaluating this competitive aspect of the merger, the Commission should consider the table below.

### DBS v. Independent Cable Systems Comparison of Regulatory Burdens

Regulatory obligation	Smaller market cable systems	DBS
Carriage of broadcast signals	Mandatory carriage of broadcast signals on basic tier	May carry broadcast signals a la carte or in separate packages
Must-carry	Mandatory carriage of all eligible broadcast signals in all markets	Discretionary carriage of broadcast signals in any market, then carry one carry all
	Mandatory channel placement	No mandatory channel placement
Carriage of premium services	Tier-buy through prohibition (Oct. 2002)	No tier-buy through prohibition
Local programming obligations	Public Access Channels Education Access Channels Governmental Access Channels Leased Access Channels	No local programming obligations
Local franchise obligations	Must have local franchise	No franchise
	Must pay local franchise fees up to 5% of gross	No franchise fee
	Must contribute to PEG access capital costs	No PEG contributions
	Must contribute to Institutional Networks	No Institutional Networks obligations
	Customer service obligations	No customer service obligations
EAS obligations	EAS equipment in each headend serving less than 5,000 by October 2002	No EAS
Rate restrictions	Geographic uniform rate requirement	No restrictions

Each of the regulatory burdens noted above imposes administrative burdens and costs on independent cable companies. Many of these regulatory burdens restrict the ability of cable operators to respond to competitive pressure from DBS. Because of regulatory restrictions, independent cable companies cannot repackage services, move broadcast stations to separate tiers, or charge different rates within a franchise area. Moreover, because of the higher cost structures imposed by these regulatory burdens, independent cable companies have higher fixed and variable costs and are less able to respond to price competition from DBS. To fully assess the competitive consequences of the proposed combination, the Commission must factor this lack of regulatory parity into the analysis.

As discussed above, the proposed DBS monopoly will wield tremendous market power to squeeze programming costs, constrain programming distribution, and exploit small cable's disparate regulatory burdens. The inevitable consequences - reduced program diversity, faltering broadband deployment, and widespread failure of local communications businesses.

This is not conjecture. As discussed in the next section, competition from DirecTV and EchoStar as separate and competing MVPDs is already contributing to the difficult straits of many smaller market cable operators and the outright failure of others. From this, the Commission can readily conclude that a DBS monopoly will trigger an epidemic of small system failures.

**C. Competition from the two existing DBS providers is already having a serious competitive impact in smaller markets and is contributing to failures of smaller market cable businesses.**

Smaller market cable systems are already facing intense competitive pressure from EchoStar and DirecTV. In many smaller markets, this competition has resulted in loss of substantial market share, with predictable consequences for smaller business. Some ACA members report subscriber losses in the 15%-25% range. DBS offers such as 100 channels for \$9.00, free or subsidized equipment and installation and other discounts, all provide strong incentives for customers to disconnect cable. With the higher cost structures inherent in operating rural networks, the resulting loss of revenues has threatened the viability of hundreds of small systems.

Many smaller market cable businesses are struggling under this competitive pressure. Others have failed outright. For example, at least three smaller market cable companies have sought Chapter 11 protection in the past 12 months.<sup>35</sup> These companies encompass at least 790 separate rural cable systems serving almost 500,000 subscribers. A principal factor in the insolvencies has been subscriber loss to DBS. Hundreds of other small systems face similar circumstances.

Ample independent evidence further demonstrates the competitive force of DBS in smaller markets. On the record in the pending program access proceeding is an October 2001 report by Credit Suisse.<sup>36</sup> That report predicts the potential widespread

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<sup>35</sup> *Cable Notes*, Warren's Cable Regulation Monitor, 2001 WL 8146945 (Nov. 19, 2001) (Classic Communications files for Chapter 11); *Bondholders OK Galaxy Plan*, Multichannel News (Oct. 1, 2001) (Galaxy Telecom Inc. files for Chapter 11); *Firm Seeks Chapter 11 Protection*, Telegram & Gazette Worcester, MA, 2001 WL 6231026 (Jan. 11, 2001) (Cooney Cable Association, Inc.).

<sup>36</sup> Ty P. Carmichael, Jr., Credit Suisse First Boston Report, *Natural Selection, DBS Should Thrive as the Fittest to Serve Rural America*, October 12, 2001, pp. 11-14 (submitted as an *ex parte* filing in CS Docket No. 01-290 on November 9, 2001) (CSFB Report).

extinction of smaller market cable systems due to competition from uncombined EchoStar and DirecTV. Similarly, in evaluating the harms of the proposed DBS monopoly, Robert Litan of the Brookings Institute reaches a similar conclusion.

The claim that the merger is necessary for satellite to compete with cable is ridiculous . . . [A] monopoly will happen in about . . . 15 million homes that are served by small, typically family owned, cable systems that are gradually dying because they offer fewer choices and analog service, generally at higher prices, than the two digital satellite providers.<sup>37</sup>

The analyses of these independent observers should carry substantial weight as the Commission evaluates the Applicants' rationalization of EchoStar's desire for a DBS monopoly.

**D. The Commission cannot expect small cable businesses to compete against a DBS monopoly.**

At this point, ACA must pause to paraphrase Mark Twain. Rumors of small cable's death are greatly exaggerated. 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 reasonably level playing field between cable and DBS.

To be sure, some ACA members are holding their own against two DBS competitors, at least for now. As reported elsewhere, these companies have upgraded

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<sup>37</sup> Robert W. Litan, *Satellite Merger will Hurt TV Viewers*, Chi. Trib., Dec. 16, 2001, Sec. 1, at 24.

their networks and are rolling out broadband advanced services like digital cable and cable modem service.<sup>38</sup> But these ACA members describe achieving only some measure of competitive equilibrium, far from the market dominance claimed by the Applicants. Approving the proposed DBS monopoly will upset this equilibrium with inexorable results.

Authorizing a DBS monopoly would accelerate the decline of weaker systems and will upset the equilibrium achieved by other smaller market systems. Company failures will proliferate. The public interest in competition, program diversity, and viable local communications business will suffer.

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<sup>38</sup> *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and other Facilities*, GN 00-185, 15 FCC Rcd 19287 (2000), American Cable Association Comments (filed Dec. 1, 2000) and Reply Comments (filed Jan. 10, 2001).

**V. Conclusion.**

In the smaller markets served by independent cable systems, the proposed DBS monopoly will: (i) reduce or eliminate MVPD competition; (ii) reduce program diversity; (iii) reduce or eliminate broadband deployment; and (iv) 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.

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February 4, 2002

**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 4<sup>th</sup> day of February 2002.

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