

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

\_\_\_\_\_)  
*In re Consolidated Application of* )  
 )  
**EchoStar Communications Corporation,** )  
**General Motors Corporation,** )  
**Hughes Electronics Corporation,** )  
 )  
Transferors, )  
 )  
and )  
 )  
**EchoStar Communications Corporation,** )  
 )  
Transferee, )  
 )  
For Authority to Transfer Control. )  
\_\_\_\_\_)

CS Docket No. 01-348

TO: The Commission

**REPLY COMMENTS IN OPPOSITION**

**Law and Communications Policy Seminar  
at**



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1 **INTRODUCTION AND SUMMARY**

2 The following comments are submitted by the students in the Law and Communications  
3 Policy Seminar at Duke Law School.<sup>1</sup> The substantive focus of the seminar is to understand the  
4 purpose and examine the “public interest, convenience and necessity” language appearing in the  
5 Communications Act and, using open Commission dockets, to apply the Act’s tenets and  
6 Commission’s jurisprudence to pending matters.

7 These comments were written and assembled by students after reviewing the entire  
8 record of comments before the Commission. The seminar also examined several prior merger  
9 orders to discern the underpinnings of the Commission’s four-part public interest test and studied  
10 the concerns expressed in the concurrences and dissents in those mergers. The seminar  
11 concluded that the four-part test frames the public interest obligation reasonably well, the  
12 evidentiary burden on the applicant is appropriate and to the extent there are parameters of  
13 merger review that are not obviously rules-based, such review expresses a necessary adjunct to  
14 the Commission’s existing authority. In particular, the seminar supports the conclusion that  
15 federal communications policy is primarily about ensuring the interests of Americans as citizens,  
16 while federal competition policy primarily seeks to ensure the interests of Americans as  
17 consumers.

18 In the instant case, the seminar’s conclusion is that, as proposed, the applicants have not  
19 carried their burden of demonstrating that the merger, on balance, serves the public interest. The  
20 seminar submits the following conclusions:

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<sup>1</sup> The seminar is offered in Spring 2002 and taught by William J. Friedman, Senior Legal Advisor to former Commissioner Tristani. Friedman is currently Senior Fellow, Intellectual Property and the Public Domain at Duke University Law School.

- 1           1. The evidence preponderates against the move to a monopoly MVPD situation in areas  
2           without cable and non-digital cable, and against the contention that such a market  
3           development will discipline cable MVPDs in the urban markets (this conclusion was  
4           reached without resolving the factual dispute whether 3% or 22% of American homes  
5           are passed by cable).
- 6           2. The evidence preponderates against the public interest being served by the  
7           consolidation of all prime CONUS orbital slots in one company especially when  
8           combined with the current absence of any viable competitor or the existence of  
9           regulatory conditions favoring development of such competition.
- 10          3. The evidence preponderates against concluding that a “national pricing scheme”  
11          would be sufficient to offset the harm to customers in rural markets where the result  
12          is a reduction in the number of competitors from 2 to1, and in antiquated cable  
13          markets where no digital tier exists. As proposed, the national pricing scheme cannot  
14          function as an adequate proxy for competition under the 1996 Act and may well lead  
15          to rural subscribers subsidizing urban cable consumers.
- 16          4. The evidence preponderates against concluding the “spectrum efficiencies” arising  
17          from signal non-duplication are necessary to achieve the public interest benefits the  
18          Applicants allege. Specifically, it appears that local into local programming can  
19          reach the top 100 DMAs with little or no change in the existing DBS duopoly  
20          structure and based on the limited facts of record regarding the benefits of spot beam  
21          technology, the seminar concluded the existing market structure will likely provide  
22          local into local beyond the top 100 DMAs. Second, the evidence preponderates

1           against the need to eliminate signal duplication to allow DBS to effectively compete  
2           with cable by offering advanced services such as ITV, HDTV, PVR, and VOD.

3           5. The evidence preponderates against the use of conditions to mitigate the harm to the  
4           public interest, as demonstrated by diminished competition and a complete monopoly  
5           over the DBS spectrum by one company, especially behavioral conditions  
6           considering the evidence adduced on Echostar's past record of compliance with  
7           programming requirements of DBS licensees.

8

9

1     **I.     THE FOUR-FACTOR PUBLIC INTEREST TEST**

2             The Commission has been asked to approve the consolidated transfer of control  
3 application filed by Echostar and DirecTV (“Application to merge”). Pursuant to Sections  
4 214(a)<sup>2</sup> and 310(d)<sup>3</sup> of the Communications Act, the Commission must determine whether the  
5 proposed transfer serves the public interest, convenience, and necessity.<sup>4</sup> In recent merger  
6 orders, the Commission has utilized a balancing test whereby the Commission weighs the  
7 potential public interest harms of the proposed transaction against the potential public interest  
8 benefits.<sup>5</sup> The “[A]pplicants bear the burden of proving by a preponderance of the evidence that,  
9 on balance, the proposed transaction serves the public interest,”<sup>6</sup> and if their “claims [of serving  
10 the public interest] are vague or speculative, and cannot be verified by reasonable means,”<sup>7</sup> the  
11 burden is not successfully carried.

12             When structuring and reviewing the submission of evidence under the public interest  
13 balancing test, the Commission considers four questions: (1) whether the transaction would

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<sup>2</sup> 47 U.S.C. § 214(a) (1994) (“No carrier shall . . . acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . .”).

<sup>3</sup> 47 U.S.C. § 310(d) (1994) (“No construction permit or station license . . . shall be transferred, assigned, or disposed of in any manner . . . except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby”).

<sup>4</sup> *In re Application of WorldCom, Inc. and MCI Communications Corp. for Transfer and Control of MCI Communications Corp. to WorldCom, Inc.*, 13 F.C.C.R. 18025, 18026, ¶ 1 (1998) (“MCI-WorldCom Order”).

<sup>5</sup> *Id.* at 18031-32, ¶ 10.

<sup>6</sup> *In re Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee; For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 F.C.C.R. 14032, 14046, ¶ 22 (2000) (“GTE-Bell Atlantic Order”) (citations omitted).

1 result in a violation of the Communications Act, (2) whether the transaction would result in a  
2 violation of the Commission's rules, (3) whether the transaction would substantially frustrate the  
3 Commission's ability to implement or enforce the Communications Act, and (4) whether the  
4 merger promises to yield affirmative public interest benefits that could not be achieved without  
5 the merger.<sup>8</sup> The first two prongs of the test assume that the public interest is reflected in the  
6 existing policy choices of Congress and reflected in the rules of the Commission.<sup>9</sup> Under this  
7 formulation, and absent exemption or waiver, any violation of the statute or rules would  
8 manifestly contravene the public interest. The third part of the public interest test reflects the  
9 Commission's need to address penumbral concerns that arise from its particular expertise in  
10 addressing the communications industry and its experience in implementing and enforcing  
11 conditions imposed on the parties to a license transfer.<sup>10</sup> The fourth part of the test assumes that  
12 the request for merger yields increased ownership concentration and thus negatively impacts

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<sup>7</sup> *In re Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 F.C.C.R. 1985, 20064, ¶ 158 (1997) (“*Bell Atlantic-NYNEX Order*”).

<sup>8</sup> *GTE-Bell Atlantic Order*, *supra* note 6, at 14046, ¶ 22.

<sup>9</sup> *See, e.g., In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 F.C.C.R. 9816, 9910 (2000) (“*AT&T-MediaOne Order*”) (Commissioner Furchtgott-Roth concurring in part, dissenting in part).

<sup>10</sup> *See, e.g., In re Applications to 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*, 16 F.C.C.R. 6547, 6554 (2001) (“*AOL Time Warner Order*”) (approving merger subject to: 1) conditions relating to AOL Time Warner's contracts and negotiations with unaffiliated ISPs; 2) a condition forbidding the merged firm from entering into contracts with AT&T that would give AOL exclusive carriage or preferential terms, conditions and prices; and 3) a condition requiring AOL Time Warner, before it could offer an advanced IM-based application that includes streaming video, to provide interoperability between its NPD-based applications and those of other providers, or to show by clear and convincing evidence that circumstances have changed such that the public interest is no longer served by an interoperability condition); *Fox v. FCC*, 2002 U.S. App. LEXIS 2575, \*58 (D.C. Cir 2002) (acknowledging the Commission's authority to impose behavioral and structural remedies).



1 diversity of voices and information. Thus, a positive determination must be made that the  
2 benefits to the public flow from the merger and overcome any presumption of harm arising from  
3 increased ownership concentration.<sup>11</sup>

#### 4 **A. Merger Review and the Public Interest**

5 The Commission’s analysis of public interest benefits and harms includes, among other  
6 things, an analysis of the potential effects of the transaction on competition.<sup>12</sup> Since this analysis  
7 is informed by antitrust principles, but *not* governed by them, the Commission is permitted to  
8 arrive at a different assessment of likely competitive benefits and harms than antitrust agencies  
9 reach based on antitrust law.<sup>13</sup> In the telecommunications and cable industries, as in most others,  
10 competition is shaped by the regulatory policies that govern the interaction of industry players, in  
11 addition to antitrust laws.<sup>14</sup> Whereas an antitrust analysis focuses entirely on whether the effect  
12 of the proposed transaction may substantially lessen competition,<sup>15</sup> the Commission is required  
13 to apply a different standard under the Communications Act.<sup>16</sup> Specifically, the Commission  
14 “must make an independent public interest determination that includes an evaluation of the  
15 merger’s likely effect on future competition.”<sup>17</sup> Since Congress has determined that the public

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<sup>11</sup> See, e.g., *Fox*, *supra* note 10, at \*35 (approving of diversity as a basis for limiting ownership).

<sup>12</sup> *GTE-Bell Atlantic Order*, *supra* note 6, at 14046-47, ¶ 23.

<sup>13</sup> *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (*en banc*) (The Commission’s “determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the ‘special considerations’ of the particular industry.”)

<sup>14</sup> In re Applications for Consent to the Transfer and Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, 14 F.C.C.R. 3160, 3169, ¶ 14 (1999) (“*AT&T-TCI Order*”).

<sup>15</sup> 15 U.S.C. § 18 (1994).

<sup>16</sup> *GTE-Bell Atlantic Order*, *supra* note 6, at 14046-47, ¶ 23.

<sup>17</sup> *Id.*; see also *AT&T-MediaOne Order*, *supra* note 9, at 9821, ¶ 10 (citing *Bell Atlantic- NYNEX Order*, *supra* note 6, at 20035, ¶ 95) (“In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will

1 interest is served by increased competition in telecommunications markets, the Commission must  
2 “be convinced that [the merger] will *enhance* competition,”<sup>18</sup> and not merely, as in antitrust, that  
3 the merger will not “*lessen* competition.”<sup>19</sup>

4 The public interest review is conducted against the backdrop of the “broad aims of the  
5 Communications Act” which, according to the Commission, includes among other things, the  
6 preservation and advancement of universal service; the acceleration of private sector deployment  
7 of advanced services; and the implementation of Congress’ pro-competitive, deregulatory  
8 national policy framework designed to liberalize all communications markets.<sup>20</sup> The  
9 Commission may also assess whether the transaction will result in the provision of new or  
10 additional communications services to consumers<sup>21</sup> or will affect the quality and diversity of  
11 such services.<sup>22</sup> In performing this analysis, “the Commission [should use] its expertise to

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accelerate the decline of market power by dominant firms in the relevant communications markets.”)

<sup>18</sup> *Bell Atlantic-NYNEX Order*, *supra* note 7, at 19,987, ¶ 2 (italics added).

<sup>19</sup> 15 U.S.C. § 18 (1994) (italics added).

<sup>20</sup> In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, 101 of the Commission’s Rules, 14 F.C.C.R. 14712, 14739, ¶ 50 (1999) (“*SBC-Ameritech Order*”); *MCI-WorldCom Order*, *supra* note 4, at 18030-31, ¶ 9; *see also* 47 U.S.C §§ 254, 259, 332 (c)(7), 706 (1994); Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”) (Preamble).

<sup>21</sup> *SBC-Ameritech Order*, *supra* note 20, at 14739, ¶ 50; *WorldCom-MCI Order*, *supra* note 4, at 18030-3, ¶ 9; In re Applications of Teleport Communications Group Inc. and AT&T Corp. for Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities Based and Resold Communications Services, 13 F.C.C.R. 15236, 15242-43, ¶ 11 (1998) (“*AT&T-Teleport Order*”); *Bell Atlantic- NYNEX Order*, *supra* note 7, at 20063, ¶ 158.

<sup>22</sup> *SBC-Ameritech Order*, *supra* note 20, at 14739 ¶ 51 (“[W]hen a transaction is likely to affect local telecommunications markets, our statutory obligation requires us to assess future market conditions. In doing so, the Commission may rely upon its specialized judgment and expertise to render informed predictions about future market conditions and the likelihood of success of individual market participants.”).

1 consider the trends within, and needs of, the communications industry as well as Congress’  
2 preference for competitive market structures and outcomes.”<sup>23</sup>

3 Following passage of the 1996 Act, local communications markets have been moving  
4 toward competitive markets. A merger may have predictable yet dramatic consequences for  
5 competition over time, even if the immediate effect is less remarkable.<sup>24</sup> Therefore, when a  
6 transaction is likely to affect local communications markets, the Commission is statutorily  
7 obligated to evaluate future as well as current market conditions.<sup>25</sup> In this evaluation, the  
8 Commission can use its specialized expertise to make educated predictions about future market  
9 conditions and the probability of success of individual market players.<sup>26</sup>

#### 10 **B. Balancing Federal Competition Policy and Federal Communications Policy**

11 Prior Commission orders have contained dissenting and concurring statements of  
12 individual Commissioners raising concerns that the Commission unduly duplicates efforts made  
13 by the Department of Justice’s Antitrust Division.<sup>27</sup> However, close examination of the record in  
14 this case demonstrates that application of the four-part public interest test will not duplicate  
15 competition authorities’ work, nor should an antitrust review limit the Commission in fully  
16 analyzing the instant merger to determine whether or not it advances the public interest.

17 As discussed above, it is well settled that the Commission and the Department of Justice  
18 (“DOJ”) play related but separate roles in merger review. The role of the Commission assumes  
19 that competition in and between the information transmission mechanisms that make up the  
20 communications industry, is shaped not only by an evaluation of likely competitive outcomes,

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<sup>23</sup> *AT&T-MediaOne Order*, *supra* note 9, at 9821-22, ¶ 11 (citations omitted).

<sup>24</sup> *Id.* at 9822, ¶ 12.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; *SBC-Ameritech Order*, *supra* note 20, at 14739, ¶ 51.

<sup>27</sup> *AT&T-TCI Order*, *supra* note 14, at 3241 (1999) (Commissioner Furchtgott-Roth concurring).

1 but also by the existing regulatory requirements that govern the interactions of firms inside the  
2 relevant industries (for example, interconnection requirements and universal service  
3 requirements in telephone service). The Commission assumes competition is shaped by the  
4 interaction between communication firms and the public citizenry (for example the public  
5 interest obligations of broadcasters) as well. The responsibility to citizens and the public interest  
6 is best revealed by the requirement that all applications for license transfers be put on public  
7 notice. The field of facts available to the Commission is vast, and the merits of an application  
8 placed before the Commission must include all of the issues raised by the parties to the  
9 proceeding *as well as* all additional issues that the Commission itself believes may significantly  
10 affect the public interest.<sup>28</sup>

11 The Commission has specialized expertise in evaluating the relevant issues arising under  
12 the Communications Act.<sup>29</sup> This expertise extends beyond simply implementing bright-line  
13 Congressional prerogatives in the communications industry, and reaches to the more difficult  
14 assessment of whether particular transactions serve the public interest and whether certain  
15 behavioral or structural conditions are needed.<sup>30</sup> In addition, the Commission must exercise both  
16 its expertise and an appropriate judicial deference to less easily determined and pursued  
17 Congressional goals, like accelerating the private sector deployment of advanced services,

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<sup>28</sup> *Id.* at 3169-70, ¶ 15; *see* 47 C.F.R. § 21.27 (2002) (delineating the public notice period.).

<sup>29</sup> *E.g.*, *Sprint Communications Co. v. FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001) (The circuit court found that issues involving “a high level of technical expertise in an area of rapidly changing technological and competitive circumstances,” *inter alia*, warranted “special deference” to the Commission’s findings.); *See also Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) (finding deference to an agency appropriate where the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.).

<sup>30</sup> *Fox v. FCC*, (noting deferential review on ownership limit questions has been repeatedly approved by U.S. Supreme Court)

1 ensuring the provision of new or additional services to consumers, and determining whether the  
2 merger will affect the quality and diversity of communications services.<sup>31</sup>

3 This last requirement—demanding an inquiry as to the merger’s effect on the quality and  
4 diversity of communications services—is particularly illustrative. Encouraging program diversity  
5 has been an important objective of both the Commission and Congress for several decades.<sup>32</sup>  
6 The Commission has long recognized its congressional mandate to ensure that proposed  
7 transactions further the statutory goal of “promot[ing] competition in the delivery of diverse  
8 sources of video programming.”<sup>33</sup>

9 The development of the Commission’s recognition of this value stems from the “basic  
10 tenet of national communications policy that ‘the widest possible dissemination of information  
11 from diverse and antagonistic sources is essential to the welfare of the public.’”<sup>34</sup> The Supreme  
12 Court has insisted that,

13 [b]roadcast television is an important source of information to many Americans.  
14 Though it is but one of many means for communication, by tradition and use for  
15 decades now it has been an essential part of the national discourse on subjects  
16 across the whole broad spectrum of speech, thought, and expression.<sup>35</sup>  
17

18 In *Turner II*, the Court held that federal must-carry provisions survived intermediate  
19 scrutiny under the First Amendment precisely because of the public interest in preserving

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<sup>31</sup> *AT&T-MediaOne Order*, supra note 9, at 9821-22, ¶ 11.

<sup>32</sup> *Turner Broadcasting v. FCC*, 512 U.S. 622, 663-664 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668, n. 27 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))); see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981). “[I]ncreasing the number of outlets for community self-expression” represents a “long-established regulatory goal[l] in the field of television broadcasting.” *United States v. Midwest Video Corp.*, supra, at 667-668 (plurality opinion).

<sup>33</sup> 47 U.S.C. § 532(c) (1994); *AOL Time Warner Order*, supra note 10, at 6555, ¶ 22.

<sup>34</sup> *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 192 (1997) (“*Turner II*”) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663-64 (1994) (“*Turner I*”).

<sup>35</sup> *Id.* at 194.

1 communication through broadcast television.<sup>36</sup> DBS should not be immune to this type of  
2 analysis: The proposed merger would affect the way in which over 16 million households  
3 receive information. If approved, the merger would immediately eliminate competing DBS  
4 voices and, eventually, eliminate a multiplicity of speakers delivered to many of these  
5 households through, for example, smaller market cable systems.<sup>37</sup>

6 There is no room in the DOJ’s antitrust analysis to consider the informational effects of  
7 the proposed Echostar merger. The Commission is the only body that is charged with the duty,  
8 supplied with the policies and possessed of the expertise to tackle these questions. The  
9 Commission’s mandate is to examine issues surrounding “not bottled water or sneakers, but the  
10 dissemination of news and information—the lifeblood of our democratic way of life.”<sup>38</sup> In sum,  
11 the Commission’s mandate differs from that of the DOJ because communication policy treats  
12 Americans as citizens first and consumers second, and competition policy treats Americans as  
13 consumers only.

14 **II. PROPOSED MERGER WOULD RESULT IN INEFFICIENT CONCENTRATION OF MARKET**  
15 **POWER**

16  
17 **A. DEFINING THE RELEVANT MARKET**  
18

19 In cases implicating increased ownership concentration and potential harm to  
20 competition, the first step in any public interest analysis begins by defining the relevant market.  
21 The Commission has previously utilized DOJ and FTC Commission guidelines to define the  
22 relevant market and those guidelines focus primarily on demand substitution factors.<sup>39</sup> Demand

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<sup>36</sup> *Id.* at 224-25.

<sup>37</sup> Petition to Deny of the American Cable Association at 7 [hereinafter American Cable Association].

<sup>38</sup> *AT&T-MediaOne Order*, *supra* note 9, at 9915 (Commissioner Tristani concurring).

<sup>39</sup> 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, <http://www.ftc.gov/bc/docs/horizmer.htm> [hereinafter Merger Guidelines].

1 substitution factors may be defined simply as the consumer’s ability to substitute one supplier for  
2 another.<sup>40</sup> The guidelines assume the alternate supplier is offering a good that is a perfect (or  
3 near-perfect) substitute, or is perceived by consumers to be so.<sup>41</sup>

4 A market is defined as a product or group of products and a geographic area in  
5 which it is produced or sold such that a hypothetical profit-maximizing firm, not  
6 subject to price regulation, that was the only present and future producer or seller  
7 of those products in that area likely would impose at least a ‘small but significant  
8 and nontransitory’ increase in price, assuming the terms of sale of all other  
9 products are held constant. A relevant market is a group of products and a  
10 geographic area that is no bigger than necessary to satisfy this test.<sup>42</sup> \* \* \*

11  
12 [A]ssuming that buyers likely would respond to an increase in price for a  
13 tentatively identified product group only by shifting to other products, what would  
14 happen? If the alternatives were, in the aggregate, sufficiently attractive at their  
15 existing terms of sale, an attempt to raise prices would result in a reduction of  
16 sales large enough that the price increase would not prove profitable, and the  
17 tentatively identified product group would prove to be too narrow.”<sup>43</sup>

18  
19 Courts have supported the view that “defining the relevant product market is a process of  
20 describing those groups of producers which, because of the similarity of their products, have the  
21 ability – actual or potential – to take significant amounts of business away from each other.”<sup>44</sup>  
22 “The outer boundaries of a product market are determined by the reasonable interchangeability  
23 of use or the cross-elasticity of demand between the product itself and substitutes for it.”<sup>45</sup> These  
24 are three ways of saying the same thing: relevant market delineation occurs where the dynamic  
25 of available substitutes changes.

26 The Applicants would have the Commission overlook the geographic element of the  
27 relevant market for purposes of evaluating the competitive impact of the proposed merger.

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. Denied*, 439 U.S. 838 (1978).

1 Echostar maintains that the relevant market is the MVPD market of the U.S.<sup>46</sup> This definition  
2 ignores the geographic delineation that must occur where demand substitution factors vary.<sup>47</sup> In  
3 other words, the relevant market for New York City is the entirety of the MVPD market  
4 (including cable, DBS, and any other forms of pay-TV available in the city). The relevant  
5 market for Juneau, Alaska, on the other hand, is the DBS market because there are no near-  
6 perfect substitutes for DBS, like digital cable, that are available to consumers in that DMA. The  
7 relevant markets are different because the demand substitution factors are different. Just because  
8 cable is available in some areas does not mean it is available in all areas, and those areas where it  
9 is not available must be delineated as separate relevant markets. Prior Commission or  
10 competition agency cases or authorities do not justify consideration of the relevant market on a  
11 national basis.<sup>48</sup> Moreover, as several commentators point out, antiquated cable systems that  
12 have not upgraded their plant from analog to digital are not truly competitive with DBS. The  
13 Application thus obscures the competitive impact of its proposal in two ways that are  
14 inconsistent with market realities.

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<sup>45</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

<sup>46</sup> Echostar Communications Corp., General Motors Corp., Hughes Electronics Corp. and Echostar Communications Corp., Consolidated Application for Authority to Transfer Control at 3 (Dec. 3, 2001) [hereinafter Application to Merge].

<sup>47</sup> Merger Guidelines, *supra* note 39.

<sup>48</sup> See *In the Matter of 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, Memorandum Opinion and Order, 16 F.C.C.R. at 6647 ¶ 244 (“One or more MVPD providers furnish MVPD services in local franchise areas. Only one cable operator serves most franchise areas.”); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 F.C.C.R. 3160, 3172 ¶ 21 (1999) (“Consumers in a local cable franchise area cannot switch to alternative MVPD services that are not offered in the same local service area.”).



1 Prior to the merger application, Echostar agreed with the assertion that the DBS market is  
2 different from, or is at least a sub-market of, the entire MVPD market.<sup>49</sup> Chairman and CEO of  
3 Echostar Charles Ergen still considers the DBS market to be a sub-market of MVPD, particularly  
4 in rural areas.<sup>50</sup> As the NAB points out in its Petition to Deny, there are many distinctions  
5 between cable and DBS that support the conclusion that they are not near-perfect substitutes for  
6 one another.<sup>51</sup>

### 7 **B. Examining the National Pricing Scheme**

8 Relying on and strengthening its argument that the relevant market is the national MVPD  
9 market, Echostar claims that it will mitigate the public interest harm arising from single  
10 ownership of DBS spectrum by setting a single national price for its service.<sup>52</sup> In addition to  
11 leaving its proposal largely undefined, Echostar makes the unsupported claim that its national  
12 price will be constrained by competition with cable prices.<sup>53</sup> This argument is flawed in at least  
13 two ways.

14 First, cable prices have risen at an average of 7% per year while DBS prices have risen an  
15 average of .06%.<sup>54</sup> Second, and more fundamental, the argument ignores the relevant market

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<sup>49</sup> Request for Rule 56(f) Continuance to Respond to DIRECTV Defendant’s Motion for Summary Judgment and Memorandum of Law in Support Thereof at 7-8, *Echostar Communications Corp. v. DIRECTV Entertainment Corp.*, Civ. No. 00-K-212 (D. Colo. Nov. 6, 2000) (“Rule 56(f) Motion”).

<sup>50</sup> *Ergen Makes His Case*, Satellite Bus. News, Dec. 31, 2001, at 11.

<sup>51</sup> *See In re Consolidated Application of Echostar Communications Corp., General Motors Corp., Hughes Electronics Corp., Transferrors, and Echostar Communications Corp., Transferee*, CS Docket No. 01-348, Petition to Deny of Nat’l Ass’n of Broadcasters at 41-44 (2002) (“DBS Offers Many More Channels Of Programming Than Most Cable Systems . . . The Picture and Sound Quality Available Through DBS Is Superior to Cable . . . DBS Offers More Pay-Per-View Options . . . DBS Offers More And Richer Sports Packages . . . DBS Customer Service Is Better Than Cable”) [hereinafter “NAB”].

<sup>52</sup> Application to Merge, at 42.

<sup>53</sup> *Id.*

<sup>54</sup> *See Pegasus*, at 23.

1 delineation described above. This is a problem because a national price would be based on the  
2 aggregate of the relevant markets in which the firm provides product, as opposed to any one  
3 single market in which the firm provides product. Presumably, New Echostar would set its  
4 national price based on the aggregate demand curve of its markets. New Echostar's aggregate  
5 product market includes relevant markets (rural areas) where cable is not available as an  
6 alternative to DBS and those markets where antiquated cable is not a viable consumer  
7 alternative. Because New Echostar will be a monopoly provider of pay TV in rural areas and  
8 will compete with cable in a duopoly in more developed areas, New Echostar will set its national  
9 price somewhere *between* the monopoly price (that it could set in rural areas) and the duopoly  
10 price (that it will "take" based on cable's competition in developed areas). Given these facts, it  
11 appears that rural consumers will end up subsidizing the urban ones.

### 12 **C. Analyzing Monopolies and the Exercise of Market Power**

13 New Echostar would be a monopoly in those relevant markets where there are no demand  
14 substitution options, such as digital cable, available to consumers. In other areas, New Echostar  
15 will compete as a duopoly with cable. Deciding whether to label the proposed New Echostar as  
16 a monopoly or not is good politics for its opponents, but ultimately irrelevant to this  
17 Commission's public interest obligation because monopolies are not *per se* illegal.<sup>55</sup> The proper  
18 consideration in this case is New Echostar's ability to exercise its market power.<sup>56</sup> New Echostar  
19 may exercise its market power to set prices and to restrict competition.<sup>57</sup> The monopoly in areas  
20 without any cable or digital cable will set prices by calculating the profit-maximizing price and

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<sup>55</sup> *Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws*,  
<http://www.ftc.gov/bc/compguide/maintain.htm>.

<sup>56</sup> *Id.*, <http://www.ftc.gov/bc/compguide/mergers.htm>.

<sup>57</sup> *Id.*

1 charging that price. Supply restriction is an unnecessary consideration because it applies to  
2 manufacturing industries and not to MVPDs utilizing satellite transmission.<sup>58</sup>

3 As a general rule, the exercise of monopoly market power is bad for consumers.<sup>59</sup> The  
4 model of perfect competition is the antithesis of the monopoly model and provides that the  
5 market sets the price and firms are simply price takers (they have *no* power to affect the market  
6 price).<sup>60</sup> Both Congress and this Commission have recognized that allowing the market to set the  
7 price results in the efficient allocation of resources.<sup>61</sup> This is not the same type of efficiency  
8 described by Echostar. The efficiencies that Echostar refers to are production efficiencies that  
9 result in lower production costs.<sup>62</sup>

10 In a perfect competition model, production efficiencies must be passed along to the  
11 consumer.<sup>63</sup> In the monopoly or duopoly model, the incentive to pass production efficiencies  
12 along to consumers is almost nonexistent.<sup>64</sup> What little incentive there is relates to the barriers to  
13 entry of the market.<sup>65</sup> The incentive to pass production efficiencies along to consumers is  
14 inversely related to the barriers to the entry of the market. In a government granted monopoly,

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<sup>58</sup> The marginal cost of delivering an additional unit of satellite transmission is near zero. The satellites are already transmitting signal to the entire U.S. The DBS firms simply provide new customers with the ability to decode that signal. There is no reason for them to restrict supply in an effort to raise prices because their supply curve is flat. Their only consideration is the demand curve, so they select a price that corresponds with a quantity demand that will result in the greatest level of profit for their firm.

<sup>59</sup> Merger Guidelines, *supra* note 39.

<sup>60</sup> David D. Friedman, *Price Theory: An Intermediate Text* (South-Western Publ'g Co. 1990), [http://www.daviddfriedman.com/Academic/Price\\_Theory/PThy\\_Chapter\\_9/PThy\\_Chapter\\_9.html](http://www.daviddfriedman.com/Academic/Price_Theory/PThy_Chapter_9/PThy_Chapter_9.html).

<sup>61</sup> *Id.*, [http://www.daviddfriedman.com/Academic/Price\\_Theory/PThy\\_Chapter\\_16/CHAP16.html](http://www.daviddfriedman.com/Academic/Price_Theory/PThy_Chapter_16/CHAP16.html).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

1 the barriers to entry are legal and absolute.<sup>66</sup> Other firms are simply unable to enter the relevant  
2 market.<sup>67</sup> In a government granted monopoly, there is little or no incentive to pass production  
3 efficiencies along to consumers. New Echostar will possess a government granted monopoly in  
4 the relevant markets where cable is not available because it will control the entire available DBS  
5 satellite spectrum for North America.<sup>68</sup>

6 It is irrational for a profit-maximizing firm to pass savings from production efficiencies  
7 along to consumers, absent an incentive. With no possible satellite competitors, there is no threat  
8 of competition from alternate providers, and thus no incentive to pass production efficiencies to  
9 consumers. Prior market behavior of cable MVPDs demonstrates that the fixed, or sunk, costs of  
10 entering these rural markets are too high to warrant its entry, despite the fact that, prior to DBS,  
11 cable, but for some C-Band satellite systems, would have possessed a near monopoly in the  
12 MVPD market in those areas. It is unreasonable to expect that cable will now choose to invest  
13 those sunk costs with an entrenched DBS competitor in those areas.

14 Although the simple response is that rural markets appear to trend toward a natural  
15 monopoly,<sup>69</sup> it is unavailable here because the DBS market has existed for several years in a  
16 state of oligopoly. The firms have already invested the sunk costs to put satellites into orbit  
17 (their primary sunk costs). This disproves the notion that only one firm could profitably provide

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<sup>66</sup> *Id.*,  
[http://www.daviddfriedman.com/Academic/Price\\_Theory/PThy\\_Chapter\\_10/PThy\\_Chapter\\_10.html](http://www.daviddfriedman.com/Academic/Price_Theory/PThy_Chapter_10/PThy_Chapter_10.html)

<sup>67</sup> *Id.*

<sup>68</sup> NAB, at 9.

<sup>69</sup> Friedman, *supra* note 15,  
[www.daviddfriedman.com/Academic/Price\\_Theory/PThy\\_Chapter\\_16/CHAP16.html](http://www.daviddfriedman.com/Academic/Price_Theory/PThy_Chapter_16/CHAP16.html) (noting that a natural monopoly is the result of a market where the fixed (sunk) costs of entry are such that only one firm may enter the market and recoup those fixed costs, given the demand).

1 DBS to the relevant market given the sunk costs. DBS service is not a natural monopoly in rural  
2 areas.

3 New Echostar could exert great market power over setting prices because it would be a  
4 government granted monopoly (competitors can not enter the market, as described above).<sup>70</sup> In  
5 the rural markets, this power would be absolute. In a duopoly market with cable, this power  
6 would be considerable. The market power of the proposed New Echostar is much more  
7 significant than the sum of the current market powers of DirecTV and Echostar.

8 **III. SPECTRUM EFFICIENCY CONCERNS DO NOT NECESSITATE THIS MERGER**

9 One of the primary reasons the Applicants assert that a monopoly over the DBS market in  
10 rural is acceptable is to achieve greater spectrum use efficiency. The Application for Merger  
11 suggests that the DBS spectrum is too scarce to permit duplicative transmissions by competing  
12 DBS companies and the public interest is unduly harmed thereby.<sup>71</sup> Echostar and DirecTV  
13 contend that the merger would eliminate this duplication and remedy the harm. According to the  
14 Application, two DBS companies competing in the same market for customers actually disserves  
15 the public interest by wasting spectrum and disserves the pro-competitive goals of Congress by  
16 hobbling the companies' ability to compete with the monolithic cable MVPDs.

17 The alleged public interest benefits of the merger include more local into local broadcast  
18 programming, satellite delivered broadband and other enhanced services.<sup>72</sup> Although the DBS  
19 spectrum is not infinite in size, the Application fails to demonstrate that scarcity has been a  
20 constraint on competitive activity, either between DBS providers or between DBS and other

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<sup>70</sup> *Id.*

<sup>71</sup> Application to Merge, at 23.

<sup>72</sup> *Id.* at 25-27.

1 MVPDs, in a manner that is harmful to the public interest.<sup>73</sup> Additionally, the Application makes  
2 no concrete promises that it will make use of the newly liberated spectrum in a manner not  
3 already planned by each company respectively. In fact, in geographic areas where the merged  
4 company will be the sole MVPD, or areas where the local cable MVPD has not upgraded its  
5 plant to provide digital video tiers, creating a monopoly in New Echostar would remove any  
6 incentive that currently exists to innovate and compete for customers based on that innovation.  
7 The Commission has several avenues for increasing spectrum allocation efficiency without  
8 approving the requested merger and the record discloses that any true constraints on spectrum  
9 efficiency could be successfully addressed by a joint venture between Echostar and DirecTV,  
10 thereby eliminating the need for the proposed merger.

11 **A. USING CURRENT SPECTRUM ALLOCATIONS INEFFICIENTLY**

12 The record discloses that Echostar currently uses its spectrum to provide non-DBS  
13 services such as virtual private television networks, corporate LAN data package transmission,  
14 and other corporate transmission needs.<sup>74</sup> If uncontroverted by Echostar in a Reply pleading, any  
15 perceived spectrum scarcity is by voluntary election of the companies. Moreover, the benefit  
16 arising from consolidation of the spectrum into New Echostar's hands that is alleged in the  
17 Application, greater rollout and expansion of additional services such as HDTV and ITV, would  
18 merely remedy consumer harms imposed by the existing Echostar. Controlling legal authorities  
19 have long rejected subordination of the public interest to the financial needs of the licensee or its

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<sup>73</sup> See e.g. NAB, at 15-31 (detailing benefits to consumers of DBS head to head competition)

<sup>74</sup> Pegasus Communications Corp.'s Petition to Deny, at 39 [hereinafter "Pegasus"].

1 corporate clients who do not directly serve the public interest.<sup>75</sup> There is nothing in the record to  
2 suggest that New Echostar would have different objectives regarding this practice.

3 **B. Providing More National Content than Digital Cable Counterparts**

4 The Application suggests that the spectrum will be used to “compete favorably against  
5 increasingly sophisticated digital cable.”<sup>76</sup> Echostar and DirecTV each offer substantially more  
6 channels than digital cable providers, including basic stations, premium content, and pay-per-  
7 view.<sup>77</sup> While there may be hurdles to expanding services in the future, digital cable companies  
8 will also have potentially debilitating competitive issues to cope with in the wake of media  
9 convergence. For example, an upgrade in digital cable service involves overhauls of cable  
10 routers across the country. In contrast, satellite upgrades can be achieved by changing one  
11 satellite or a single ground-based transmitter. Both cable and DBS must upgrade set-top boxes  
12 for a major upgrade. Satellite broadcast limitations arising from spectrum availability are not so  
13 crippling as to require a government sponsored, license-based monopoly of the relevant  
14 spectrum.

15 **C. Providing More Local-into-Local Transmission Independently**

16 The Application pledges that New Echostar will use the merged spectrum to provide  
17 local channels to more communities than can presently be served by the competing companies.<sup>78</sup>  
18 DBS currently serves 42 metropolitan areas.<sup>79</sup> Thirty-five of those areas are served by both  
19 Echostar and DirecTV. New Echostar promises to serve 100 DMAs. This commitment, which  
20 is not at this time binding, would still serve less than half of the 210 DMAs in the United States.

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<sup>75</sup> See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”)

<sup>76</sup> Pegasus, at 32.

<sup>77</sup> *Id.* at 46.

<sup>78</sup> Application to Merge, at 28.

1 The record shows that in the past, local programming choices have been added by Echostar and  
2 DirecTV in order to compete with each other. The extent to which competition has flourished  
3 and served the public interest is best illustrated by the significant overlap of the local into local  
4 coverage by the two companies.<sup>80</sup> The creation of New Echostar would remove the competitive  
5 incentive to continue to expand the number of DMAs served with local into local programming.  
6 New Echostar's desire to serve 100 DMAs is aspirational only, and nothing provided in the  
7 Application suggests it is legally or contractually binding.<sup>81</sup>

8 If a competitive climate between Echostar and DirecTV is preserved, and the record of  
9 one-upsmanship in program offerings continues, each company would likely expand its local  
10 content offerings in order to gain a greater market share in that area. Any duplication of services  
11 and spectral use inefficiencies arising from signal duplication will be offset by emerging  
12 technologies, including spot beam transmission. Spot beam transmission allows retransmission  
13 of local stations to smaller geographical areas.<sup>82</sup> Because of the regional nature of the  
14 transmissions, spot beam spectrum can be reused eight to twelve times.<sup>83</sup> Pegasus suggested  
15 that, using this technology, Echostar and DirecTV could each serve all 210 DMAs using single  
16 satellite or two-satellite design. If this contention is uncontrovered by Echostar in a Reply  
17 pleading, the primary justification for allowing a 2-1 monopoly dissipates.

#### 18 **D. Using Spectrum Scarcity to Promote Technological Innovation**

19 The field of satellite television transmission exists in a perpetual state of technological  
20 flux. Pegasus outlined four areas where capacity-expanding innovation is possible, if not

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Pegasus, at 44.

<sup>82</sup> *Id.* at 40.

<sup>83</sup> *Id.* at 41.



1 imminent.<sup>84</sup> First, turbo coding has the potential to double the effective channel capacity of a  
2 satellite. Second, 8PSK modulation is a technology already used by cable and telephone  
3 companies to increase data transmission speeds. 8PSK and successive iterations of Phase Shift  
4 Keying could increase capacity by an additional 35%. Third, a shift in video compression from  
5 MPEG-2 to MPEG-4 would reduce data rates two- or three-fold.<sup>85</sup> Due to an increased interest  
6 in streaming video over packet-based networks, even more efficient compression-decompression  
7 algorithms (“codecs”) will be available in the near future,<sup>86</sup> with little or no capital investment  
8 necessary on the part of Echostar or DirecTV. Finally, the recent evolution of personal video  
9 recorders (“PVRs”) has provided a time-shifting solution to pay-per-view problems that inhere in  
10 satellite technology. PVR capability in a set-top box (“STB”) allows the satellite to transmit an  
11 entire program only once because it can be stored for later viewing in the memory of the STB,  
12 bypassing the current system of repeated transmission of identical programming. Pegasus  
13 suggests that this might lead to a 96% improvement in spectrum efficiency.<sup>87</sup>

14 If approved, the proposed merger would eliminate any incentive to timely pursue these  
15 new technological innovations in a timely manner. If the benefits cited in the Application serve  
16 the public interest, as is claimed, then those same service improvements achieved through  
17 technological upgrades must also serve the public interest. New Echostar, with its glut of  
18 spectrum, would have no business or competitive incentive to develop further spectrum  
19 efficiency measures.

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<sup>84</sup> *Id.* at 50-51.

<sup>85</sup> *Id.*

<sup>86</sup> <http://www.divx.com>

<sup>87</sup> *Id.* at 51 n129.

1           **E.       Warehousing of Spectrum Resulting in Loss of Orbital Slots**

2           According to the record, this merger would place 100% of the BSS Ku-band slots and  
3 one-third of all Ka-band slots that are licensed to the United States under the control of a single  
4 company.<sup>88</sup> The Commission has acted in the past to prevent the acquisition of all full-CONUS  
5 slots by a single entity in order to foster competition among DBS providers.<sup>89</sup> The proposed  
6 merger would result in the abandonment of sound Commission policy on spectrum ownership  
7 limits.

8           The United States would likely lose its claim to some of the six Ka-bands that it is  
9 charged to use before 2005.<sup>90</sup> A merged DBS monopoly would not require the use of six  
10 separate satellites, and is more likely to launch two or three within the ITU time frame. The  
11 remaining empty slots may be redistributed to other countries after the deadline has passed.

12           **F.       Consolidation through Joint Venture Creating Same Efficiencies as Merger**

13           In the event that Echostar and DirecTV completely exploit their assigned spectrum after  
14 maximizing compression and spot beam advancements, and certain DMAs remain without local  
15 into local programming, this harm can be mitigated by reduction in transmission overlap without  
16 the creation of a DBS monopoly. Echostar and DirecTV could execute a joint venture to  
17 consolidate local channel delivery as well as basic tier programming overlap and duplication.  
18 The public interest would gain spectrum efficiency without the negative effects of a DBS  
19 monopoly. The record discloses that Echostar and DirecTV receivers currently operate on  
20 incompatible platforms, and it is argued that standardizing the set top box is a benefit of the  
21 merger and a costly if not insurmountable barrier to a joint venture. But it is clear that

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<sup>88</sup> *Id.* at 8.

<sup>89</sup> *Id.* at 66.

<sup>90</sup> *Id.* at 72.

1 approximately one half of all set top boxes will have to be reconfigured or replaced as a result of  
2 the merger. Under a joint venture scheme, Echostar and DirecTV could divide the freed  
3 bandwidth and compete to provide new services with the scarce resource.

#### 4 **IV. PROPOSED MERGER WOULD HARM THE PUBLIC INTEREST**

5 Despite the Applicants' assurances that the merger is in the public interest, a review of the  
6 record reveals that the public interest inevitably would be harmed by the consequences of the  
7 merger. The merged entity would have an absolute monopoly on both DBS and Ka-band  
8 broadband satellite operations at orbital locations with the most desirable signal footprint. In  
9 addition, as the largest MVPD provider in the United States, the merged entity would enjoy  
10 unprecedented market power in the operation of one of the largest fleets of commercial  
11 communications satellites in the world.

##### 12 **A. Creating a Monopoly of Rural DBS Service**

13 While digital cable television has been implemented in metropolitan areas around the  
14 country and competes fiercely against DBS in those locations, for much of rural America, DBS  
15 is the only digital MVPD provider.<sup>91</sup> Given the expense involved in rolling out digital cable  
16 service in rural areas, this is likely to remain the case in the foreseeable future. Therefore, the  
17 Commission must look at the impact that this merger will have on these areas where the  
18 competition between the two satellite providers would be eliminated.

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<sup>91</sup> Although the exact percentage of homes not passed by cable is subject to intense debate, even conservative estimates in the 96-97% range would leave millions of households without cable service and subject to a DBS monopoly. For a more complete discussion of the issue of homes passed by cable, see National Rural Telecommunications Cooperative, *Petition to Deny* (February 4, 2002) at 6 [hereinafter "NRTC"].

1                   **1. The merged entity would have a complete monopoly over orbital**  
2                   **locations with the most desirable signal footprint.**

3                   If the proposed merger goes through, New Echostar would hold the licenses for all three  
4 Ku-band DBS orbital locations with full coverage of the continental United States ("full  
5 CONUS"): 101° W.L., 110° W.L. and 119° W.L. The Applicants contend that such a monopoly  
6 would lead to badly-needed spectrum efficiencies in the provision of Ku-band DBS service. As  
7 the NAB point out in their petition, however, the extent of such a monopoly is unprecedented  
8 under existing federal communications policy.<sup>92</sup>

9                   The wisdom of maintaining competition within a band of the spectrum can be seen in the  
10 Commission's approach to establishing policies in the Digital Audio Radio Satellite Service  
11 ("DARS").<sup>93</sup> Even though the spectrum available for allocation to this type of service was  
12 extremely limited (only 50 Mhz total), the Commission still authorized two different operators in  
13 the frequency band, finding that "licensing two satellite DARS providers will serve the public  
14 interest."<sup>94</sup> If the Commission recognized the public interest benefit of maintaining at least two  
15 competitors in even this narrow slice of the spectrum, it is inconceivable that the public interest  
16 would be served by allowing the creation of a monopoly in three different orbital locations and  
17 thousands of megahertz of spectrum.

18                   Although the Commission has recognized the legitimacy of some consolidation in the  
19 Ku-band DBS spectrum allocations during the past several years, each consolidation has taken  
20 place within the context of a continuing competitive market. For instance, in the Order assigning  
21 DBS rights at the 119° W.L. orbital location from Tempo Satellite, Inc. to DirecTV, the

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<sup>92</sup> NAB, at 105.

<sup>93</sup> *In re Establishment of the Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754 ¶ 77 (1997) ("Our goal is to create as competitive a market structure as possible, while permitting each DARS provider to offer sufficient channels for a viable service.")

1 Commission noted that "most television households in the United States have a choice between  
2 at least one cable operator and two full-CONUS DBS competitors (i.e. DirecTV and  
3 Echostar)."<sup>95</sup> Obviously, if the proposed merger is approved, all television households would  
4 lose any choice in DBS operators and tens of millions of citizens served by antiquated, non-  
5 digital cable, or no cable service, would have no meaningful choice at all of MVPD providers.

6 **2. The lack of attractive alternative orbital locations would prevent any**  
7 **future entrants into the DBS market.**

8 While there is some available space in non-full-CONUS satellite orbits that a new entrant  
9 into the DBS market could theoretically use, the economic realities of the DBS industry make  
10 such an entry extremely unlikely. As the National Rural Telecommunications Cooperative  
11 pointed out, all 32 frequencies at the 61.5° W.L. orbital location are operated, either directly or  
12 through affiliates, by Echostar.<sup>96</sup> This 61.5° W.L. is the only one of the five non-full-CONUS  
13 orbital slots that is capable of providing complete coverage to the eastern half of the United  
14 States. At the 148° W.L. location, Echostar is the licensee of 24 of 32 channels. The remaining  
15 three non-full-CONUS orbital slots that are available for DBS service (at 157° W.L., 166° W.L.  
16 and 175° W.L.) are not in use at this time, but are positioned too far west to provide satisfactory  
17 coverage to most of the continental United States.

18 With the very limited coverage provided by these available slots, any potential new  
19 competitor would have to operate at least twice as many satellites as the incumbent DBS  
20 operator to provide the same level of coverage. Based on the available estimates of the costs  
21 involved in launching, insuring, and operating new DBS satellites, no new entrant could hope to

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<sup>94</sup> *Id.* at ¶78.

<sup>95</sup> Order And Authorization, *Tempo Satellite, Inc., Assignor and DirecTV Enterprises, Inc., Assignee; Application for Consent to Assign Authorization to Construct, Launch and Operate a Direct Broadcast Satellite System Using 11 Frequencies at the 119° W.L. Orbital Location*, 14 FCC Rcd 7946, 16 CR 27, ¶11 (1999).

1 offer competitive price or service. In fact, this was the very position the Commission took in  
2 revising the rules for DBS in 1995.<sup>97</sup>

3 **B. Creating a Domination of Television by Including PanAmSat**

4 Under the conditions of the proposed merger, the majority interest (approximately 81%)  
5 in PamAmSat will also be transferred from Hughes Electronics to New Echostar. While this  
6 particular aspect of the merger transaction did not receive significant attention in the initial  
7 comment round, the combination of PanAmSat and a DBS monopoly could have a substantial  
8 negative impact on the American television industry.

9 **1. New Echostar's position vis-à-vis broadcasters and programming**  
10 **distributors would be overwhelming as a result of the merger.**

11 Even according to its own public relations materials, PanAmSat has a wide-ranging and  
12 important role in the United States telecommunications industry in general and broadcast  
13 television in particular.<sup>98</sup> PanAmSat is used by nine of the top ten cable networks, including  
14 HBO Networks and CNN, to deliver programming to MVPDs around the world. This  
15 programming is viewed by over 125 million households every day.

16 This merger would result in the largest MVPD in the country—New Echostar—having  
17 essentially absolute control over the most popular and heavily-used commercial satellite  
18 programming distribution network in the country. This would put New Echostar in a position of  
19 great leverage when it negotiates with broadcasters and cable networks over pricing. New  
20 Echostar would be able to use the market power of a 16 million-plus block of viewers to increase  
21 the rates it charges to carry network programming and use its dominant position in the carriage

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<sup>96</sup>NRTC, at 5.

<sup>97</sup>*In re Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd. 9712, 9729 ¶ 44 (1995) (stating that the potential "number of DBS firms is necessarily limited by the number of full-CONUS orbital locations").

1 of network programming to reduce the price it pays for DBS programming. The net result: New  
2 Echostar would be able to leverage its monopoly (or near-monopoly) in both commercial and  
3 direct-to-home markets to increase its profits with no incentive to utilize revenue increases for  
4 any purpose but shareholder benefits.

5 **2. Complaints from broadcasters and networks over the behavior of**  
6 **Echostar and its chief executive, Mr. Charles Ergen, should give the**  
7 **Commission pause before it hands control of PanAmSat.**

8 Although the behavior of Echostar in dealing with public interest and other broadcasters  
9 is addressed elsewhere in this filing, it should be emphasized here as well. As part of its Petition  
10 to Deny, Univision vigorously contended that Echostar “has not been hesitant to use its existing  
11 gatekeeper role to obstruct . . . the availability of public interest DBS programming . . . .”<sup>99</sup>  
12 Since the CEO of Echostar will head New Echostar, it is reasonable to conclude that such  
13 behavior, frustrating the public interest, would continue. Once the power of PanAmSat is added  
14 to the mix, it is likely that New Echostar will begin to use its gatekeeper role in the commercial  
15 programming distribution market to contravene the public interest at an even earlier stage in the  
16 distribution chain.

17 **C. Preventing Rural Broadband Competition**

18 Under the proposed merger, New Echostar would control six of the full-CONUS orbital  
19 locations available for Ka-band broadband service as well as many other non-full-CONUS wing  
20 satellites.<sup>100</sup> As one concerned party pointed out, the merged entity is less likely to utilize all of  
21 these allotted orbital locations without the kind of competitive pressure that has, until now,

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<sup>98</sup> PanAmSat Facts, <[http://www.panamsat.com/news/pas\\_facts.asp](http://www.panamsat.com/news/pas_facts.asp)> (last visited February 24, 2002).

<sup>99</sup> Univision Communication Inc.’s Petition to Deny, at 4 [hereinafter Univision].

<sup>100</sup> *In re Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service Space Stations in the Ka-Band*, DA 01-1693, adopted August 2, 2001, at Appendix.

1 existed between the two Applicants.<sup>101</sup> The Application itself suggests that sufficient returns on  
2 investment would be realized with as few as three operational satellites. If New Echostar fails to  
3 use these allotted orbital locations by June 2005, the United States will lose the protection of its  
4 registration with the ITI for those slots and they will be made available to other nations. This  
5 would seriously diminish the quality and extent of our nation's future high-speed satellite  
6 broadband market.

7 **1. Rural customers often have no other options for broadband.**

8 The broadband options available for urban and suburban residents are largely absent from  
9 the rural areas of the country. Because other types of broadband connections are limited by  
10 either the distance they can be deployed from the service provider's central location, which is the  
11 case for DSL, or limited to areas with existing cable service, the issue for cable modems,  
12 alternatives to broadband satellite service are not likely to appear in rural areas in the near  
13 future.<sup>102</sup> Therefore, rural residents who desire to have broadband access will continue to be  
14 limited to satellite service and, as stated above, the proposed merger would create a near-  
15 monopoly service provider in New Echostar. Significantly, New Echostar's proposed national  
16 pricing scheme does not include pricing of satellite broadband, which means that rural customers  
17 would not even be given that thin protection against the price discrimination that is likely to  
18 result from the merger.

19 **2. The Applicants do not need the merger to provide sufficient broadband**  
20 **service.**

21 While it is a colorable argument that the merger would create a meaningful spectrum  
22 allocation efficiency in the broadcast of DBS programming, it is certain that no such efficiency

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<sup>101</sup> Pegasus, at 72.



1 would result in the provision of Ka-band broadband service. There is no programming  
2 duplication (such as each service provider carrying a separate CNN, a separate HBO) in the  
3 broadband context, because each subscriber requests unique information that takes up the same  
4 amount of spectrum space whether it is carried by DirecTV, Echostar or some other carrier.

5 Furthermore, by the Applicants' own estimates, only three full-CONUS Ka-band  
6 satellites would be necessary to recoup the up-front investment involved in providing such  
7 broadband service and each of the Applicants, on its own, already control that many slots.<sup>103</sup>  
8 Additionally, given the difficulty some other Ka-band licensees have had in rolling out their  
9 services getting up and running, both Applicants could probably obtain additional Ka-band  
10 orbital locations even without the merger, as happened when Echostar acquired a 90% interest in  
11 licensee VisionStar.<sup>104</sup>

## 12 **V. CONDITIONS ARE INEFFECTIVE MEANS TO CURE THESE HARMS**

13 Several parties to this proceeding have suggested the imposition of conditions to lessen  
14 harms predicted to arise from approval of the merger.<sup>105</sup> Although the Commission has the  
15 power to impose conditions on the parties as a requirement of the license transfer, there are  
16 several reasons why the harms identified in the record are unlikely to be sufficiently mitigated to

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<sup>102</sup> Cable modems, for instance, must be within 16,000 feet of a node and DSL lines can be no more than 18,000 from a central switching facility. *See* NRTC, at 45.

<sup>103</sup> Application to Merge (Joint Engineering Statement, at 15).

<sup>104</sup> Order And Authorization, VisionStar, Inc., Transferor and Echostar VisionStarCorp., Transferee; Application for Consent to Transfer Authorization to Construct, Launch and Operate a Ka-band Satellite System in the Fixed-Satellite Service at the 113° W.L. Orbital Location, DA 01-2481, adopted October 25, 2001.

<sup>105</sup> Comments of the Association of the Public Television Stations and the Public Broadcasting Service (suggesting enforceable expansion into new markets and elimination of secondary satellites) [hereinafter "PBS", Pegasus, at 53 (discussing implications of national pricing scheme), NAB, at 91 (same)].

1 tip the balance in favor of approval.<sup>106</sup> Even if all the proposed conditions were adopted, their  
2 imposition would likely be fruitless, and the harm to the public interest too great to bear. The  
3 following close examination of the conditions that could be imposed reveals that the pending  
4 application to merge must still be denied.

5 **A. CONDITIONING THE MERGER ON ADOPTION OF A NATIONAL PRICING SCHEME**

6 As noted above, there is the potential for price increases in areas where the merged entity  
7 has a monopoly or a duopoly with cable. Some parties have suggested that this risk might be  
8 diminished by adherence of New Echostar to a fixed national pricing plan.<sup>107</sup> In fact, New  
9 Echostar has already informally promised to create a price structure of this kind and to subject  
10 itself to federal regulatory supervision.<sup>108</sup> Specifically, New Echostar has pledged to impose  
11 “uniform and nondiscriminatory pricing and service throughout the country.”<sup>109</sup> Echostar has  
12 alleged that this pricing scheme is intended to enhance competition with cable, especially for  
13 customers in *urban* areas.<sup>110</sup>

14 There are several problems with this proposed approach. First, this proposal is  
15 particularly troubling in the way that it would affect rural customers. Because the cost of living  
16 is higher in urban areas, the fixed cost of New Echostar’s services would consequently be higher  
17 as well to remain in line with the price of cable services. If the urban price is imposed  
18 nationally, consumers in rural areas would face a price increase not in line with rural cable

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<sup>106</sup> 47 U.S.C.A §303(r); §214(c).

<sup>107</sup> Application to Merge, at 34.

<sup>108</sup> *Id.* at 42.

<sup>109</sup> *Id.* at 34.

<sup>110</sup> *Id.* at 37-41.

1 provider prices.<sup>111</sup> In areas where the only available post-merger MVPD service is DBS, rural  
2 consumers are forced to bear increased service costs of a national price fix.

3         Second, a national pricing plan would force the Commission to assume the role of rate-  
4 regulator. As former FTC Chairman Robert Pitofsky explained, this role “leaves the government  
5 in the position of monitoring rates and complicated terms in every community to guard against  
6 discrimination – a role that the government tries not to play in a free market economy.”<sup>112</sup> It is  
7 this role for government that the 1996 Act was promulgated to prevent. The Act was intended  
8 “to promote competition and reduce regulation in order to secure lower prices and higher quality  
9 services for American telecommunications consumers and encourage the rapid deployment of  
10 new telecommunications technologies.”<sup>113</sup> As Echostar’s owner told Congress in 1998, the Act  
11 did not envision a return to the “monopoly oriented, over-regulatory origins of communications  
12 policy,”<sup>114</sup> nor did it envision lower prices for urban communications customers only.<sup>115</sup>

13         Third, the monitoring and enforcing of a national pricing scheme, in addition to being  
14 contrary to the goals of the Act, presents enormous problems. The Application as filed does not

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<sup>111</sup> See generally FCC, Report on Cable Industry Prices, Dec. 11, 1997 (finding that large cable service providers, defined as those serving more than 50,000 subscribers, charged more than those cable service providers serving fewer than 50,000 subscribers).

<sup>112</sup> Robert Pitofsky, Prepared Statement before the House Comm. on the Judiciary (Dec. 4, 2001), at 8.

<sup>113</sup> Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (introductory statement).

<sup>114</sup> *Competition to Cable: Hearing Before the Senate Commerce Committee* (July 27, 1998) (Statement of Charles W. Ergen) (quoting Michael Powell, *Communications Policy Leadership*, 50 FED. COMM. L. J. 529, 534 (1998)).

<sup>115</sup> Members of the House of Representatives from North Carolina have recognized, on the record, the necessity of consumer safeguards specifically for rural consumers in the event that the merger goes through. Bob Etheridge (D-NC), Robin Hayes (R-NC), Eva Clayton (D-NC), Mike McIntyre (D-NC), and Walter Jones (R-NC) all signed an ex parte letter to Attorney General Ashcroft and Chairman Powell to this effect. Letter from Hon. Jo Ann Emerson and Hon. Eva Clayton to Hon. John Ashcroft and Hon. Michael Powell (Jan. 16, 2002).

1 define exactly what is meant by “national pricing scheme.”<sup>116</sup> Echostar’s owner further muddied  
2 the water by attempting to reserve the ability to deviate from a national pricing plan by offering  
3 some special promotions available only in certain areas.<sup>117</sup> Even if the monthly service price is  
4 the same nationwide, prices for equipment, installation and maintenance might vary widely in  
5 order to compete with cable. Monitoring the service plans, evaluating whether the provision of  
6 services and equipment is uniform, and ensuring that the proposed national pricing standard is  
7 enforced, would press the Commission into a monopolist regulatory role, like that it labored  
8 under for years with telephone service providers. The resources and attention of the Commission  
9 would necessarily be spread thin.

10       Assuming *arguendo* the national pricing scheme envisioned by Echostar and DirecTV  
11 encompasses monthly service, equipment, installation and maintenance, the effect would be  
12 harmful to competition. Because cable companies operate regionally and locally, DBS service  
13 providers that have no option to vary their prices may find no way to compete with aggressive  
14 cable pricing. This one-size-fits-all solution is in actuality a one-size-fits none. Either New  
15 Echostar would have to sacrifice revenue from urban customers to price for lower-cost rural  
16 customers, or the merged entity would have to force rural customers to pay more than they  
17 currently do for the same service. Echostar itself has recognized the value of local pricing in  
18 competing with both DirecTV and cable.<sup>118</sup> It is clear, therefore, that a national pricing scheme,  
19 which is inherently contrary to the goals of the Act implemented by the Commission and

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<sup>116</sup> Application to Merge, at 34, 42. The application contains several references to this suggested approach, none of which are sufficiently detailed to be adoptable solely on the basis of the application’s representations.

<sup>117</sup> NAB, at 95; Pegasus, at 54.

<sup>118</sup> NAB, at 95.

1 contrary to the post-1996 Act deregulatory function of the Commission, does not compensate for  
2 the otherwise anti-competitive effects of the merger.

3 **B. Conditioning Merger on Expansion of DBS Markets**

4 The Public Broadcasting Service (“PBS”) has suggested that another possible condition  
5 of the merger could be an enforceable expansion of DBS’ local into local service markets.  
6 Specifically, PBS urges that the merged entity be made to provide local into local service in the  
7 top 110 DMAs within 120 days of the merger.<sup>119</sup> Compliance with this condition would ensure  
8 that “the merger [would] dramatically expand the number of areas that [could] receive local  
9 broadcast station signals and [would] result in more vigorous competition to cable in these  
10 areas.”<sup>120</sup> Unlike the national pricing plan, which was proposed to offset the monopoly pricing  
11 power arising from the merger that would result in rural areas, both parties to the merger have  
12 *previously* promised to expand their service coverage into these markets.<sup>121</sup>

13 Even were there no strong concerns about the anti-competitive effects of the merger, the  
14 fact that this service expansion could be accomplished by the companies operating separately,  
15 conclusively demonstrates that a merger is not necessary to reach this level of service.<sup>122</sup> Thus  
16 this “benefit” fails to meet the fourth prong of the Commission’s four-part test.<sup>123</sup> In fact, the  
17 record discloses each company separately has the existing capacity to exceed the 100 DMA  
18 target.<sup>124</sup> A close reading of the Application reveals that Echostar and DirecTV do not claim that

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<sup>119</sup> PBS, at 5.

<sup>120</sup> Application to Merge, at 29.

<sup>121</sup> PBS, at 4; PBS, at 80.

<sup>122</sup> NAB, at 80.

<sup>123</sup> *GTE-Bell Atlantic Order*, *supra* note 6, at 14046, ¶ 22 (-(4) “whether the merger promises to yield affirmative public interest benefits that could not be achieved without the merger.”)

<sup>124</sup> *Id.*

1 this target could only be achieved if the companies merged.<sup>125</sup> The companies promise only that,  
2 “New Echostar will provide local broadcast programming to far more metropolitan areas [than  
3 are] served respectively by [Echostar] and DirecTV now.”<sup>126</sup> Moreover, by the firms’ own  
4 admission, each company could even provide local-into-local service in all 210 DMAs.<sup>127</sup>  
5 Because the parties do not claim that the merger is necessary to reach all 210 DMAs, the claimed  
6 local into local market expansion should not be considered when evaluating the merger  
7 application. This supposed benefit is illusory.

8 This inaccuracy is best illustrated by the record evidence demonstrating the existence of  
9 new technology which would enable them to deliver local-into-local programming more  
10 effectively and to more markets. Both companies, prior to the application for merger, had  
11 planned to build and launch spot-beam satellites. At a bare minimum, if Echostar and DirecTV  
12 wish to claim that the merger is necessary for the 100 DMA target, they need to disclose how  
13 many DMAs each would have reached operating separately using spot beam technology. No  
14 disclosures of this nature have been made; New Echostar has merely affirmed the new entity’s  
15 market-reaching abilities. Not only is the merger unnecessary to achieve goals of *greater* market  
16 saturation, it is even possible that the merger would result in a net *loss* in local-into-local  
17 service.<sup>128</sup>

### 18 **C. Conditioning Merger on More Public Interest/Ethnic Programming**

19 A third condition proposed by concerned parties is that New Echostar should be required  
20 to place all public interest and minority-targeted programming on primary satellites, or, in the

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<sup>125</sup> Application to Merge at 4.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at Attachment B (Joint Engineering Statement at 9).

<sup>128</sup> NAB, at 79.

1 alternative, make all such programming available with one receiver.<sup>129</sup> This condition, while  
2 admirable, does not eliminate concerns about the anti-competitive effects of the merger and,  
3 arguably, should be addressed whether or not the merger takes place.

4 Echostar currently places some local stations on its primary satellites, while relegating  
5 others to the doghouse of secondary (“wing”) satellites. Consumers can only access  
6 programming from these wing satellites by installing a second dish. Although the second dish is  
7 provided free of charge, the record discloses that Echostar has historically publicized neither the  
8 programming on the secondary satellite nor the method of receiving such programming.<sup>130</sup>  
9 Unfortunately, not only is the availability of public interest and foreign language programming  
10 obstructed but the quality of the signal coming from wing satellites is often noticeably worse.

11 While there is no allegation in the record that DirecTV engages in these questionable  
12 practices, it is unclear whether the new entity will follow Echostar’s abysmal record. This  
13 concern takes on special significance with respect to programming for minorities, especially  
14 Spanish language programming. In some past cases, the only channels carried on an Echostar  
15 wing satellite were of minority interest.<sup>131</sup> With a growing Latino population, U.S. consumers  
16 are especially interested in maintaining and increasing the availability of public interest  
17 programming, including Spanish language channels. By eliminating competition within the  
18 satellite market, the merger would effectively foreclose consumers from seeking programming  
19 alternatives from other DBS providers.

20 A merger is simply not necessary to compel Echostar to follow existing Commission  
21 rules or devote more attention to public interest and foreign language programming. As appears

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<sup>129</sup> PBS, at 5-8.

<sup>130</sup> Univision, at 10.

<sup>131</sup> *Id.*

1 clear from the record, both companies separately have capacity to place public interest  
2 programming on their primary satellites. Even if relegated to wing satellites, it would cost little  
3 effort or money to advertise the existence of the additional channels not presently carried on  
4 primary satellites. Echostar could simply list the new channels on its Electronic On-screen  
5 Programming Guide. Although the imposition of this condition would result in favorable  
6 changes for consumers and public interest programmers, the formation of a monopoly is hardly  
7 the best way to solve problems that should be addressed even without the merger.

8 **D. Monitoring and Enforcing Conditions Are Difficult**

9 While the above conditions have been discussed with reference to their specific merits,  
10 there are overarching concerns about the efficacy of conditional acceptance of a merger by the  
11 Commission. First, conditions increase the likelihood that the Commission will be forced to  
12 assume a heightened regulatory role – a role that is explicitly contrary to the deregulatory goals  
13 of the 1996 Act and, in the context of DBS services, contrary to the historic role of the agency.  
14 Second, with regard to national pricing, there is no fixed means by which the agency can  
15 measure whether the conditions have been met. Moreover, absent detailed reporting  
16 requirements that could be used to discern compliance, the enforceability of the scheme is  
17 suspect. Third, with respect to the supposed spectral efficiencies of the merger, there is no way  
18 to ensure that the claimed benefits will flow through to the consumers. Finally, it is unclear how  
19 and to what degree penalties might be assessed for violations, and whether these penalties would  
20 be sufficient to compel future compliance.<sup>132</sup> Because of the inherent difficulties in monitoring

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<sup>132</sup> The Telecommunications Act of 1996, Pub. Law No. 104-104, 47 U.S.C. 271, states the following, concerning the enforcement of conditions of the Bell mergers:

(6) Enforcement of conditions.----

(A) Commission authority.--If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company



1 conditions generally, this merger and any potential constraints on it should be carefully  
2 considered before much reliance is placed on them as the means of protecting the public interest.

3 **VI. ECHOSTAR’S PAST RECORD AS A LICENSEE SUGGESTS FUTURE MISCONDUCT**

4 Even were meaningful conditions imposed, and the conditions deemed sufficient to  
5 remove the anti-competitive harms identified in the record, there remain grave concerns about  
6 Echostar’s commitment to the public interest and its ability to follow behavioral conditions.

7 **A. Reviewing Echostar’s Past Bad Actions**

8 There is evidence in the record to suggest that in the past Echostar and DirecTV have  
9 attempted to keep new satellite providers out of the market. Northpoint Technology complains  
10 that its bid to acquire spectrum has been opposed at every turn by the Applicants, both before  
11 Congress and the Commission. Essentially, Echostar and DirecTV have sought to “shut the door  
12 behind them, and ensure that no new entrant can obtain the same fair chance at success they  
13 enjoyed.”<sup>133</sup> Because Northpoint’s entry into the satellite market has been delayed by eight years  
14 due to alleged obstruction by the Applicants,<sup>134</sup> Echostar and DirecTV have been able to  
15 stockpile nearly the entire spectrum and capture almost the entire DBS market – a whopping  
16 96%. The Northpoint example provides an illustration of the Applicants’ unwelcoming attitude  
17 towards competition, which does not bode well for the mere 4% of the satellite market that  
18 would remain post-merger.

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has ceased to meet any of the conditions required for such approval, the  
Commission may, after notice and opportunity for a hearing--

- (i) issue an order to such company to correct the deficiency;
- (ii) impose a penalty on such company pursuant to title V; or
- (iii) suspend or revoke such approval.

It is likely that these same procedures would be employed with respect to conditional mergers in  
other areas of telecommunications. Check HFR dissent.

<sup>133</sup> Northpoint Technology’s Petition to Deny at 13.

<sup>134</sup> *Id.* at 14.

1           Secondly, Echostar, as a DBS provider, has been accused of discriminating against  
2 minority-owned and foreign-language programming. Even after the passage of the Satellite  
3 Home Viewer Improvement Act of 1999 (SHVIA), Echostar has repeatedly denied mandatory  
4 carriage to a host of minority channels. In September 2001, the Commission found that  
5 Echostar’s actions were “not consistent with the SHVIA or our rules”<sup>135</sup> and criticized Echostar  
6 for not providing “valid reasons for rejecting requests for mandatory carriage.”<sup>136</sup> In addition to  
7 the fact that Echostar has not always publicized the existence of the foreign language  
8 programming that it does carry, these examples would seem to indicate that Echostar does not  
9 consider this type of programming a priority. This undermines one of the central benefits  
10 Echostar and DirecTV maintain would flow from their proposed merger.

#### 11           **B. Reviewing Imminent Vertical Integration**

12           Another point of concern is Echostar’s attempts at vertical integration after claiming it  
13 would not pursue this strategy. The Commission has defined vertical integration as occurring  
14 when “a video programming distributor has an ownership interest in a video programming  
15 supplier or vice versa.”<sup>137</sup> Two weeks after the Application to Merge was filed, Echostar and  
16 Vivendi Universal announced a partnership deal.<sup>138</sup> Under this agreement, Vivendi, a content  
17 provider, agreed to invest significant monies in Echostar and create many new non-exclusive  
18 channels to be carried by Echostar.<sup>139</sup> Several concerned entities petitioned the Commission in  
19 order to suspend the pleading cycle for the merger. These petitioners argued that vertical

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<sup>135</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Order on Reconsideration, CS Docket 00-96, FCC 01-249 (rel. Sept. 5, 2001), at ¶ 61

<sup>136</sup> *Id.* at ¶ 59.

<sup>137</sup> *8<sup>th</sup> Annual Report, supra*, ¶ 156.

<sup>138</sup> Pegasus Communications Corporation’s Petition to Suspend the Pleading Cycle at 2.

<sup>139</sup> Comments of Vivendi Universal, S.A. at 3.

1 integration contravened prior pronouncements and, in particular, undercut Echostar and  
2 DirecTV's assertion that the usual harms of concentrated ownership would not flow from this  
3 merger. Although the Commission denied the Motion to Suspend, the Commission sought  
4 additional information from Echostar concerning the impact of the Vivendi deal.<sup>140</sup> No such  
5 information has yet been released. At best, this most recent move is curiously timed, and at  
6 worst, is an apparently underhanded attempt at vertical integration. Evidence indicates that  
7 Echostar may not be taken at its word. Rather than keeping the public interest foremost in the  
8 merger, Echostar is arguably subverting the public interest by seeking to monopolize delivery  
9 and beginning to dominate content.

### 10 **C. Reviewing Echostar's Inconsistent Viewpoints**

11 Echostar's waffling on whether the DBS MVPD market is separate from the cable  
12 MVPD market represents another about-face for the company. Its prior position stands in sharp  
13 contrast to the views expressed in its merger application. In February 2000, in an antitrust suit  
14 filed against DirecTV, Echostar conveniently claimed that the DBS MVPD market was different  
15 than the cable MVPD market. Echostar even went so far as to insist that the DBS MVPD  
16 market was, standing alone, the relevant antitrust point of inquiry. Echostar maintained that  
17 although "there is an MVPD Market and that both Echostar and DirecTV compete with cable  
18 companies in that market . . . the DBS Market is an appropriate submarket of the MVPD Market  
19 for antitrust purposes."<sup>141</sup> Furthermore, Echostar even sought additional discovery to establish

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<sup>140</sup> Order Denying Pegasus Communications Corporation's Petition to Suspend the Pleading Cycle at 2 ¶ 4.

<sup>141</sup> *Request for Rule 56(f) Continuance to Respond to DirecTV Defendant's Motion for Summary Judgment Memorandum of Law in Support Thereof* at 7-8, *Echostar Comm. Corp. v. DirecTV Entertainment Corp.*, Civ. No. 00-K-212 (D. Colo. Nov. 6, 2000).

1 that satellite was a separate product market from cable.<sup>142</sup> This view of satellite MVPDs as  
2 separate products and markets is reinforced by consumer research.<sup>143</sup> Without commenting on  
3 the realities of the DBS market, it is clear that Echostar has demonstrated a remarkable  
4 willingness to define its position based on little more than convenience.

#### 5 **D. Reviewing Echostar’s Lack of Candor**

6 Of perhaps greatest concern is Echostar’s verified lack of candor and its “disingenuous”  
7 behavior. Lack of candor has traditionally been a key consideration in the Commission’s  
8 decisions to deny license applications and renewals.<sup>144</sup> In 1998, Echostar was heavily fined for  
9 operating satellites from non-authorized locations.<sup>145</sup> In 1999, Echostar tried to sidestep public  
10 interest carriage requirements by placing public interest programming on secondary satellites.  
11 More recently, in the Fall of 2001, the Commission found that Echostar had been withholding  
12 information.<sup>146</sup> These illustrations, taken as a whole, suggest that Echostar should not be trusted  
13 to either candidly reveal information or live up to its public interest obligations. Given the fact  
14 that this merger would establish a virtual monopoly in the DBS market, Echostar’s past bad  
15 behavior is all the more untenable.

#### 16 **CONCLUSION**

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<sup>142</sup> *Id.* at 13.

<sup>143</sup> *Competitive Market Study 2000*, The Yankee Group (sponsored by SBCA) at 30 (finding that DBS households were more susceptible to attacks from other DBS providers, not cable companies).

<sup>144</sup> See Commission News Release, “FCC Revokes Texas Radio License Due to Licensee Misrepresentation and Lack of Candor,” MM Docket 96-173 (Apr. 22, 1998); see also *In re Applications of Fox River Broadcasting Inc.*, 93 F.C.C.2d 127 (1983) (defining the characteristics of lack of candor).

<sup>145</sup> *In the matter of Echostar Satellite Corporation*, Notice of Apparent Liability, 13 FCC Rcd 16510 (1998).

<sup>146</sup> Univision, at 6.

- 1 For the foregoing reasons, the Application for approval of the license transfers necessary
- 2 to complete this merger should be denied.

1 **CERTIFICATE OF SERVICE**

2 I, Eileen Wojciechowski hereby certify true copies of the foregoing Reply Comments of  
3 the Duke Seminar on Communications Law and Policy in the of CS Docket NO. 01-348 were  
4 filed via ECFS and in accordance with the filing requirements set forth in the Public Notice  
5 issued on January 11, 2002.

6  
7 \_\_\_\_\_  
8 Eileen Wojciechowski