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Washington, D.C. 20554

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Via Facsimile

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Re: Consolidated Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation for Authority to Transfer Control, CS Docket No. 01-348

Dear Mr. Michalopoulos and Mr. Epstein:

On December 3, 2001, EchoStar Communications Corporation ("EchoStar"), General Motors Corporation, and its wholly owned subsidiary, Hughes Electronics Corporation ("Hughes") (the "Applicants") filed an application with the Commission seeking approval of the transfer of control of licenses and authorizations in connection with the proposed merger of EchoStar and Hughes. On February 4, 2002, we sent you an Initial Information and Document Request (the "Request") asking the Applicants to provide documents and information by March 6, 2002, to assist us in our review of the proposed transfer of control.¹

Beginning on March 6, 2002, and concluding on July 19, 2002, the Applicants submitted documents and information in response to the Request.² As described below, during this period, the Applicants and Commission staff discussed ways to clarify and refine the procedures for

¹ See Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications Corporations, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (collectively "Applicants' Counsel") (Feb. 4, 2002).

² EchoStar and Hughes separately submitted documents and information, both public and confidential documents pursuant to the Commission's Initial Protective Order, on a rolling basis. See Order Adopting Protective Order, CS Docket No. 01-348, DA 02-27 (rel. Jan. 9, 2002) ("Initial Protective Order").

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responding to the Request. The staff has reviewed the significant number of documents submitted by the Applicants. On this basis, we now find that that the Applicants have substantially complied with our Request consistent with the amended procedures. Therefore, we will restart our merger review clock effective July 23, 2002, at day 78.

We now resolve outstanding issues regarding the procedures used for the responses to the Request. Initially, the Applicants and staff met on February 21, 2002, to consider procedural issues.³ At that meeting, we discussed a set of procedures the Applicants proposed to follow in responding to the Request. In addition, the Applicants proposed to limit the search for documents to a select group of personnel ("custodians"), whom they indicated were most likely to have the relevant documents. The staff asked that these proposals be submitted in writing for consideration. On February 28, 2002, the Applicants submitted the proposed list of custodians.⁴ On March 5, 2002, the Applicants submitted their proposed procedures in writing ("March 5 Procedures").⁵ The proposals covered relevant time frames, relevant services, geographic scope, available data, requests for analysis, document review, and confidentiality.⁶ The Applicants stated that these procedures were designed to facilitate prompt responses to the Request by conforming certain parameters to those being used for their ongoing responses to requests for additional information from the Department of Justice ("DOJ") under the Hart Scott Rodino Act.

On March 11, 2002, the staff met with the Applicants to discuss the March 5 Procedures.⁷ At that meeting, the staff indicated that most of the proposals appeared reasonable for the initial submission, although once the filings were reviewed, the staff indicated it might require additional information. However, with respect to confidentiality, the Applicants were asked to review materials responsive to the Request that were only sent to DOJ and to identify those documents for Protective Order treatment so that they can be submitted directly to the Commission. The staff also requested that available data be provided in its most disaggregated level of detail, as had been provided to DOJ. On March 27, 2002, staff held a teleconference with the Applicants to continue discussions regarding the confidential treatment of certain information and data.⁸ On April 10, 2002, Applicants submitted proposed procedures to limit

³ See Letter from Alex Hoehn-Saric, Counsel for Hughes, to William F. Caton, Acting Secretary, FCC (Feb. 25, 2002) The Applicants subsequently recognized that this notice did not comply with the Commissions *ex parte* rules and submitted a second *ex parte* notice on March 5, 2002. See Letter from Pantelis Michalopoulos, Counsel for EchoStar William F. Caton (Mar. 5, 2002). See also Letter from W. Kenneth Ferree, to Applicants' Counsel (Mar. 7, 2002) admonishing the applicants for failure to comply with the *ex parte* rules.

⁴ See Letter from Alex Hoehn-Saric to W. Kenneth Ferree (Feb. 28, 2002); Letter from Pantelis Michalopoulos to W. Kenneth Ferree (Feb. 28, 2002) ("Feb. 28 Letters") The Applicants submitted separate lists under the Initial Protective Order.

⁵ See Letter from Applicants' Counsel to W. Kenneth Ferree (Mar. 5, 2002).

⁶ Each proposal is addressed in detail below.

⁷ See Letter from Pantelis Michalopoulos, to William F. Caton (Mar. 12, 2002) ("March 12 Letter").

⁸ See Letter from Applicants' Counsel to William F. Caton (Mar. 28, 2002).

access to certain detailed subscriber and churn data that had been submitted to DOJ.⁹ On April 17, 2002, the staff conducted two teleconferences to discuss the Applicants' proposal to limit access for such information and possible alternatives to the Applicants' proposal.¹⁰ On April 22, 2002, the Applicants submitted justifications to support affording an even a greater level of protection than that provided by the Protective Order to a certain limited class of documents.¹¹ On April 25, 2002, we issued a Second Protective Order limiting access to highly confidential documents and information and providing for the treatment of certain confidential databases.¹²

The National Rural Telecommunications Cooperative ("NRTC")¹³ and the National Association of Broadcasters ("NAB")¹⁴ filed *ex parte* comments on the Applicants' March 5 Procedures. NRTC and NAB generally opposed the proposed procedures, arguing that they were an attempt to limit the scope of the information request and denying those parties access to certain documents only submitted to DOJ.¹⁵ In particular, NRTC objects to the Applicants' proposal to conform the search parameters to those used to respond to DOJ's requests. First, NRTC points out that the Commission and DOJ are governed by different statutory standards, and second, it argues that different procedures are required for each because the Commission's merger review process is open to the public, and DOJ's is not.¹⁶

In response, the Applicants asserted that NAB and NRTC objections to the March 5 Procedures raise no substantive issues, and only seek boundless litigation-type discovery, which would delay the Commission's review process.¹⁷ They state that it was imperative for the Commission and Applicants to discuss how the responses to the Request can be provided in a streamlined and expedited manner.¹⁸ Moreover, the Applicants objected to NRTC's and NAB's attempt to dictate whether the Commission can discuss its own Request with the Applicants to identify ways in which it can obtain the relevant information.¹⁹ In reply, NRTC reiterated its concern that the proposed procedures will limit the scope of the information produced in

⁹ See Letter from Applicants' Counsel to William F. Caton (Apr. 10, 2002).

¹⁰ See Letter from Applicants' Counsel to Marlene H. Dortch, Secretary, FCC (Apr. 18, 2002).

¹¹ See Letter from Applicants' Counsel to Marlene H. Dortch (Apr. 22, 2002).

¹² See Order Adopting Second Protective Order, CS Docket No. 01-348, DA 02-964 (rel. Apr. 25, 2002) ("Second Protective Order").

¹³ See Letter from Jack Richards, Counsel to NRTC, to William F. Caton (Mar. 13, 2002) ("NRTC Comments").

¹⁴ See Letter from Edward P. Henneberry, Counsel to NAB (Mar. 14, 2002). (NAB's letter does not specify specific objections, it only states its agreement with NRTC's comments.)

¹⁵ NAB Comments at 1; NRTC Comments at 1-3.

¹⁶ NRTC Comments at 2-3.

¹⁷ See Letter from Applicants' Counsel to William F. Caton (Mar. 22, 2002) ("Applicants' Response") at 1-2.

¹⁸ Applicants' Response at 2

¹⁹ *Id.*

response to the Request.²⁰ In particular, NRTC asserted that it is entitled to review the information produced in response to the Request, subject to the Protective Order.²¹

The Request asked for a significant number of documents and amount of information to assist the Commission in its review of the proposed transfer of control. We sought to develop a full record to evaluate the proposed transaction consistent with the Commission's statutory mandate. Recognizing that our process differs from that of DOJ, we did not seek to conduct a litigation-type discovery process. We did not intend to solicit a vast collection of documents or impose an unnecessary burden upon the Applicants beyond that which would be needed for a complete analysis. To balance these concerns, we found some of the Applicants' proposals reasonable and determined that they would provide the Commission with adequate information. However, in several cases, we rejected the Applicants' proposals, particularly those that limited staff and public access to the information. In this respect, we concur with NRTC and NAB that confidential information should be submitted to the Commission under a Protective Order rather than be cross-referenced to DOJ materials. With respect to the specific proposals, we make the following findings.

Time Frame. In general, the Applicants proposed to submit documents and information for the period beginning January 1, 1999 to match the time period in the DOJ request. Information responding to requests for earlier and future information regarding MVPD service plans will cover the time period between January 1, 1998 and December 31, 2003. Information responding to requests for earlier and future information regarding broadband services, will cover the time period between January 1, 2000 and December 31, 2004. NRTC objected to the Applicants' request to modify the time frame as set forth in the Request. It also claims that the Applicants offer no relevant explanation to tie the dates to DOJ's request.²²

The staff selected time frames for the requested data and documents to permit an examination of the information over a reasonable time period and for trend analysis. However, the exact number of years chosen was not based on any exact determination. Therefore, after consideration of the Applicants' proposed alternative time frames, we find that these time frames also meet our goal of obtaining information for several years and are sufficient for our purposes.

Relevant Service. The Applicants proposed to define "Relevant Services" and "Services" to include (1) direct broadcast satellite service, (2) multi-channel video programming distribution service, and (3) satellite broadband Internet service. The definitions also include the necessary equipment to receive such services. The Applicants proposed to exclude from the definition land-based broadband services ("DSL") and sale of central office equipment, unless specifically requested. NRTC opposed the Applicants' proposal to exclude land based services

²⁰ See Letter from Jack Richards, Counsel to NRTC, to William F. Caton (Apr. 4, 2002) ("NRTC Reply").

²¹ *Id.* at 1-2, 5.

²² NRTC Comments at 4.

and sale of central office equipment from the scope of the Request, stating that no justification for this exclusion is provided. NRTC also states that the only reference to “relevant services” is found in Section IV.A.7 of the Request.²³ We observe that, in addition to Section IV.A.7, which seeks information about video programming and other services offered by the Applicants, these terms are used in Section VI.B. concerning prices for equipment and related services. In neither case, will the proposed definitions limit the scope of the requested data sought, and we permit the Applicants to use them.

Geographic Scope. The Applicants propose to limit information to operations within the United States. NRTC claims that foreign services should be included, “especially in light of the Applicants’ recent claims regarding the feasibility of DBS service from foreign orbital slots[.]”²⁴ We conclude that that the proposal to limit the geographic scope is reasonable given the Commission’s statutory mandate to regulate communications in the United States.

Available Data. The Applicants proposed to provide the data and the level of detail of information obtained in the ordinary course of business. Initially, the Applicants provided data to the Commission at a level of detail that was insufficient for our review. The staff determined that disaggregated data, equivalent to that which had been provided to DOJ, would be required to perform a complete analysis. The staff and the Applicants conducted subsequent discussions regarding this issue and the highly sensitive nature of requested data. As a result, a Second Protective Order²⁵ was adopted to protect the confidentiality of specific data, which were then submitted on April 26, 2002.²⁶

Requests for Analyses, etc. The Applicants proposed to produce final and draft reports, plans, analyses, etc., but not informal discussions and comments such as e-mails and notes. NRTC claims that informal discussions and comments such as e-mails and notes may be relevant to the Commission’s efforts to obtain information and were not excluded under the terms of the Request.²⁷ The staff decided that informal comments and discussions were unlikely to produce the types of information needed for our initial analyses and were therefore not specifically requested. If we find that such information will be useful, we will request it separately.

Document Review. The Applicants proposed to provide the Commission with a list of individuals (“custodians”) from whose files they planned to collect responsive documents for each issue enumerated in the Request.²⁸ This would be done by reviewing key documents

²³ *Id.*

²⁴ *Id.* at 5.

²⁵ See Second Protective OrderI

²⁶ On April 26, 2002, the Applicants provided the Commission with separate CD-ROMs filed subject to the Second Protective Order.

²⁷ NRTC Comments at 5.

²⁸ See Feb.28 Letters.

collected from specified individuals for the response to DOJ's request for additional information. NRTC argues that this procedure is a short-circuit of the Request and believes that the Applicants proposed this procedure to avoid the production of documents because they are not required for DOJ review.²⁹

The Request was intended to provide information for review and not be a complete document search of the Applicants' files. As NRTC notes, our process differs from that of DOJ.³⁰ We do not believe that any purpose is served by having multiple copies of individual documents, as would result through the discovery process. Since such a complete review is conducted by the Applicants to respond to DOJ's request, and we have access to any documents filed at DOJ, we concluded that if there was a reason to acquire other documents, we will request them from the Applicants at a later date.

Confidentiality. Due to the highly confidential nature of certain information, in lieu of submitting the documents directly to the Commission, the Applicants proposed to cross-reference documents which have been submitted to DOJ. NRTC expressed concern regarding the Applicants proposal to cross-reference certain material, instead of submitting the material to the Commission.³¹ NRTC claims that the failure to submit documents effectively will preclude the Commission and the public from adequately reviewing such materials. Moreover, NRTC claims that the Applicants fail to state why the Commission's Protective Order is inadequate to safeguard confidential material.

Initially, the Applicants cross-referenced a significant number of documents that were submitted to DOJ in response to our Request. The staff found this procedure unacceptable and directed the Applicants to provide the requested documents and information to the Commission.³² Most of the information now has been submitted to the Commission, with only a very limited number of documents responsive to our Request currently remaining at DOJ, which will be made available on the record if we request. However, to accommodate the Applicants concern regarding the competitive sensitivity of certain materials, the Commission issued a Second Protective Order that further limits access to such documents and also protects the confidentiality of certain databases that the staff determined were essential to our review.³³ The staff now has received the documents and data sought in the Request. In addition, parties, such as NAB and NRTC, can access this information subject to the Protective Orders.

Ex Parte Submission. In addition to the objections raised to the proposed procedures, NRTC argues that the Applicants' March 12 Letter fails to comply with the Commission's *ex*

²⁹ NRTC Comments at 5.

³⁰ *Id.* at 2.

³¹ *Id.* at 3-4.

³² See March 12 Letter.

³³ See Second Protective Order.

parte rules.³⁴ Specifically, NRTC complains that the notice fails to include a summary of the substance or resolution of the discussion, and merely lists the subjects discussed. In response, the Applicants deny that the *ex parte* notice is inadequate, and accuse NRTC and NAB of attempting merely to burden and delay the proceeding.³⁵ The Applicants object to NRTC's accusations that they have failed to comply with the *ex parte* requirements. They argue that the March 11 meeting was focused on clarifying and refining procedures for the production of information requested by the Commission, and was not "directed to the merits or outcome" of the proceeding. Thus, the discussions were not "presentations" within the meaning of section 1.1202(a) of the *ex parte* rules, and did not require such notice.³⁶ Moreover, the Applicants contend that, even if the *ex parte* rules apply, their obligation is to "summarize" only "new data or "arguments" as provided in section 1.1206(b)(2).³⁷ In reply, NRTC again asserts that the Applicants failed to comply with the *ex parte* rules since the discussions involved the Applicants obligation to produce information for review by the Commission and the public in connection with the proposed merger.³⁸

Section 1.1202(a) of the rules excludes from the definition of "presentations" communications which are "inquiries concerning compliance with procedural requirements if the procedural matter is not an area of controversy." The purpose of the March 11 meeting was for the Applicants and staff to discuss the procedures for complying with the Request, which were not an area of controversy until NRTC and NAB objected to the proposed procedures several days later. Thus, we concur with the Applicants that the *ex parte* requirements technically do not apply. With respect to the March 12 Letter, we find that the Applicants' notice reflects the substance of the meeting. As stated in that letter, the Applicants described their ongoing work to respond to the Request and restated the proposed procedures set forth in the March 5 Letter. No issues were resolved at this meeting with the exception of the Applicants agreeing to "review certain documents filed with the Department of Justice in order to identify ... materials" for protective order treatment and submission directly to the Commission.³⁹ In addition, the Applicants presented no new data or arguments at the meeting. Therefore, we find that the Applicants' March 12 Letter satisfies the *ex parte* requirements.

As set for the above, the staff agrees that many of the procedural proposals suggested by the Applicants are reasonable. Where we disagreed, the Applicants have addressed the staff's concerns and the procedures have been amended, accordingly. These procedural changes address, in part, the concerns raised by NRTC and NAB. However, for the reasons detailed

³⁴ NRTC Comments at 1-2.

³⁵ Applicants' Response at 3.

³⁶ *Id.*

³⁷ *Id.*

³⁸ NRTC Reply at 2.

³⁹ See March 12 Letter.

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above, to the extent that NRTC and NAB raise other objections, we find their opposition without merit.

Accordingly, we conclude that the substantial amount of information submitted in response to the Request provides a sufficient response to the Initial Information and Document Request. Since the Applicants have substantially complied with the Request, we restart our 180-day merger review clock. As we continue to review the submitted information, however, we may determine that additional data and information is needed and we, of course, reserve the right to request such information and data.

Sincerely,



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