BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In The Matter Of	)	
Application Of	)	
	)	
EchoStar Communications Corporation,	)	**CS Docket No. 01-348**
General Motors Corporation, And Hughes	)	
Electronics Corporation	)	
	)	
For Consent For A Proposed Transfer	)	
Of Control	)	
	)	
To: The Commission	)	

PETITION TO DENY BY THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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February 4, 2002

Exhibit	**Description**
A	**NRTC Territory Map With DMAs**
B	**EchoStar Memorandum of Law**
C	**Ku-band Video & Data Resources**
D	**DBS Competition Table**
E	**Kagan Questionnaire**
F	**Letter From G. Allen (RUS)**
G	**Letter From M. Taliaferro (NTIA)**
H	**NRTC/Affiliate Survey Results**
I	**Declaration of Dr. Paul W. MacAvoy**
J	**Cable Pass Rates In States With Significant Rural Populations**
K	**New York Times Homes Passed Map**
L	**Press Releases**
M	**DMAs Served By DIRECTV and EchoStar**
N	**Cable Mass Market Terrestrial Deployment (Hughes)**
O	**Declaration Of Walter Morgan**

SUMMARY

EchoStar and DIRECTV already are successfully competing against each other -- and against cable. The Commission recently found that the number of DBS subscribers is skyrocketing -- an increase of 24% within the last year alone. Every day, DBS gains more than 8,500 subscribers. There is no economic necessity for EchoStar and DIRECTV to merge in order to compete, because the market is functioning effectively now with two healthy, facilities-based competitors.

The effect of the proposed EchoStar/DIRECTV Merger is readily apparent: in areas where cable is not available, the number of comparable multichannel video program distributors (MVPDs) would be reduced from two (EchoStar and DIRECTV) to one (New EchoStar); in areas where cable is available, the number would be reduced from three (EchoStar, DIRECTV and the local cable operator) to two (New EchoStar and the local cable operator).

Tens of millions of rural homes -- up to 25,000,000 or more -- are not passed by cable and have no access to any MVPD services except through EchoStar's DISH Network and Hughes' DIRECTV, the two currently competing providers of high powered Direct Broadcast Satellite (DBS) services. Additional millions have no access to digital cable services. If the Commission allows EchoStar to merge with Hughes, there would be a monopoly DBS provider throughout the country -- and *no* MVPD competition from any other comparable source in all areas not passed by digital cable.

In all of these areas, New EchoStar will determine in its sole discretion the particular programming that consumers will be able to receive. If New EchoStar decides to eliminate specific programs from its line-up, that programming will no longer be available to consumers.

In all of these areas, New EchoStar will attempt to set installation policies, consumer service standards, billing procedures, price and all other aspects of its MVPD offerings to consumers, unchecked by competition. If any consumers in these areas are dissatisfied with New EchoStar's programming, policies or prices, they will have no alternative but to accept whatever New EchoStar provides or to do without MVPD programming altogether. They will have no other choice.

Similarly, approximately 40,000,000 homes are not passed by cable modem or digital subscriber line facilities and have no access to high-speed Internet service except via satellite. Currently, there are only two competing providers of broadband satellite services using the Ku-band: StarBand, controlled by EchoStar, and DIRECWAY, owned by Hughes. The proposed Merger would combine these two entities and create a monopoly in the delivery of broadband services to rural Americans. It also would create an overwhelmingly dominant player in the delivery of advanced broadband services in the promising Ka-band, before any other competitors can get off the ground.

To justify their merger to monopoly, the Applicants offer a host of vague and unenforceable promises. To the millions of rural Americans who will have no alternative but to accept whatever programming, services and prices that New EchoStar would decide to provide, the Applicants respond with meaningless promises of uniform national pricing.

Promises of national pricing are no substitute for competition and will not protect rural Americans from the effects of a monopoly. The promises are legally unenforceable and easily gamed through various subsidies made available only to certain consumers, including special installation and equipment deals, additional program offerings and other benefits. Even EchoStar's CEO recently conceded that his national pricing plan will need to be flexible enough to respond to cable promotions and rebates at the local level. NRTC's economic consultant shows that national pricing actually would lead to higher prices in both urban and rural areas.

None of the other claimed "justifications" for the proposed Merger provides a sufficient basis for the Commission to conclude that a grant of the Application would be in the public interest. The elimination of a rare facilities-based competitor on the mere claim that efficiencies will result would be grossly inconsistent with previous decisions and policies. As New EchoStar's own economist has recognized, deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it already has by limiting its use and raising its price.

The claim by New EchoStar's economist that EchoStar and DIRECTV do not compete is unbelievable and contradicts EchoStar's statements filed under penalty of perjury in recent litigation. It defies logic that two companies offering similar products in the same market do not compete against each other. For years, in numerous documented instances, EchoStar and DIRECTV have competed on price and service. In fact, competition has been rampant between EchoStar and DIRECTV and has driven each to provide better service, more advanced technologies and lower prices to consumers. This type of facilities-based competition, which the Commission has long encouraged, will be eliminated if the Merger is approved.

The recent investment by Vivendi Universal SA (Vivendi) raises additional concerns. The Applicants have attempted to cast the Vivendi deal as a simple carriage arrangement that does not affect the proposed Merger. In fact, it is a major equity deal with an entrenched programmer. The Applicants should be required to file all the relevant contracts concerning the new relationship between EchoStar and Vivendi. Given the Applicants' earlier statements to the Commission denying any intention to enter into vertically integrated arrangements with programmers, legitimate questions about the accuracy and truthfulness of these statements are before the Commission.

The Application is clearly inconsistent with the public interest and the Commission's long established goals of promoting facilities-based competition and consumer choice in the delivery of multichannel video programming and broadband services. The Merger will eliminate consumer choice and result in higher prices, less innovation and lower quality service. These consequences will be especially profound in rural America, where millions of consumers will have no choice but to accept New EchoStar's programming, prices and services, or to do without multichannel video programming and broadband services altogether.

Accordingly, the Application should be denied.

* * *

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To: The Commission

PETITION TO DENY
BY THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

The National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby submits this Petition to Deny the application of EchoStar Communications Corporation (EchoStar), General Motors Corporation (GM) and Hughes Electronics Corporation (Hughes), a subsidiary of GM (collectively, the Applicants), to transfer control of their satellite, earth station and other related authorizations to New EchoStar (the Merger).[1]

The Applicants assert that DBS is a weak and ineffective competitor to cable and that the Merger is necessary to create a "viable alternative to entrenched cable companies."[2] In fact, EchoStar and DIRECTV already are successfully competing against cable -- and against each other.

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[1] Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor; and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control, File Number 01-348, p. 6 (filed December 3, 2001) (the Application). *See also* Cable Service Bureau Action, EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control, CS Docket No. 01-348, DA 01-3005 (released December 21, 2001).

[2] Application, p. i.

The DBS industry's growth is nearly *two and a half times* the cable subscriber growth rate.[3] Last year alone, the number of DBS subscribers increased by 24%.[4] *Every day*, DBS is gaining more than 8,500 subscribers.[5] In light of this documented growth, there is no question that EchoStar and DIRECTV are successfully competing against the cable industry and can continue to do so without the proposed Merger.

The proposed transaction -- an unlawful merger to monopoly -- is clearly inconsistent with the interests of rural Americans and the Commission's long established goals of promoting facilities-based competition and consumer choice in the delivery of multichannel programming and broadband services. Despite the Applicants' illusory and contradictory promises of uniform national prices, the consequences of the Merger will be classic monopolistic behavior: higher prices, elimination of consumer choice, less innovation and lower quality service, especially in rural America. The Application should be denied.

I. NRTC BACKGROUND.

1. NRTC is a not-for-profit cooperative comprised of 705 rural electric cooperatives, 128 rural telephone cooperatives and 189 independent rural telephone companies located throughout 46 states. Since its founding in 1986, NRTC's mission has been to provide advanced telecommunications technologies and services to rural America. NRTC has long represented the views of rural Americans before the FCC, the National Telecommunications and Information Agency (NTIA), and the United States Congress.

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

[4] *Eighth Video Competition Report*, ¶13.

[5] *Eighth Video Competition Report*, ¶58.

2. In 1994, NRTC assisted in capitalizing the launch of the DIRECTV satellite business. Through a Distribution Agreement between NRTC and Hughes Communications Galaxy, Inc. (DIRECTV's predecessor-in-interest), NRTC received exclusive program distribution and other rights to market DIRECTV's DBS programming services to much of rural America. NRTC, its members and affiliates currently distribute DIRECTV programming to approximately 1,900,000 rural households.[6]

3. Since its inception, NRTC has championed the rights of rural Americans to enjoy fair and nondiscriminatory access to the same programming that is available to consumers in more populated urban areas. As early as 1989, NRTC was active in Commission and Congressional efforts to prohibit discrimination against distributors of satellite programming to rural America.[7] In 1992, NRTC advocated passage of the Program Access provisions of the Cable Television Consumer Protection and Competition Act of 1992, which were designed in part to prevent discrimination against rural consumers.[8] In response to the captioned Application, NRTC again speaks on behalf of rural Americans: this time, to prevent the creation of a satellite monopoly that will harm consumers.[9]

II. ARGUMENT.

4. Pursuant to Sections 214(a) and 310(d) of the Communications Act of 1934, as amended (the Act), the Commission must determine whether the proposed Merger would be

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[6] *See* **Exhibit A**. Pegasus Communications Corporation (Pegasus) is the largest affiliate of NRTC, distributing DIRECTV programming to approximately 1.5 million households through NRTC.

[7] *See* Notice of Inquiry, *Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, 4 FCC Rcd 3833 (1989).

[8] 47 U.S.C. § 628. *See also* First Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 72 RR 2d 649, 8 FCC Rcd 3359 (1993).

[9] The highest DBS penetration rates -- averaging almost 32% -- occur in states with substantial rural populations. *See* Satellite Broadcasting & Communications Association web site <http://www.sbca.com/mediaguide/factsfigures.htm> (visited January 23, 2002).

consistent with the public interest.[10] In reviewing satellite transactions, the Commission will evaluate "the competitive effects of the proposed transaction in both the relevant product markets and the relevant geographic markets."[11]

5. Product markets are defined primarily with reference to demand cross-elasticities. In other words, two services are deemed to be in the same product market if a small, non-transitory price increase by a provider of one of the services would cause enough buyers to shift their purchases to the second service so as to render the price increase unprofitable to the first provider.[12] In reviewing mergers, courts and the FCC rely on qualitative evidence to determine whether two services are "reasonably interchangeable" in their use.[13] In today's marketplace, digital cable may well be the only reasonably interchangeable alternative to DBS. EchoStar itself has submitted court pleadings recognizing that "consumers desiring as broad a range of television programming and entertainment options as possible, comprehensive premium sports coverage, maximum clarity of video and audio transmission, and ease of installation and operation have no alternative to High Power DBS service, since cable does not offer such choices."[14]

6. For purposes of analyzing satellite consolidations, the Commission has long made clear that the relevant geographic market is *local*, not national.[15] Although the number of homes

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[10] 47 U.S.C. §§214(a), 310(d).

[11] *See, e.g., Motient Services, Inc. and TMI Communications and Company, LP*, DA 01-2732 (released November 21, 2001).

[12] *See* United States Department of Justice Antitrust Division and Federal Trade Commission, 1992 Horizontal Merger Guidelines, 57 FR 41552 (1992) (*Merger Guidelines*).

[13] *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

[14] Memorandum of Law In Support of Request for Rule 56(f) Continuance to Respond to DIRECTV Defendants' Motion For Summary Judgment, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed Nov. 6, 2000) (*EchoStar Memorandum*) (copy attached hereto as **Exhibit B**).

[15] *See* Order and Authorization, *MCI Telecommunications Corporation, Assignor and EchoStar 110 Corporation, Assignee*, 15 CR 1038, ¶10 (1999) (*MCI Order*); Order and Authorization, *United States Broadcasting Co.*
(continued . . .)

passed by cable nationwide has been cited by the Applicants in support of their merger to monopoly, the Commission must focus on the actual number of homes passed by cable *in local markets*. A substantial number of homes -- certainly tens of millions and perhaps as many as 25,000,000 or more -- are *not* passed by any type of cable at the local level (far more if only digital cable were counted) and would be subject to New EchoStar's monopoly pricing and practices.

A. THE MERGER WOULD CREATE A DBS MONOPOLY.

7. Only three orbital slots have signal footprints that allow a high-powered DBS satellite to transmit programming to the entire continental United States: 101° W.L., 110° W.L. and 119° W.L.[16] There are 32 frequencies available at each of these three full-CONUS orbital slots and, collectively, EchoStar and DIRECTV are licensed for all of them. The proposed Merger would place all three full-CONUS orbital slots in the hands of a single entity, New EchoStar.

8. Non-full-CONUS orbital slots are located at 61.5˚ W.L., 148˚ W.L., 157˚ W.L., 166˚ W.L., and 175˚ W.L. To the extent these slots have been assigned by the Commission, they are either licensed to or used by EchoStar, are used to provide "niche" programming or are dormant. For example, at the 61.5˚ W.L. orbital slot that covers the eastern United States, EchoStar essentially operates all 32 frequencies: 11 channels are licensed directly to EchoStar, 13 channels are operated by EchoStar pursuant to FCC special temporary authority, and the remaining eight channels are licensed to Dominion Video Satellite, Inc., which uses EchoStar's satellite and customer receiving equipment. Of the 32 channels available at 148˚ W.L. that cover the western

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Transferor and DIRECTV Enterprises, Inc. Transferee, 14 FCC Rcd, 15 CR 645, ¶13 (1999) (*USSB Order*); 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) (*Tempo Order*).

[16] *See* Report and Order, *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, ¶39 (1995) (*DBS Order*).

United States, EchoStar is the licensee of 24. Finally, the orbital slots at 157˚ W.L., 166˚ W.L., and 175˚ W.L. are not even in use. Effective competition from any of these non-full- CONUS slots would be highly unlikely, because it would take twice the number of satellites to cover the same amount of the country -- a substantial barrier to entry and an insurmountable competitive disadvantage.[17]

1. New EchoStar Is Relying On Flawed Data To Create The False Impression That Cable Services Are Available Throughout Virtually The Entire Country.

9. In downplaying the adverse impact of the Merger on rural Americans, the Applicants erroneously claim that since virtually all homes in America have access to cable, little harm to MVPD competition would result from a consolidation of the only two full-CONUS, high-powered DBS satellite providers. According to Charles Ergen, EchoStar's Chairman and CEO, the Merger will not result in "any kind of monopoly at all," because "over 96% or 97%" of the country is passed by cable.[18]

10. While recognizing that these numbers are subject to "debate,"[19] Dr. Robert D. Willig, EchoStar's economic consultant, also bases his pro-Merger analysis on the premise that "nearly every household in America with a television is passed by cable: according to the FCC, 96.7 percent of television households are passed by cable."[20] After the Merger, according to the

[17] The licensees of the various full-CONUS and non-full-CONUS orbital slots are depicted in a chart attached hereto as **Exhibit C.** A table illustrating the current competitive DBS market and the post-Merger, non-competitive market is attached hereto as **Exhibit D.**

[18] SEC Form 425, filed by EchoStar Communications, Inc., *Transcript of "Charlie Chat,"* November 12, 2001, p.6 (November 16, 2001) ("…probably almost nobody watching this tonight (via satellite) doesn't have the opportunity to subscribe to cable if they'd like to").

[19] Declaration of Dr. Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, p. 24 (December 3, 2001) (*Willig Declaration*).

[20] *Willig Declaration*, p. 24.

Applicants, almost all consumers who may not wish to receive service from New EchoStar would be free to turn to their local cable operators for MVPD programming.

11. Although the Applicants repeatedly rely on the 96.7% national Homes Passed rate, the Commission has never independently verified the number of homes passed by cable nor analyzed their local or regional distribution.[21] Rather, over the years, the Commission has simply accepted the cable industry's self-serving figures while noting questions raised by NRTC and other regarding their accuracy.[22]

12. In the context of the proposed Merger, reliance on the resulting national Homes Passed rate is misplaced and leads to erroneous conclusions about the state of competition in local markets. By grossly inflating the extent of cable coverage in rural America, the Applicants create the false impression that the Commission need not worry about the consolidation of the only two real competitors to cable. In fact, tens of millions of consumers will be trapped in a monopolistic vise if the Commission approves the Merger.

13. NRTC and others have repeatedly stressed that the Homes Passed rate is premised on flawed data collection methods and does not accurately reflect the actual number of households

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[21] "Homes Passed" is defined by the Commission as the total number of households capable of receiving cable television service. *See Eighth Video Competition Report*, n. 11. Notably, this definition is not commonly understood by cable operators providing the Homes Passed numbers embraced by the Commission. *See* ¶¶ 16-25.

[22] *See* Comments of NRTC, submitted September 8, 2000 in response to Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 00-270 (released August 1, 2000) (*NRTC Seventh Video Competition Comments*); Comments and Reply Comments of NRTC, submitted August 3, 2001 and September 5, 2001, in response to Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-191 (released June 25, 2001) (*2001 Video Competition NOI*); Comments of NRTC submitted December 3, 2001, in response to Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 01-290, FCC 01-307 (released October 18, 2001). *See also* Ex Parte Comments of the Rural Utilities Service, submitted June 23, 2000, in response to Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 99-230, FCC 99-148 (released June 23, 1999) (*RUS Filing*); National Telecommunications and Information Administration and Rural Utilities Service, *Advanced Telecommunications In Rural America: The Challenge of Bringing Broadband Service to All Americans*, April, 2000, n. 62 (*NTIA/RUS Report*); *Look, Up in the Sky! Big Bets on a Big Deal*, N.Y. Times, October 30, 2001, at C-1 (*NYT Article*).

throughout the country that are not passed by cable. As discussed below, NTIA, the Rural Utilities Service (RUS) and others estimate that the actual cable passage rate is far lower than 96.7%. Whatever the correct rate for Homes Passed, however, it represents a *national* number and is largely irrelevant in evaluating competition in *local* markets -- which is required in order to assess properly the impact of the proposed Merger on rural Americans.

14. In April of 2000, NTIA and RUS demonstrated serious flaws with the cable industry's long-standing methodology for calculating Homes Passed and suggested a better, more accurate approach.[23] They pointed out that the calculation of cable pass rates is dramatically affected by three basic, different sets of statistics: 1) Housing Units; 2) Households; and 3) Television Households.[24] A "Housing Unit" is defined as a house, apartment, mobile home, group of rooms, or single room, that is occupied (or, if vacant, is intended for occupancy) as separate living quarters.[25] A "Household" is a currently occupied "Housing Unit."[26] A "Television Household" is defined as a Household with at least one television.[27] The diagram below (not to scale) illustrates the relationship between these groups as well as their most current estimates.[28] As can be seen, all Television Households are Households; all Households are Housing Units.

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[23] *See NTIA/RUS Report*, n. 62. *See also NRTC Seventh Video Competition Comments*, ¶¶8-15.

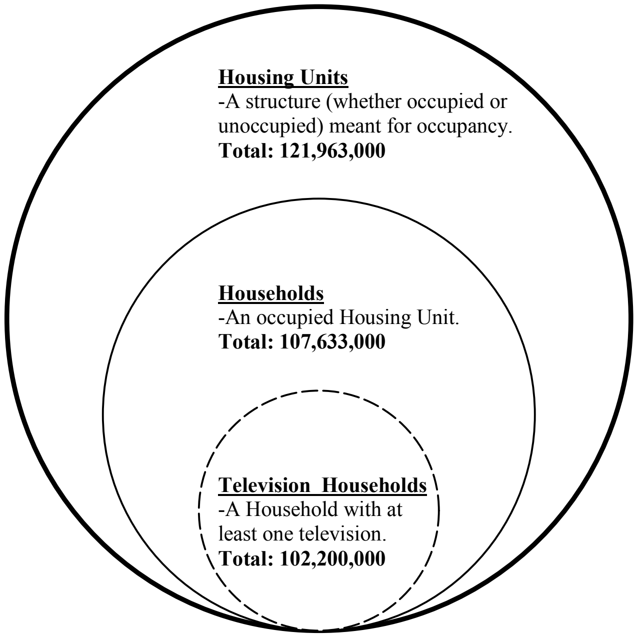
[24] *Eighth Video Competition Report*, ¶17.

[25] *See* U.S. Census Bureau, *Profiles of General Demographic Characteristics, 2000 Census of Population and Housing*, at A-2 (released May 2001) (*2000 Census Report*).

[26] *Id.*

[27] *Eighth Video Competition Report*, ¶17.

[28] The numbers for Housing Units and Households are based on numbers provided by the U.S. Census Bureau (*See* United States Department of Commerce, Bureau of the Census Press Release, *Census Bureau Reports on Residential Vacancies and Homeownership*, CB 02-04 (released January 25, 2002) (*Census 2001 Update*). The number for Television Households is based upon information contained in the Commission's most recent Video Competition Report. *Eighth Video Competition Report*, ¶17. Additionally, the National Cable & Telecommunications Association web site claims that the number of Television Households is 105,444,330. *See Industry Statistics*, < http://www.ncta.com/industry_overview/indStats.cfm?indOverviewID=2> (visited January 23, 2002) (NCTA National Web Site).



15. As the Commission has repeatedly noted, the national Homes Passed rate varies wildly based on the methodology used for the calculation. Depending on the numerator (the number of "homes passed") and the denominator (the universe of homes for comparison purposes), the percentage of Homes Passed could be as low as **81%**.[29] It may be even lower.

a. The Numerator Overcounts The Number Of Homes Passed.

16. As noted by NTIA and RUS, when a cable operator does not serve a house, it is unable to determine whether the house is occupied or unoccupied or whether it has a television set or does not have a television set. The cable operator knows only that a Housing Unit (occupied or unoccupied; with or without a television) is passed. The operator cannot distinguish "among a household without a television, a household with a television, or an

[29] Seventh Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 CR 1414, FCC 01-1, at ¶18, n. 23 (*Seventh Video Competition Report*) (where the Commission also noted that by simply switching data sources from Kagan to Warren drops the percentage of Homes Passed to **92%**.)

unoccupied housing unit."[30] As a result, the number of Homes Passed actually reflects the total number of Housing Units passed, not Television Households.

17. The questionnaire sent to cable operators by Kagan World Media (Kagan), whose numbers have been relied upon by the cable industry and the Commission over the years, requests information on the number of homes passed by cable but does not provide any definition of "homes passed."[31] The cable operator is not instructed to count a home only if it is occupied and has a television set. Nor is the operator instructed to count a home only if it is located within a certain proximity to the cable plant.

18. If a cable operator were to seek a definition of "Homes Passed" on the Internet, it would be free to choose from among the following confusing and at times contradictory definitions:

- The number of homes for which cable television service is or can be readily made available because *feeder cables are in place nearby*;[32]
- The number of homes for which cable television service is or can be *readily available*;[33]
- The total number of homes that have the *potential* to be connected to the cable television system;[34] or
- The total number of households *capable* of receiving cable television service.[35]

19. Based on the various uses of these definitions, it is certain that cable system operators are not reporting their numbers consistently. For example, unoccupied homes may be

[30] *NTIA/RUS Report*, n. 62.

[31] A copy of a sample questionnaire is attached hereto as **Exhibit E** (redacted to eliminate proprietary information).

[32] *See* National Cable Communications' Glossary of Cable Industry Terms, <http://www.spotcable.com/asp/abo/glossary.asp?section=publicresources&sub =glossary> (visited January 23, 2002).

[33] *See* Horizon Media Glossary, <http://www.horizonmedia.com/glossary/h.htm> (visited January 23, 2002).

[34] *See* AOL Time Warner Industry Glossary: Cable, <http://www.aoltimewarner.com/about/companies/glossary/cable.html> (visited January 23, 2002).

[35] *Eighth Video Competition Report*, ¶16, n. 11 (emphasis added).

counted. Homes without television sets may be counted. Some operators may count an apartment building as a single "household," while others may count each apartment unit as a separate "household." Some may count all units within the building regardless of whether the unit is occupied or has a television set. Obviously, the resulting differences are numerically very significant.

20. Recognizing this confusion and potential for inaccuracy, RUS requested that Warren Publishing, Inc. (Warren) clarify its use of the term "homes passed" in conjunction with its calculation of "homes passed by cable" and "homes in franchised area" in its Television & Cable Factbook, upon which the Commission also relies.[36] Warren responded that in both cases, *"the term '<u>homes</u>' means the number of <u>housing units</u>."* Warren further conceded that "the wording is a bit confusing and therefore will be changed in the 2001 edition to read 'housing units.'"[37]

21. Inaccurate reporting of homes passed becomes readily apparent by comparing cable industry statistics with statistics of the Census Bureau. Incredibly, in some states the cable industry reports *more Homes Passed than the Census Bureau reports as Households*:

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[36] *See* Letter from Gary B. Allen, Chief Universal Services Branch, Rural Utilities Service, to Michael Taliaferro, Managing Editor and Assistant Publisher, Television & Cable Factbook, Warren Publishing, Inc. (April 18, 2000) (appended as "Attachment A" to the RUS Filing) (copy attached hereto as **Exhibit F**.)

[37] *See* Letter from Michael Taliaferro, Managing Editor and Assistant Publisher, Television & Cable Factbook, Warren Publishing, Inc., to Gary B. Allen, Chief Universal Services Branch, Rural Utilities Service (April 24, 2000) (appended as "Attachment B" to the RUS Filing) (copy attached hereto as **Exhibit G**.)

Table 1
Census Bureau Households vs. Cable Homes Passed

	The Census Bureau reported the existence of the following number of **Households**:[38]	The Cable Industry reported a *greater* number of **Homes Passed**:[39]	Reflecting a difference of:
Arizona	1,901,327	2,178,695	277,368
Connecticut	1,301,670	1,440,019	138,349
Washington, DC	248,338	319,034	70,696
Hawaii	403,240	410,195	6,955
Illinois	4,591,779	4,633,495	41,716
New Jersey	3,064,645	3,726,812	662,167

These numbers cannot possibly be reconciled, because the number of Households should *never* exceed the number of Homes Passed (which purportedly includes only TV Households). The total for these six states where the cable industry claims that the number of homes passed exceeds the number of Census Bureau Households undeniably shows that the cable industry data is so flawed that it cannot be relied upon for analyzing the proposed Merger.

22. The Commission's latest computation of Homes Passed suffers from this same type of defect. Relying again on data from Kagan, the Commission reported in its *Eighth Video Competition Report* that in 2000 there were *exactly the same number of Television Households (106.4 million) as there were Households listed by the Census Bureau (106.4 million)*.[40] This cannot possibly be the case -- unless every home in the country is occupied *and* has a television

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[38] Sources: *2000 Census Report*, at 1028, 1032, 1034, 1037, 1039, 1056.

[39] NCTA web site, <http:www.ncta.com/industry_overview/indStats.cfm?statID=16> (visted January 16, 2002) (*NCTA State Web Site*) (reporting state data as of December 2000).

[40] *See Census 2001 Update*, Table 3 (containing the Fourth Quarter 2000 estimates for "Occupied Housing Units" (*i.e.*, Households)). *See also Eighth Video Competition Report*, Appendix B, Table B-1 (Year End data for Television Households for 2000).

set.[41] Moreover, Kagan's most recent estimate of TV Households for June 2001 (107.1 million) exceeds the Census Bureau's own estimate of Households for the same period (106.7 million).[42]

b. The Denominator Undercounts The Universe Of Homes.

23. In arriving at a national Homes Passed rate, the cable industry -- and the Commission -- take the total number of Homes Passed as reported by the cable industry and divide that number into "Television Households." The resulting (and misleading) figure -- 96.7% -- is now the linchpin of the Applicants' claim that no harm to MVPD competition will result from the Merger.

24. However, the denominator in the calculation of the national Homes Passed rate undercounts the universe of homes. Because the numerator includes Housing Units (not just Television Households), the denominator should be Housing Units. Instead, it is Television Households.

25. As a result, the Homes Passed calculation does not show that cable passes 96.7% *of TV households*, as is claimed. Instead, it shows that cable passes 96.7% *as many housing units as there are TV households*.[43] This is a major distinction with serious repercussions, yet it is not

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[41] Based on a comparison of the Seventh and Eighth Video Competition Reports, Kagan's numbers for Households and Homes Passed spiked retroactively from 2000 to 2001. As of June 2000, Kagan estimated 100.5 million Television Households and 97.1 Homes Passed for 2000. By 2001, *those numbers increased by 6,000,000 each:* 106.4 million Television Households and 103.2 million Homes Passed (increases of 6.4% and 6.8%, respectively) in the last six months of 2000. The Commission offered no explanation in either Report as to how such an unprecedented increase could have occurred. In each of the previous eight years, the annual increase in either category was less than 1.2% (*Seventh Video Competition Report*, Appendix B, Table B-1; *Eighth Video Competition Report*, Appendix B, Table B-1).

[42] *See Eighth Video Competition Report*, Appendix B, Table B-1 (Year End estimate for Television Households for June 2001); United States Department of Commerce, Bureau of the Census Press Release, Census Bureau Reports on Residential Vacancies and Homeownership, CB 01-121 (released July 26, 2001) (disclosing Second Quarter 2001 Housing Inventory for the United States). Using the number of TV Households as reported by Nielsen Media Research (102 million) (*Eighth Video Competition Report*, ¶17), the Homes Passed rate even exceeds 100%. It is inconceivable that every home in the country (and then some!) has a television set.

[43] *RUS Filing*, p. 4.

addressed in the FCC's Reports.[44] As described below, it results in the difference of tens of millions of homes that are not actually "passed by cable."

2. Tens Of Millions Of Housing Units Are Not Passed By Cable And Would Be Captive To New EchoStar's Monopoly.

26. According to NTIA and RUS, simply by using the cable industry's own numbers and dividing Homes Passed into Housing Units (rather than TV Households), the national Homes Passed rate drops to as low as **81%**. In other words, using the NTIA/RUS methodology, approximately 23 million homes do not have access to cable services and have no MVPD alternative except DBS.[45] This is a far cry from the three million unpassed homes cited by New EchoStar.

27. Another respected source recently arrived at an even lower national Homes Passed rate than NTIA and RUS. The New York Times, citing as independent sources the National Cable Television Association, the Census Bureau, SkyRESEARCH, the Satellite Broadcasting and Communications Association of America, and Kagan World Media, reported that of 115.9 million homes with access to satellite, only 90.9 million had access to cable. Based on these figures, some 25,000,000 homes may not be passed by cable, which translates into a national Homes Passed rate of only **78.4%**.[46]

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[44] As RUS also emphasized, the FCC's Homes Passed statistics have been presented in such a manner as to suggest that the ratio of "homes passed by cable" to "TV households" is a genuine measure of cable availability when it is actually a much less meaningful comparison of incompletely overlapping sets (*i.e.,* there are units in the numerator that are not in the denominator) (*RUS Filing*, n.17). After reviewing the headings in its FCC's Reports ("Cable's Capacity to Serve Television Households") and its phraseology *(e.g.,* "the number of homes passed by cable as a proportion of the number of TV households"), RUS noted that the Commission implies that every "home passed by cable" is a "TV Household." *Id.*

[45] Using updated numbers from the *Census 2001 Update* and the *Eighth Video Competition Report*, the current passage rate ranges from **101.9%** (Homes Passed (104,000,000) divided by the total number of Television Households (102,200,000)) to **85.2%** (Homes Passed (104,000,000) divided by the total number of Housing Units (121,900,000)). NCTA still posts a **96.7%** pass rate on its *NCTA National Web Site* (*See NCTA National Web Site* (visited January 23, 2002).

[46] *NYT Article*. According to a recent analysis by The Yankee Group, 88% of Households say that cable is available to them. The Yankee Group, *Competitive Market Study 2000*, p. 6.

28. As if these independent sources were not convincing enough, DIRECTV itself recently reported that only **71%** of its subscribers are able to receive cable television service.[47] DIRECTV's own numbers are much more consistent with the findings of NTIA, RUS and The New York Times (that cable services are available to roughly 80% of the country) than the cable industry. If DIRECTV's rate were applied nationwide, some 35,000,000 of the nation's 122,000,000 homes across the country would not have access to cable.

29. Last week, NRTC completed a survey of its members and affiliates to determine the availability of cable service in their respective service territories. More than 50% of the respondents said that cable is available to less than half of the homes in their territories.[48]

30. To say the least, there are serious questions regarding the accuracy of the 96.7% national Homes Passed rate cited by the Applicants to justify their Merger. Clearly, the Commission is unable to rely on it in analyzing the Merger.[49] The Applicants' own economic consultant goes so far as to recognize that the number is subject to "debate."[50]

31. Even if the number were accurate (which it is not), it sheds no light on the state of competition at the *local* level, which has always been the focus of the FCC's public interest and competition analyses.[51] Nor, as discussed below, does it reflect the significant differences between analog and digital cable systems.

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[47] *See* Comments of DIRECTV, Inc., p. 13, submitted August 3, 2001, in response to *2001 Video Competition NOI*.

[48] A summary of NRTC's survey results is attached hereto as **Exhibit H.** Exhibit A depicts the location of NRTC's territories.

[49] Additionally, none of these numbers distinguishes between analog cable (which, as discussed later, is not substitutable for DBS service) and digital cable (which is substitutable). If only digital cable were considered, NRTC believes that the Homes Passed rate would be reduced by at least 10%, for an estimated national digital Homes Passed rate of 71%.

[50] *Willig Declaration*, p.24.

[51] *See* Memorandum Opinion and Order, *In the Matter of Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, 14 FCC Rcd 3160 (February 18, 1999) at ¶21 (*AT&T TCI Order*); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America*
(continued . . .)

32. In light of the Applicants' claim that the Merger will have a *de minimus* impact on MVPD competition because cable operators provide a virtually ubiquitous nationwide alternative, they must identify the number of homes not passed by cable *at the local level*. A mere repetition of the national Homes Passed rate historically submitted by the cable industry is inappropriate to assess the impact of the proposed Merger.

3. The Proposed Merger Would Create An MVPD Monopoly In Local Geographic Markets.

33. In recent years, the Commission has reviewed DBS spectrum aggregation issues in the context of three proceedings: 1) United States Satellite Broadcasting Co., Inc.'s transfer of control to DIRECTV of licenses for eight DBS channels at 101° W.L. and 110° W.L.;[52] 2) MCI's assignment to EchoStar of licenses for 28 DBS frequencies at the 110° W.L. orbital location;[53] and 3) Tempo Satellite, Inc.'s assignment to DIRECTV of licenses for 11 channels at the 119° W.L. orbital position.[54]

34. In each of these proceedings, the Commission followed an almost identical course. First, the Commission determined that any MVPD market analysis must be conducted *at the local level*.[55] Second, instead of conducting the local level analysis that the Commission believed necessary, the Commission by default relied on the dubious national Homes Passed

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Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, 16 FCC Rcd 6547, ¶244 (January 22, 2001) (*AOL/Time Warner Order*). *See also* Declaration of Dr. Paul W. MacAvoy, The Effects of the Proposed EchoStar – DIRECTV Merger on Competition in Direct Broadcast Satellite Rural Markets Where Cable Is Not Available (February 1, 2002) (*MacAvoy Declaration*, attached hereto as **Exhibit I**).

[52] *USSB Order*, ¶6 (a total of eight channels were the subject of the application: five at the 101° W.L. orbital location and three at 110° W.L.).

[53] *MCI Order*, ¶28.

[54] *Tempo Order*, ¶1.

[55] *MCI Order*, at ¶10; *USSB Order*, at ¶13; *Tempo Order*, at ¶11. This is contrary to Dr. Willig's unsupported contention that a *national* analysis is required. As discussed at p. 37, even Mr. Ergen recognizes that pricing competition occurs at the local level.

rate.[56] Third, and most importantly, the Commission relied upon the existence of two competitive DBS alternatives to cable as a *safeguard* in utilizing the national Homes Passed statistic.

35. For example, in the *MCI Order*, the Commission concluded that "[t]here are consumers, such as those living in sparsely populated rural areas, who may *only* be able to purchase the offerings of DBS distributors because their homes are not served by any other MVPD."[57] Since it lacked the data to assess the scope of cable availability at the local level, the Commission instead relied on a national Homes Passed rate.[58] In the Commission's opinion, this national statistic "suggest[ed] that most U.S. TV households have a choice between *at least* one cable operator and *two DBS competitors*."[59]

36. In the *Tempo Order*, the Commission again found a substitute for its required analysis of competition at the local level. Using a national Homes Passed percentage of 96.6%, the Commission concluded that "most television households in the United States *have a choice* between *at least* one cable operator and *two full-CONUS DBS competitors (i.e., DIRECTV and EchoStar*)."[60] In granting the application, the Commission concluded that DIRECTV "will face

[56] *MCI Order*, at ¶16 (where the Commission reasoned that, "96.6% of U.S. television households are passed by a cable system. This estimate suggests that most U.S. television households have a choice between at least one cable operator and two DBS competitors"); *USSB Order*, at ¶14 (where the Commission stated that because "only 3.4% of U.S. television households are not passed by a cable system . . . for most U.S. television households, DIRECTV must potentially compete with at least one cable operator that likely will have a significant share of the local MVPD market"); and *Tempo Order*, at ¶16 (where the Commission noted that "approximately 96.6% of U.S. TV households are passed by a cable system").

[57] *MCI Order*, ¶16 (emphasis added).

[58] *Id.*, ¶16 (the Commission stated that it lacked the necessary "geographically delineated data" to accurately determine the level of local MVPD competition).

[59] *Id.*, ¶16 (emphasis added).

[60] *Tempo Order*, ¶16 (emphasis added).

stiff competition from *at least one other MVPD operator* [*i.e.,* EchoStar] in each of the markets in which it competes."[61]

37. In each of these proceedings, the Commission felt it necessary to evaluate MVPD competition at the local level but relied instead on the safety net created by the existence of two DBS competitors in all areas not passed by cable.[62] In other words, in granting the applications, the Commission's use of the 96.6% Homes Passed rate *did not matter* since two full-CONUS DBS providers were competing in all areas not passed by cable. Regardless of whether cable was unavailable in 3% (or 20%) of the homes, the Commission reasoned that all consumers at a minimum received the benefits of MVPD competition from two competing DBS providers.

38. With respect to the proposed Merger, however, the policy rationale discussed above disappears. If the proposed Merger is approved, there will no longer be two competing DBS providers to serve as a safety net for local competition in areas not passed by cable. As a result, the Commission should not rely on the national Homes Passed rate as justification for the Merger. Instead, before passing on the Application, the Commission *must assess the actual state of competition to cable at the local level*.[63]

39. In analyzing cable availability at the local level, NRTC retained the services of Dr. Paul W. MacAvoy. Dr. MacAvoy concluded that the local market is different for each consumer.[64] He did not attempt to determine the gross number of Homes Passed by cable at the

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[61] *Id.*, ¶16 (emphasis added).

[62] The Commission utilized the first of these proceedings -- the *USSB Order* -- to establish an *additional* DBS provider in the form of DIRECTV. The Commission stated that in granting the application, it was seeking to "allow DIRECTV to become a stronger competitor in the MVPD market." *USSB Order*, ¶17. This end-game became plainly apparent with the release of the MCI Order one month later, which established EchoStar as DIRECTV's primary DBS competitor.

[63] *See AT&T TCI Order* ¶21; Memorandum Opinion and Order, *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*, 16 FCC Rcd 6547, ¶244 (January 22, 2001).

[64] *See MacAvoy Declaration*, pp. 7-10.

local level. Rather, in response to Dr. Willig's claim that unpassed homes are "geographically dispersed," Dr. MacAvoy reviewed the smallest unit available -- Census Blocks used by the Census Bureau -- and identified "collections" of thousands of similar local markets that could be examined together for the purpose of characterizing competitive conditions.[65] He applied conservative assumptions that result in a material overstatement of cable availability (*e.g.,* if any home in a Census Block were passed by cable, he assumed that all homes in the Census Block were passed). Nevertheless, Dr. MacAvoy identified 14 large regions of the country containing contiguous Census Blocks that were *not* passed by cable. In these large, primarily rural "clusters," DBS does not compete with cable and is not interchangeable with any other MVPD service.[66] Aside from this sampling of 14 regions, there are thousands of other, smaller areas, representing millions of homes throughout the country that do not have access to cable.

40. In each local market where cable is not available, there will be absolutely no MVPD competition if the proposed Merger is approved. In these areas, consumers will face the Hobson's Choice of taking service from New EchoStar, or doing without MVPD service altogether.

41. EchoStar itself noted the importance of local competition in a separate proceeding, where it stated that "*[m]illions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and*

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[65] *Id.*, ¶13 (citing Order, *Regulatory Treatment of LEC Provision of Interchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Dkt. No. 96-149, 12 FCC Rcd 15,756, 15,804, ¶85 (1997) (where the Commission examined "collections" of similar local markets for the purpose of characterizing competitive conditions).

[66] When calculated on a state-by-state rather than national or regional basis (using either Households *or* Housing Units), the national Homes Passed rate drops precipitously and shows low cable availability in a sampling of individual states with significant rural populations. *See* **Exhibit J**. According to a map published in The New York Times, in 22 states more than **30%** of homes are not passed by cable (*i.e.*, the cable pass rates for those states are less than 70%). *NYT Article*. A copy of the map, which has been re-colored and re-created by NRTC, is attached hereto as **Exhibit K**.

EchoStar, there is no competition at all."[67] This is exactly the anticompetitive result that would result from the Merger. For this reason, after computing the pre-Merger and post-Merger Herfindahl-Hirschman Index (HHI), Dr. MacAvoy concludes that the Merger would constitute a merger to monopoly under the *Merger Guidelines*.[68]

4. Only Digital Cable Is Reasonably Interchangeable With DBS.

42. Not all cable is created equally. The cable world has two broad types of plant -- digital and analog cable. It has been estimated that that approximately 77% of households with cable are passed by at least 550 MHz of digital plant. Nearly 20% of cable subscribers currently receive digital cable service.[69]

43. The continued viability of many of the existing rural, analog cable systems is very much in doubt. Many, including EchoStar's investment bank, believe that large numbers of rural cable operators will go out of business if they cannot afford to upgrade to digital and compete with EchoStar and DIRECTV.[70]

44. In those areas passed only by analog cable, there is no real competition aside from DIRECTV and EchoStar. Analog cable has far fewer channels (often fewer than 60), poorer picture quality, fewer or no pay-per-view movies, significantly higher per channel cost to subscribers, and an inability to use new technologies, such as interactive television. Digital

[67] *EchoStar Memorandum*, p. 12 (emphasis added).

[68] *MacAvoy Declaration*, pp. 3-4.

[69] Cable & Telecommunications Overview 2001, National Cable & Telecommunications Association (2001), p. 2.

[70] *See* Ty P. Carmichael, Jr., Credit Suisse First Boston Report, *Natural Selection, DBS Should Thrive as the Fittest to Serve Rural America*, October 12, 2001, pp. 11-14 (submitted as an *ex parte* filing in CS Docket No. 01-290 on November 9, 2001) (*CSFB Report*). *See also* Prepared Testimony of Mr. Neal Schnog, President, Uvision, *The Status of Competition in the Multi-Channel Video Programming Distribution Marketplace*, The Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, December 4, 2001.

offers a wider selection of movies, more music channels, extensive programming menus, video-on-demand and other options and services not found on analog systems.[71]

45. As the Commission has noted, "cable systems using digital signal transmission can provide customers with superior video picture quality, increased programming options, and more advanced service offerings than customers can receive from cable systems using standard analog signal transmission."[72] Analog cable systems do not offer these features and do not represent an acceptable substitute for DBS.[73] In fact, EchoStar has recognized that "cable television is an imperfect and comparatively weak substitute for DBS."[74]

46. Dr. MacAvoy's findings support these conclusions. In his attached Declaration, he points out the stark differences between analog and digital cable.[75] He suggests that cable services not yet upgraded for digital (and not to be upgraded within the next two years) are not substitutable for DBS and should not be included in the relevant product market in rural areas where DBS is otherwise the only available MVPD.

47. The *CSFB Report*, published in October, 2001, found that in order to effectively compete with DBS, rural cable operators must upgrade to a more advanced service platform (*i.e.,*

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[71] *CSFB Report*, p. 54. *See also* Buchanan, Doug, *Seeing is Understanding When It Comes To Digital TV,"* Business First, July 28, 2000, <http://columbus.bcentral.com/columbus/stories/2000/07/31/focus3.html?t=printable (visited January 30, 2002).

[72] *See Seventh Video Competition Report*, ¶41.

[73] EchoStar's own previous statements bear this out: "DBS and/or High Power DBS is superior to most cable services in several respects, including higher quality picture, substantially more programming options, and pay-per-view in a 'near-on-demand' environment that consumers find more attractive than the pay-per-view environment offered by cable." *EchoStar Memorandum*, p. 12.

[74] *Id.*

[75] *MacAvoy Declaration*, pp. 2, 6.

digital). However, low household density and small system size make such upgrades economically unattainable.[76]

48. As a result, according to CSFB, these operators face a dire Catch-22: upgrade their analog systems to digital despite the prohibitively high costs, or maintain their analog systems and face the loss of their subscribers to DBS. CSFB ultimately concludes that over the next five to eight years, approximately 8,270 cable systems serving roughly 8.2 million subscribers are at risk for business failure.[77] These cable systems are concentrated largely in "C" and "D" counties with fewer than 20,000 households.[78]

49. The loss of these analog cable systems is not only relevant in demonstrating that analog cable is not a competitor to DBS, but further underscores the loss of competition in rural markets if the Merger were approved. These analog cable systems -- representing 8.2 million subscribers -- currently appear in the Commission's competition reports as homes passed by cable. Their elimination from the MVPD market will further erode the percentage of homes passed by cable while simultaneously expanding the monopoly power of New EchoStar at the local level.

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[76] *CSFB Report*, p. 4. The CSFB Report makes note of the historical fact that since cable's advent in the 1940s, new technologies and a digital infrastructure upgrades were implemented in the more profitable urban markets, while rural America has largely been ignored. *Id.*, p. 2.

[77] *CSFB Report*, p. 3 CSFB projects that DBS will ultimately capture the majority of the 8.2 million subscribers who lose their analog cable service. *Id.*, p. 37.

[78] *CSFB Report*, p. 14. "A" Counties - highly urbanized areas; belong to the 21 largest Metropolitan Statistical Areas; counties contain 40% of U.S. households; "B" Counties - counties not defined as A counties that have more than 85,000 households; counties contain 30% of U.S. households; "C" Counties - not defined as A or B counties that have more than 20,000 households or are in Consolidated Metropolitan Statistical Areas or Metropolitan Statistical Areas with more than 20,000 households; counties contain 15% of U.S. households; and "D" Counties - all counties not classified as A, B or C counties; considered very rural; counties contain 15% of U.S. households.

5. Other MVPD Alternatives Are Fringe Technologies And Are Not Reasonably Interchangeable With DBS.

50. The Applicants claim that in addition to cable, DBS must compete with a number of other MVPD distributors, including C-band satellite, Multichannel Multipoint Distribution Service (MMDS), Satellite Master Antenna TV systems (SMATV), cable overbuilders and Northpoint.[79] Citing these technologies, New EchoStar says that the merged entity will face "tough competition" in non-cabled areas.[80]

51. None of these technologies, however, is reasonably interchangeable with DBS and by no stretch of the imagination will offer "tough competition" to New EchoStar as it contends.[81] All of them are experiencing serious declines in the number of subscribers they serve or are not available in rural America. None of them offers the same quality, features or diversity of programming services as DBS.

a. C-Band.

52. In the late 1970s, C-band satellites began to deliver programming directly to households. C-band's low-power signal requires enormous backyard receiving dishes, usually measuring six to eight feet in diameter. As a result, C-band was traditionally marketed to rural areas. The price of the dish plus installation generally runs into the thousands of dollars, while the cost of an entry-level DIRECTV or EchoStar system is typically $150 or less (sometimes the

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[79] Application, p. 40. *See also* Prepared Testimony of Mr. Charles W. Ergen, Chairman and CEO, EchoStar Communications, Inc., *The Status of Competition in the Multi-Channel Video Programming Distribution Marketplace*, The Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, December 4, 2001 (*EchoStar Congressional Testimony*).

[80] SEC Form 425, filed by EchoStar Communications Corporation, pp. 2, 7 (November 30, 2001).

[81] In his Declaration, Dr. MacAvoy explains that in areas without access to cable services, a monopolist in DBS would not need to control SMATV, MMDS and C-band (HSD) in order to exercise market power. *See MacAvoy Declaration*, p. 5.

equipment is provided without cost to subscribers). Remarkably, the Applicants suggest that C-band offerings "remain very attractive."[82]

53. If C-band providers were as competitive as the Applicants claim, the number of its subscribers would be growing or at a minimum remaining stable. Instead, the opposite is true: the Commission's own numbers reflect that C-band is losing subscribers at a dramatic rate. Between June 1999 and June 2001, the number of C-band subscribers declined from 1.8 million to 1 million (a decrease of 44% in just two years), for a total MVPD market share of 1.13%. Because of C-band's high cost and the unsightly large dishes, the C-band business will likely continue to diminish as existing customers replace their larger dishes with smaller, less expensive DBS equipment.

54. Despite the Commission's findings that C-band subscribership is rapidly declining, both the Applicants and Dr. Willig argue that it offers effective competition to DBS, because "C-Band providers . . . are beginning to roll out new digital offerings."[83] That Motorola may be developing digital equipment for the few remaining C-band holdouts hardly supports their contention that C-band is a close substitute for DBS.

55. In fact, the same DOJ report which the Applicants cite in their Application[84] reached the conclusion as early as 1998 that "the C-Band business is largely obsolete today. The industry consensus is that the C-band business will gradually disappear as existing customers replace their

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[82] Application, p. 41.

[83] *Id.*, p. 41; *Willig Declaration*, p. 25.

[84] *Id.*, n. 84 (referencing Comments of the United States Department of Justice, *In the Matter of MCI Telecommunications Corp. and EchoStar 110 Corp.,* File No. SAT-ASG-19981202-0093 (January 14, 1999)) (*DOJ MCI Comments*).

larger dishes with smaller, less expensive DBS equipment."[85] If C-band was "largely obsolete" in 1998, it hardly can constitute a competitive force today as the Applicants claim.[86]

b. MMDS.

56. MMDS is another declining MVPD business that the Applicants erroneously portray as providing effective competition to DBS. Also known as "wireless cable," MMDS is a terrestrial, fixed wireless technology, using signals transmitted from a large antenna on a high tower to receiving antennas located on the rooftops of subscriber homes.

57. MMDS is fraught with numerous technical and competitive obstacles. For example, an MMDS system *must* have a line of sight path or a signal booster between the transmitter and the receiving antenna.[87] Because the necessary line-of-sight is obstructed in many areas by buildings, mountains and even trees, it is unsuitable for many regions. Further, because of spectrum capacity limitations when using analog signals (and the expense of converting to digital), MMDS operators can offer only a maximum of 33 microwave channels in each market.[88] In addition, and most importantly, MMDS is unavailable in much of rural America, because it is not cost-effective to construct a terrestrial infrastructure that would serve relatively few rural households. In this regard, MMDS suffers problems similar to those affecting analog cable systems and other terrestrial technologies.

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[85] *Id.*, Exhibit A, ¶27 (referencing the DOJ's Complaint filed in, *United States v. Primestar, Inc., et al.*, No. 1:98CV01193, ¶27 (D.D.C.) (filed May 12, 1998)) (*DOJ Primestar Complaint*).

[86] The next satellite television technology to emerge after C-band was medium-powered DBS. Medium-power providers operated in a different Ku-band range than high-powered DBS. Because this technology operated at a lower power, it was unable to deliver as many channels as high-power DBS, yet its overhead costs were at least as high. In addition, it required satellite dishes approximately 27" to 39" in diameter. With the rise of DIRECTV and EchoStar, medium-power DBS was unable to compete. The last medium-powered DBS provider offering service directly to consumers was Primestar, which was purchased by DIRECTV in 1999. The Primestar subscribers have since been converted to DIRECTV's high-powered DBS service. There currently is no medium-powered DBS company providing service directly to consumers and no new entry is anticipated.

[87] *Seventh Video Competition Report*, ¶86.

[88] *Id.,* ¶86.

58. Indeed, the largest holders of this spectrum, Sprint Corporation (Sprint), BellSouth Corporation, and WorldCom, Inc. (WorldCom), as well as other MMDS operators, long ago announced plans to cease providing video programming over MMDS frequencies.[89] The FCC's decision last year authorizing mobile uses of the spectrum will likely accelerate plans to deploy non-video services in those few areas still served by MMDS.[90]

59. As a competitive force within the MVPD market, MMDS is sprinkled throughout the country but its subscribership is dwindling. As early as 1998, the DOJ dismissed MMDS as a viable MVPD competitor.[91] The Commission has reported that the number of MMDS subscribers has decreased from 1.1 million in December of 1996, to 700,000 in June of 2001, and currently represents only 0.79% of the MVPD market.[92] The Commission correctly concluded that "most MMDS licenses will not be used in the future to compete in the MVPD market."[93]

c. SMATV.

60. SMATV systems are video distribution facilities that use closed transmission paths that do not cross public rights-of-way.[94] SMATV systems only serve multiple dwelling units (MDUs) and thus are not a viable alternative for the vast majority of rural Americans, who tend

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[89] *See* ¶111, *infra*.

[90] *See e.g.,* John Mansell, *Changing Fortune of Broadband Fixed Wireless,* BROADBAND FIXED WIRELESS, p. 1 (October 31, 2001); John Mansell, *Sprint Halts Expansion of MMDS*, BROADBAND FIXED WIRELESS, p. 3 (October 31, 2001) (reporting October 17, 2001 announcement of halt of further growth of MMDS fixed wireless service until second-generation equipment becomes available); John Mansell, *Nucentrix Delays Service Rollout*, BROADBAND FIXED WIRELESS, p. 6 (reporting company's delay in expansion until new line-of-sight equipment is developed). Nucentrix is renegotiating its marketing agreement with DIRECTV under which approximately 28,000 Nucentrix customers receive DIRECTV programming (See Form 10-Q, Nucentrix Broadband Networks, Inc., for the Quarter Ended September 30, 2001 (November 4, 2001); Karen Brown, *Muffled Ring: BellSouth Still a Broadband Enigma*, Broadband Week (June 4, 2001).

[91] *DOJ Primestar Complaint*, ¶68.

[92] *Eighth Video Competition Report*, ¶71, Table C-1.

[93] *Seventh Video Competition Report*, ¶88.

[94] 47 U.S.C. § 522(7). SMATV systems do not use public rights-of-way, and thus fall outside of the Act's definition of a cable system.

not to live in MDU complexes.[95] Moreover, a consumer in an MDU can subscribe to SMATV only if the MDU owner has chosen to install a SMATV system. While SMATV may offer limited competition to cable and DBS in certain urban markets, its share of the overall MVPD market is less than 2%.[96]

d. Cable Overbuilders.

61. As the name implies, cable overbuilders are only present where standard cable companies already are established. They do not compete with DBS in areas not served by cable.[97]

e. Northpoint.

62. Northpoint is a start-up company that does not even have an FCC license.[98] It is seeking a terrestrial license to provide Multichannel Video and Data Distribution Services (MVDDS) in the same Ku-band DBS spectrum used by EchoStar and DIRECTV. Both EchoStar and DIRECTV have opposed Northpoint's request.

63. Northpoint would operate somewhat similarly to MMDS, using large antenna towers to serve nearby households with a clear line of sight to the antennas. There are a number of significant impediments to Northpoint ever coming to market.

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[95] *Eighth Video Competition Report*, ¶73.

[96] *Eighth Video Competition Report*, Table C-1.

[97] For example, RCN Corporation, one of the largest broadband overbuilders in the country, noted in its most recent cable competition comments that it has subscribers only in "7 of the 10 largest markets in the U.S. *See* RCN Corporation Comments, p. 1, submitted August 3, 2001, in response to *2001 Video Competition NOI*. Similarly, Carolina Broadband, Inc. noted that its offering of broadband services will be available only in "major metropolitan areas. *See* Carolina Broadband Comments, p. 1, submitted August 3, 2001, in response to *2001 Video Competition NOI*.

[98] *See In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, RM-9147, RM-9245; FCC 00-418, 66 FR 7607-7613 (January 24, 2001).

64. One major impediment is that Northpoint's technology interferes with DIRECTV's and EchoStar's DBS signal. An independent study commissioned by the FCC at the direction of Congress was performed on Northpoint's technology by MITRE Corporation, which confirmed that Northpoint's technology caused interference to DBS reception.[99] It further found that the interference could be reduced if certain mitigation measures were undertaken, some of which were quite costly. It is unclear whether Northpoint has sufficient financing to undertake these proposed remedial measures.

65. Another significant impediment is that Northpoint's FCC application seeks a license for free, instead of under the FCC's usual method of auctioning valuable spectrum. Northpoint has intimated that it cannot afford to roll out its service if it has to pay for the spectrum like other applicants. It is unlikely that the FCC will, or should, give away valuable spectrum to Northpoint or any other applicant.

66. At this stage, Northpoint is a mere business plan, not a funded and deployed technology. Even if Northpoint obtained a license for free and made it to market, which is speculative at best, it would not be a significant competitor in rural America because of the economics of providing that service. Northpoint's technology, like MMDS, will be impractical in rural America, because of the high costs of building a fixed wireless infrastructure that would serve relatively few rural households.

6. NRTC Will Not Compete Effectively Against New EchoStar.

67. In addition to claiming that C-band providers, MMDS, SMATV, cable overbuilders and Northpoint compete effectively against DBS, the Applicants also attempt to justify the

[99] MITRE Technical Report, *Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band*, MITRE Corporation (April, 2001).

Merger by predicting fierce competition from NRTC, its members and affiliates (including Pegasus).[100] That, too, is false.

68. Through its contract with DIRECTV, NRTC has the exclusive right -- among other things -- to distribute in certain defined rural areas DIRECTV programming transmitted from 27 of the 32 frequencies located at one of DIRECTV's three full-CONUS orbital slots (101° W.L.).[101] EchoStar has stated that NRTC's distribution rights are limited to these 27 frequencies and do not extend to any other frequency or orbital slot. EchoStar also has stated that after the Merger, it intends to transmit its core cable programming from the 110° W.L. orbital slot, with the 101° W.L. slot used largely for local to local and "niche" programming. With NRTC's distribution rights limited to the 101° W.L. slot, as EchoStar claims, NRTC would have no access to New EchoStar's core programming and would be unable to offer a competitive package. Under EchoStar's interpretation of NRTC's contract with DIRECTV, New EchoStar would serve as NRTC's sole program provider at the wholesale level, and NRTC would never be in a position to compete effectively against the new merged entity.

69. Furthermore, EchoStar's interpretation of NRTC's contract with DIRECTV is quite likely incorrect. NRTC questions New EchoStar's legal right to transmit *any* programming to *any* subscribers residing in territories for which NRTC purchased exclusive distribution rights from DIRECTV. If, as NRTC believes, New EchoStar is prohibited from serving any of these subscribers without violating NRTC's exclusivity rights under its contract with DIRECTV, then there would never be any competitive overlap between NRTC and New EchoStar. NRTC would provide service to subscribers in NRTC's territories, and New EchoStar would provide service to

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[100] SEC Form 425, Filed by EchoStar Communications Corporation, p. 7 (November 30, 2001). *See also* EchoStar Congressional Testimony.

[101] NRTC's contract with DIRECTV currently is the subject of litigation. *NRTC v. DIRECTV, Inc.*, Master File No. 99-0566 LGB (Central Dist. Calif.).

subscribers outside of NRTC's territories. Consequently, NRTC would never provide "competition" to New EchoStar.

70. Last, although NRTC provides DIRECTV DBS programming to much of rural America, there are still large rural areas that are *not* served by NRTC. In these areas, of course, NRTC will not compete in any way against New EchoStar.

7. If The Proposed Merger Is Approved, Rural Americans Will Be Subject To Monopoly Pricing And Loss Of Choice.

71. Despite New EchoStar's claims to the contrary, the combination of EchoStar and Hughes would result in monopoly prices to rural Americans. Applying economic analysis and using empirical data, Dr. MacAvoy demonstrates how monthly prices for DBS service would increase by at least 32% in every one of the 14 identified white area "clusters;" in one cluster, the increase would be more than 70%.[102] On average, the increase would be 50% greater than current prices, which greatly exceeds the 5% threshold in the *Merger Guidelines*.[103] In monetary terms, Dr. MacAvoy estimates that rural consumers in these areas will lose *$120 million each year*.[104] And, if the preponderance of DBS subscribers are in rural areas -- as DirecTV has indicated[105] -- the total losses to rural customers would be as much as *$700 million each year*.[106] To quote Dr. MacAvoy:

> Would the merger of EchoStar and DirecTV unacceptably raise prices and reduce choice for the millions of consumers who reside in rural America? My empirical analysis supports the singular answer: that higher (monopoly) prices and/or lower quality of service has to result from the merger.[107]

[102] *MacAvoy Declaration*, pp. 47-48, Table 6.
[103] *Merger Guidelines*, § 1.11, General Standards.
[104] *MacAvoy Declaration*, p. 49.
[105] *See* ¶28, *supra*.
[106] *MacAvoy Declaration*, pp. 50-51.
[107] *Id.*, pp. 2-3.

72. Not only would New EchoStar price its service as a monopoly, it would behave like one, too. Following the Merger, New EchoStar would have no financial incentive to provide good customer service to rural America. If consumers became dissatisfied with the equipment, installation, service quality, program packages, pricing or billing practices of the merged entity, they will have no alternative provider from which to receive service. If they wish to continue receiving MVPD programming, they will be required to receive service from the merged entity.

73. In addition, innovations in technology spurred by competition, such as signal compression or the launching of additional satellites, would slow. No longer, as discussed below, would EchoStar and DIRECTV strive to expand local service to rural markets. Rather, New EchoStar would behave like a typical monopoly. The words of EchoStar's own economist are revealing:

> As both history and economic theory have taught us, deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it already has in place by limiting its use and raising its price. . . . As is well documented in the literature of economics, monopolists do not invest the full amounts required for economic efficiency when they are provided with monopoly returns on their investments. In particular, a monopolist will resist investing in new technology if its introduction will undercut the value of its existing assets.[108]

8. Promises Of National Pricing Will Not Benefit Rural Americans.

a. EchoStar And DIRECTV Compete With Each Other At The Local Level.

74. Recognizing the price increases inherent in the monopoly that would be created by the proposed Merger, the Applicants promise to set a uniform national price for their combined

[108] Letter from William J. Baumol, B. Douglas Bernheim, Robert E. Hall, William Lehr, John W. Mayo, Janusz A. Ordover, Frederick R. Warren-Bolton and Robert D. Willig to Hon. Donald L. Evans, Hon. Lawrence Lindsey, Hon. Paul H. O'Neill, Hon. R. Glenn Hubbard, Hon. Randall S. Kroszner and Hon. Mark B. McClellan, dated December 11, 2001, p. 3.

DBS service.[109] This pledge is disingenuous and ignores the fact that EchoStar and Hughes compete vigorously with one another in the marketplace today -- a benefit to rural consumers that will be promptly eliminated if the Merger is approved. Further, as the MacAvoy Declaration states, "[e]ven under a regulated uniform 'national price,' the merged company would be able to achieve monopoly prices in the rural areas where cable is not available."[110] The nail in the coffin of this national plan is that EchoStar's Chairman and CEO has a vastly different view of uniform pricing than most others. Incredibly, he believes that the national pricing plan should permit New EchoStar to change prices *at the local level*.

75. Although New EchoStar's economic consultant, Dr. Willig, unbelievably denies that DIRECTV and EchoStar even compete with each other, he is forced to admit that they vary the total price of their offerings at the local level through the pricing of installation and equipment. He states that "local variations for such costs are more practical, and both firms, in fact, have offered temporary local promotions on equipment and installation in the past."[111] But he dismisses these local pricing variations "as a reaction to cable firm activities (*e.g.*, a cable price increase) . . . and not in response to activity by the other DBS provider."[112]

76. If this were true, however, not a single promotion by DIRECTV or EchoStar has been motivated by a promotion of the other. Table 2 below specifically shows that this has *not* been the case:[113]

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[109] *See* SEC Form 425, Filed by EchoStar Communications Corporation, *EchoStar Chairman And CEO Charles Ergen On Nationwide Pricing And Consent Decrees* (December 19, 2001).

[110] *MacAvoy Declaration*, p. 55.

[111] *Willig Declaration*, n. 25.

[112] *Id.*

[113] Copies of corresponding press releases and supporting documentation are attached as **Exhibit L** hereto. *See also MacAvoy Declaration*, pp. 31-35.

Table 2
<u>EchoStar vs. DIRECTV Competition</u>

PROMOTION	ACTION		REACTION
The Cash-Back Promotion	**July 31, 1996** **EchoStar** lowers price of its equipment to $199.	26 days later	**August 26, 1996** **DIRECTV** offers $200 cash back to new customers who committed to a one-year subscription, effectively lowering its cost of equipment to $200.
$100 Off Installation	**July 25, 1997** **EchoStar** offers new customers a choice between $100 off the installation charge or a free self-installation kit.	91 days later	**October 23, 1997** **DIRECTV** offers the *identical* promotion.
Christmas in November	**November 3, 1997** **EchoStar** gives new customers a $50 gift certificate that could be used toward professional installation.	31 days later	**December 4, 1997** **DIRECTV** offers new customers a $50 gift certificate that could be used toward any programming purchases.
Cable Customers Beware	**February 23, 1998** **DIRECTV** launches an advertising campaign urging cable customers to switch to DIRECTV.	17 days later	**March 11, 1998** **EchoStar** offers free programming to cable customers who turn in their cable bills.
The Battle for Sears	**1999** **DIRECTV** pressures Sears stores for product exclusivity, which Sears declines to offer. **DIRECTV** withdraws from retail sales at Sears.		**1999** **EchoStar** acquires de facto exclusivity in nationwide Sears stores.
The Battle for Primestar Subscribers	**January 1999** **DIRECTV** acquires Primestar.		**February 1999** **EchoStar** aggressively pursues former Primestar customers.
Local Channels Available for Comparable Price	**November 19, 1999** **DIRECTV** offers local network stations plus national PBS feed for only $5.99 per month	5 days later	**November 24, 1999** **EchoStar** offers the same package for $4.99 per month.
HDTV is in High Demand	**January 5, 2000** **DIRECTV** announces HDTV-compatible set top receiver.	the *next day*	**January 6, 2000** **EchoStar** offers new HDTV satellite TV receiver
Discovering Latinos	**January 13, 2000** **DIRECTV** introduces its bilingual programming service, DIRECTV PARA TODOS, in seven additional markets.	the *next day*	**January 14, 2000** **EchoStar** launches its nationwide campaign to "Join the DISH Latino Revolution." The 20 channel Spanish-language programming package was made available to consumers across the United States.
Free Installation	**February 23, 2000** **EchoStar** offers new customers who purchase the *DISHPLAYER* 500 set-top box a $199 rebate and free installation.	the *next day*	**February 24, 2000** **DIRECTV** offers free installation for new customers at a value of $200.
Latin Programming	**March 8, 2000** **DIRECTV** introduces its DIRECTV PARA TODOS bilingual programming service in six additional markets.	19 days later	**March 27, 2000** **EchoStar** adds Television Espanola to its DISH Latino programming service.

PROMOTION	ACTION		REACTION
Programming Costs Increase	**March 27, 2000** **DIRECTV** announces $2 increase in price to new subscribers for "Select Choice" and "Total Choice" programming packages.	6 days later	**April 3, 2000** **EchoStar** announces increase in price of "America's Top 100" by $1 per month.
New Customers Get Free Installation	**September 14, 2000** **EchoStar** offers free standard installation and 3 months of free programming.	29 days later	**October 12, 2000** **DIRECTV** offers free installation for new customers ($100 value).
Free Programming for Subscribers	**July 30, 2001** **DIRECTV** offers free programming to new subscribers = NFL Sunday Ticket and more = savings up to $300.	the *next day*	**July 31, 2001** **EchoStar** offers "I Like 9 promotion;" new subscribers receive DISH 100 programming for $9/month, plus free standard installation, representing a savings of $462.
Take Me Out to the Ball Game	**August 3, 2001** **EchoStar** commits to carrying a Chicago Cubs and Colorado Rockies baseball telecast live, in high definition format "at no additional charge."	4 days later	**August 7, 2001** **DIRECTV** commits to carrying the same game, in high definition format "at no additional charge."
More Local Markets	**December 27, 2001** **DIRECTV** announces plans to Offer additional local TV channels.	the *same day*	**December 27, 2001** **EchoStar** announces plans to Offer additional local TV channels.

77. The above examples show that over the past five years EchoStar and DIRECTV have repeatedly responded within days to each other's price changes and promotions. This head-to-head competition also is evident in the provisioning of local channels. In a large number of demonstrated cases, when one DBS company introduced local channels, the other was quick to follow. In most cases, the two companies provide *the same local signals in the same local markets*.[114]

78. To remove any doubt as to the competition between EchoStar and DIRECTV, EchoStar itself has acknowledged in court proceedings that "EchoStar is DIRECTV's closest competitor; …Many, if not most, consumers who would switch away from EchoStar if it raised its prices relative to all other subscription programming services would turn to DIRECTV."[115] According to EchoStar, "[i]f not constrained by EchoStar, DIRECTV could raise its prices above

[114] *See* table attached as **Exhibit M** hereto.

[115] *EchoStar Memorandum*, p. 12.

the competitive level without experiencing a significant constraint by cable."[116] EchoStar went on to state that both DIRECTV and EchoStar "react primarily to each other when setting equipment and services prices."[117]

79. EchoStar simply noted in court what the rest of the world (except apparently Dr. Willig) already understands: that EchoStar and DIRECTV are fierce competitors. It is this type of competition that the Commission has been seeking to establish with its DBS spectrum policies: competition that the Applicants deny in the Application, yet fully acknowledge elsewhere.

80. If Dr. Willig's opinions are to have any credibility in this case, he must withdraw his assertion that EchoStar and DIRECTV do not compete. It is patently false. It simply defies logic that two companies offering similar products in the same markets do not compete against each other. This type of head-to-head competition has benefited rural Americans but would be eliminated by the Merger.

b. National Pricing Will Not Protect Against Monopoly Prices.

81. The MacAvoy Declaration discusses two inherent flaws in the Applicants' national pricing plan. First, Dr. MacAvoy points out that the uniform price would increase relative to a competitive market, explaining that:

> In contrast, if the merged firm were constrained to set a uniform price, then it would choose a price between these higher rural and lower urban prices. It is not difficult to see why that uniform price is greater than the urban price – that is, why [the] "best" post-merger uniform price for the merged firm in urban areas passed by cable plant would be higher than the "best" price in urban areas when the firm is free to discriminate. The merged firm's profits from [] such a price increase are reduced by a smaller amount than

[116] *Id.*
[117] *Id.*

> from a price decrease, since in part they are compensated by gains in the rural market. That is, the higher the uniform price, the higher the profit in the rural market from that price. (It must be the case that, in those areas not served by cable plant, price that is reduced by the smallest possible amount for achieving the uniform price is the least-profit-loss price.) Recognizing this, the merged firm will increase its uniform price over current pre-merger levels up to the point where the losses in areas served by cable (relative to the separate post-merger urban price) and the losses in areas not served by cable (relative to the rural separate post-merger price) are minimized. Thus a commitment to uniform national pricing would increase urban cable prices and likely reduce rural prices relative to post-merger discriminatory prices that could be charged. *But that commitment would raise both urban and rural prices above current levels.*[118]

82. As a second flaw, Dr. MacAvoy observes that national pricing could not be effectively implemented because it "would require the merged firm to price *every* component of its offering in an identical fashion to all retailers and then to all subscribers."[119] In other words, the national pricing plan would prevent New EchoStar from offering discounted equipment costs, reduced installation charges, short-term promotions and differently priced pay-per-view programming. This would be impossible to implement and enforce.

83. Even if national pricing were a desirable alternative to competition (which it is not), there are numerous ways that the merged company could use its monopoly power to charge rural America monopoly prices.[120] For example, it could undercharge (or give away) local programming, which apparently will be provided only in more urbanized areas. Urban households would be paying the same price for basic plus local service, while rural households effectively would be paying monopoly prices for basic service.

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[118] *MacAvoy Declaration*, pp. 52-53 (emphasis in original).
[119] *Id.*, p. 53 (emphasis in original).
[120] *Id.*, pp. 52-55.

84. Similarly, the merged company could determine, through its subscriber database, that rural subscribers are much more likely to purchase a particular programming package and then charge monopoly prices for that package. The merged entity also could subsidize the set-top box or subsidize installation only in urban America, either directly or indirectly (such as through promotions with companies whose stores are predominantly in urban and suburban America). The list is endless.

85. EchoStar's own statements demonstrate the illusory nature of its promise of uniform pricing. In a recent interview, Mr. Ergen explained that the promised uniform national pricing plan should be crafted so that it is flexible enough to respond to cable rebates and promotions at the local level:[121]

> **Q:** So you're saying you wouldn't offer a special deal in one part of the country and not offer it in another part of the country?
>
> **Ergen**: I guess if you're saying if the cable company came in and offered a rebate in one city, would you respond to that? I think you [New EchoStar] could make allowances for that.
>
> **Q:** And you would be looking for that kind of flexibility in a consent decree on national pricing?
>
> **Ergen:** Again, this is very premature. We certainly haven't had discussions with any regulators about how to do it. But we know that there are past examples of formulas and ways that can make this work.[122]

86. In other words, rather than using the effect of competition to govern DBS prices in areas not passed by cable, the "Ergen Plan" apparently would allow New EchoStar to respond to lower cable prices in the local, not national, market. While his interview concedes that

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[121] *Ergen Makes His Case*, Satellite Business News, December 21, 2001, at p.1.
[122] *Id.*, p.10.

competition occurs at the local level, this plan does nothing to benefit or protect consumers living in homes not passed by cable. It would be a classic example of the exception swallowing the rule.

87. Not only would national pricing fail to prevent the merged company from charging rural America monopoly prices, it would not eliminate any of the other problems inherent in a monopoly. In all homes not passed by cable, there would be no MVPD programming choice other than the programming that New EchoStar decides to make available. If New EchoStar determined that it no longer wished to carry ABC Family or ESPN Classic, or any other programming, that programming would become unavailable to all homes not passed by cable.

9. The Proposed Merger Would Be Inconsistent With Previous Decisions Promoting Facilities-Based Competition.

88. Long-standing Commission policies have fostered a telecommunications environment marked by competition, not regulation. Congress, through the Telecommunications Act of 1996, also envisioned the establishment of facilities-based competition as the most desirable mode of introducing competition. The Applicants seek to end facilities-based competition through a merger to monopoly where one entity would own all of the relevant facilities, thereby depriving millions of American consumers of a choice of providers.

89. The Commission often has expressed the view that facilities-based networks are to be favored over other telecommunications solutions, such as unbundling and resale.[123] For example, Chairman Powell called facilities-based competition "the ultimate objective,"[124] and

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[123] *See* "Connecting the Globe: A Regulator's Guide to Building a Global Information Community;" Press Statement of Chairman William E. Kennard on "Wireless Day."

[124] Press Conference of Chairman Michael K. Powell, "Digital Broadband Migration," October 23, 2001. Similarly, Commissioner Kevin Martin also spoke recently to the need for greater numbers of facilities-based providers, saying: "I believe the government – particularly the Commission – should place a higher priority on facilities-based deployment and competition. The goal of the Telecommunications Act was to establish a competitive and (continued . . .)

stated that it "is the mode of market entry most likely to foster simultaneously and sustainably the Act's mandates of competition, deregulation, and innovation."[125]

90. With the promotion of facilities-based competition in mind, the Commission has approved several high-profile mergers: the February 1999 merger of Tele-Communications, Inc. and AT&T;[126] the June 2000 merger of MediaOne Group, Inc. and AT&T;[127] and the January 2001 merger of America Online, Inc. and Time Warner, Inc.[128] In each of these decisions, the Commission was chiefly concerned with the potential public benefit achieved from *new facilities-based competition* that otherwise would not occur -- or would not occur with the same

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deregulated environment. But to get to true deregulation, we need facilities-based competition." Remarks of Commissioner Kevin J. Martin at the National Summit on Broadband Deployment, October 26, 2001.

[125] Notice of Proposed Rulemaking, *In the Matter of In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et. al.*., CC Docket Nos. 01-318, et al., Separate Statement of Chairman Michael K. Powell (released November 19, 2001).

[126] The FCC approved the TCI and AT&T merger based primarily on the new company's ability to employ facilities-based local telephony alternatives to Local Exchange Carriers. Despite concerns of excessive market power regarding cable-related media, the Commission instead focused on the new – and faster implementation of – facilities-based competition that would likely occur as a result of the merger. *AT&T TCI Order*, ¶48. The Commission stated that even if AT&T -- which at the time of the merger was not a retail provider of MVPD programming -- was considering entering the field on its own, it would not become a significant competitor absent its planned merger with TCI. *AT&T TCI Order*, ¶¶21-22. Thus, the Commission found that the merger – while creating new facilities-based competition within the ILEC market – would not create a dominant provider within the MVPD market. The exact opposite is true with this proposed Merger.

[127] The FCC approved the MediaOne and AT&T Merger based on substantially the same reasoning as the TCI and AT&T Merger. The Commission ignored concerns that the potential increase in facilities-based LEC competition was speculative. Instead, the Commission believed that MediaOne and AT&T had to combine in order to effectively compete with the incumbent LECs. *AT&T Media One Order*, ¶178 (stating that "the merger will create an entity that has the ability and incentives to expand its operations and provide facilities-based competition against the incumbent LECs more effectively than either party alone could"). This is not the case with DIRECTV and EchoStar. As mentioned earlier, both DBS providers are faring quite well in competing with each other and the incumbent cable providers.

[128] In a general sense, the *AOL/Time Warner Order* emphasized many of the broad principles which the Commission utilizes when analyzing a merger. As in the AT&T/TCI Merger and the AT&T/Media One Merger, the Commission once again reiterated its long-standing policy of expressing preference "for competitive telecommunications markets, [and] the existence of diverse platforms and providers." *AOL/Time Warner Order*, ¶12. The Commission emphasized the "basic tenet" of national communications policy that "the widest possible dissemination of information *from diverse and antagonistic sources is essential* to the welfare of the public." *Id.*, ¶23, citing to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n. 27 (1972)) (emphasis added). Ultimately, the *AOL /Time Warner Order* is significant for its reaffirmation of standard Commission principles, including the Commission's preference for facilities-based competition and its insistence on MVPD competition at the local level. Neither of these principles would be advanced -- and both would be set back -- by the proposed merger of EchoStar and DIRECTV.

economy of scale -- in the near future. This promise of new facilities-based competition is entirely absent from the proposed Merger. Indeed, the Merger would eliminate facilities-based competition in the high-powered DBS market.

91. The Applicants attempt to justify the Merger by claiming that only the merged entity could effectively compete with cable.[129] To support their claim, they state that the DOJ and the Commission have previously recognized that "increasing the effectiveness of DBS competition (and thus ensuring adequate MVPD competition) may only be achievable by foregoing additional DBS competitors."[130]

92. The Applicants grossly distort the views of both the Commission and the DOJ. Neither the Commission nor the DOJ has ever contemplated creating one monopoly MVPD provider. Even when the DOJ and the Commission allowed consolidation within the smaller DBS market, they did so to increase competition within the broader MVPD market, with the ultimate end-game of creating two or more effective DBS competitors.

93. As early as 1995, the Commission limited aggregation of DBS spectrum with the stated goal of fostering "rivalry among MVPDs by *promoting rivalry within the DBS service*." This rivalry would permit the development "*of fully competitive DBS services*" [131] Consolidation within the DBS industry was never contemplated, as the Applicants suggest, with the intention of creating a single DBS monopoly. Instead, the Commission believed that:

> competition *among DBS operators* is likely to be enhanced by the entry of *additional DBS operators* that are not connected with current providers, and this price competition will translate into price competition with cable operators. Therefore, the apportionment of full-CONUS

[129] Application, p. 40 (stating that the effect on competition is not adequately measured by the number of competitors, but rather by their effectiveness).
[130] *Id*.
[131] *DBS Order*, ¶29 (emphasis added).

> locations is critical in our efforts to foster a deconcentrated market structure at this time . . . As additional full-CONUS DBS entry occurs, DBS operators' incentive to compete *with each other* and other MVPDs will be reinforced by the cost structure of satellite technology . . . Where the cost of adding additional subscribers is low and the fixed costs necessary to enter the market are incurred up front, a firm has an incentive to lower price in response to competition, expanding output in order to lower unit costs.[132]

94. The Applicants make much of the DOJ's statement in the *MCI Order* that "MVPD competition is best served by the emergence of a strong high-power DBS competitor with enough capacity to compete effectively with cable."[133] However, the Applicants fail to cite the DOJ's very next sentence, that the cable owners (of Primestar) "are the most threatened by the *creation of a second formidable DBS service*."[134]

95. Rather than pushing for the creation of a single DBS provider, both the DOJ and the Commission were seeking to create a second, formidable DBS provider to enhance competition within the broader MVPD market.[135] As a result of the Commission's policies, a fully competitive DBS service has evolved to the benefit of the broader MVPD market. Following the Merger, however, facilities-based DBS competition would become a thing of the past.[136]

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[132] *Id.*, ¶¶49-50 (emphasis added).

[133] Application, n. 84 (referencing the *DOJ MCI Comments*).

[134] *DOJ MCI Comments*, p. 8 (emphasis added).

[135] *MCI Order*, ¶19 (both the Commission and the DOJ concluded that "DBS operators and cable operators have engaged in increasingly rivalrous behavior, and . . . grant of these applications will likely increase the degree of that competition"). In the assignment of DBS licenses from Tempo to DIRECTV, occurring *after* the MCI/EchoStar Assignment, the Commission specifically noted DIRECTV's own claim that one of the "important benefits to consumers" is that the assignment would allow DIRECTV "to compete more effectively with EchoStar and cable operators." *Tempo Order*, ¶6.

[136] Indeed, approval of this Merger could open the door to mergers of other facilities-based competitors, such as Sirius and XM.

B. THE MERGER WOULD LESSEN, IF NOT ELIMINATE, COMPETITION IN THE BROADBAND MARKET.

96. In the Application, EchoStar and Hughes state that the proposed merger "will have a profoundly positive effect on the deployment of facilities-based, advanced, two-way, broadband services via satellite to all Americans, especially in rural areas."[137] They claim that "[b]y combining resources in a merged entity, EchoStar and Hughes will be better positioned to create a Ka-band system capable of serving the nation's broadband service requirements while effectively and competitively challenging cable modem and DSL services."[138]

97. These claims, however, are belied by a fundamental precept. The transaction would create a merger to monopoly in the broadband market in local areas throughout rural America, subjecting rural consumers to high prices and poor quality service and thwarting any reasonable prospect for competitive entry by other satellite and terrestrial-based broadband service providers.

98. EchoStar and Hughes should not be permitted to combine to form the one and only broadband and advanced services provider for those millions of consumers who are dependent on satellite technology. As the Chief of the FCC's Office of Plans and Policy recently stated, the FCC should never agree to veiled threats to "give me a monopoly and I'll give you broadband."[139]

1. Satellite Is Often The Only Means By Which Many Rural Americans Can Receive Broadband Service.

99. Section 706 of the Act requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." In its

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[137] Application, p. 43.

[138] *Id.*, ¶48.

[139] *Communications Daily*, January 24, 2002, p. 3.

Second Report,[140] the Commission found that "overall, deployment of advanced telecommunications capability is proceeding in a reasonable and timely fashion."[141] However, the Commission concluded "that many rural Americans . . . are particularly vulnerable to untimely access to advanced services if left to market forces alone. . . . Areas with low population density are much less likely to have subscribers to high-speed services than are urban or suburban areas."[142]

100. The impact of broadband services on the economic and social well-being of rural Americans cannot be overstated. Without access to broadband services, rural Americans will be unable to compete, work or educate their children at the same level as suburban and urban Americans. The government recognized the importance of broadband services to rural America in the NTIA/RUS Report, which stated that "the rate of deployment of broadband services will be key to the future economic growth of every region, *particularly in rural areas that can benefit from high-speed connections to urban and world markets*."[143] This goal of universal access to broadband services is one strongly championed by FCC Chairman Powell, who stated his belief that a "principal objective" for broadband policy should be the "commit[ment] to achieving universal availability of broadband."[144]

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[140] Deployment of Advanced Telecommunications Capability: Second Report, 15 FCC Rcd 20913 (2000) (*Second Report*). In the *Second Report*, the Commission defines "high-speed services" as services capable of transmitting data in excess of 200 kbps in at least one direction. The Commission defines "advanced services" and "advanced telecommunications capability" as infrastructure capable of transmitting data in excess of 200 kbps in each direction. In this Petition, the term "broadband" refers to all of the foregoing. By contrast, "narrowband" services, often referred to as "dial-up" services, generally allows customers to send and receive data at rates of only 56 kbps. *See, e.g., U.S. v. AT&T Corp.*, Case No. 1:00CV01176, Competitive Impact Statement (May 25, 2000) p. 6.

[141] *Id.*, ¶8.

[142] *Id.*, ¶220 (footnote omitted). *See also NTIA/RUS Report*, p. 17 ("[d]eployment in urban and rural areas is not proceeding at a comparable pace").

[143] *NTIA/RUS Report*, p. ii. (emphasis added).

[144] Press Conference of Chairman Michael K. Powell, Federal Communications Commission, Digital Broadband Migration Part II, October 23, 2001.

101. Notwithstanding this policy, data presented by the Commission, NTIA/RUS and other sources show that broadband services are not readily available to rural Americans. According to a recent FCC report,[145] 75% of U.S. zip codes have at least one high-speed line, but 49.5% of U.S. zip codes are served by one or no providers. The *Second Report* states that more than 90% of densely populated zip codes have high-speed subscribers, but less than 20% of sparsely populated zip codes have high-speed subscribers.[146] Likewise, the *High-Speed Report* indicates that "[h]igh population density has a positive correlation with reports that high-speed subscribers are present, and low population density has a negative correlation."[147] According to the *NTIA/RUS Report*, only 5% of towns with fewer than 10,000 residents have access to cable modem service, and only 1.4% of such towns have access to DSL service.[148] PCWorld notes "the estimated 37 percent of U.S. homes that are unlikely to ever get high-speed Internet access from their cable television provider or through a telephone company's digital subscriber line

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[145] High-Speed Services for Internet Access: Subscribership as of December 31, 2000 (released August 9, 2001) (*High-Speed Report*).

[146] *See Second Report*, ¶¶84, 88 (footnote omitted).

[147] *High-Speed Report*, p. 4.

[148] *NTIA/RUS Report* at pp. 18-21. Recent analysts' reports show increases in cable modem and DSL availability. For instance, The Yankee Group estimates that 66 percent of U.S. households had access to cable modem service at the end of 2001. *See* Cable Modem Providers Continue to Lead the High-Speed Internet Charge: The Yankee Group's Predictions on Consumer Broadband Service, August, 2001 (*Yankee Broadband Report*), p.4. J.P. Morgan estimates that 73 percent of households have access to cable modem service, and 45 percent of households have access to DSL, with a combined broadband availability of 85 percent. These figures do not, however, show broadband availability in the local market. In Comments recently filed with NTIA, the Minnesota Department of Administration noted that there are still areas in major metropolitan markets, such as Minneapolis-St. Paul, where neither cable modem nor DSL services are available. In rural areas, smaller independent telephone companies have deployed DSL service to approximately 70 percent of their exchange areas, but larger telephone companies have not invested in DSL in rural areas. The Department noted that Qwest, the largest ILEC in Minnesota, has deployed DSL service to only nine percent of its rural exchanges, mostly in larger towns. The Department also stated that cable modem service is rarely available beyond the city limits of rural towns. *See* Comments of Minnesota Department of Administration. These statistics are more illustrative of the state of broadband deployment in local rural markets.

service."[149] As recently as January 14, 2002, Hughes advised the Commission that one-third of all homes in America, 30-40 million, will never be covered by DSL or cable.[150]

102. As data presented in the *Second Report* show, "cable systems capable of providing cable modem service tend to be located in more densely populated areas" because of scale economies in sharing network deployment, and operating costs.[151] Cable modem service also is limited to a range of 16,000 feet from the node due to the increase in noise that results from multiple amplification of the signal.[152] A recent Congressional report stated that cable modem service is potentially available to an estimated 64 million households, leaving more than 40 million households without such access.[153] DSL service also is limited by its technical characteristics, reaching only to homes located within 18,000 feet of the carrier's central office. This factor "remains an impediment to DSL deployment in more sparsely populated and remote locations."[154]

103. Both EchoStar and Hughes currently offer satellite-delivered "high-speed services" over Ku-band frequencies.[155] EchoStar's StarBand service provides two-way, broadband service throughout the United States with advertised download speeds of up to 500

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[149] Tom Spring, "Hughes Sweetens Satellite Sound, Sights," PCWorld website at www.pcworld.com, visited January 16, 2002 (*PCWorld Article*).

[150] Letter to Magalie Roman Salas from John P. Janka, Notice of Ex Parte Presentation: SAT-MOD-20011221-00135, S2133, dated January 14, 2002 (*Hughes Ex Parte*). A copy of the map submitted to the Commission by Hughes, entitled "Mass Market Terrestrial Deployment" and depicting the limited areas served by cable, is attached hereto as **Exhibit N.**

[151] *Id.*, ¶97 and Figure 12.

[152] *See NTIA/RUS Report*, pp. 10-11.

[153] Lennard G. Kruger, Broadband Internet Access and the Digital Divide: Federal Assistance Programs, CRS Report for Congress (January 14, 2002) at p. CRS-2.

[154] *Second Report*, ¶38. *See also NTIA/RUS Report*, pp. 12-13. A Policy Analysis from an FCC economist states that "[s]ome rural areas will be too far from a telephone switching facility to receive DSL but easily accessible by satellite." Wayne A. Leighton, *Policy Analysis Broadband Deployment and the Digital Divide*, August 7, 2001, at 24.

[155] NRTC's affiliates distribute these services in their respective regions pursuant to agreements between NRTC and each of EchoStar and Hughes.

kbps, ten times the rate of dial-up services, and upload speeds of up to 150 kbps.[156] Hughes' DIRECWAY service offers one-way and two-way, high-speed broadband service, with download speeds of up to 400 kbps and upload speeds of up to 128 kbps.[157]

104. In addition, both EchoStar and Hughes plan to offer two-way broadband services -- "advanced telecommunications capability" -- over Ka-band frequencies to rural America and other parts of the country. The Ka-band is a promising new satellite service that "ha[s] the potential to provide a wide variety of broadband interactive, direct-to-home, and digital services to all areas of the United States, including under-served and rural areas, and around the world."[158] In recent years, the Commission has authorized numerous companies to provide Ka-band satellite services, and several entities have begun to construct satellites.[159]

105. EchoStar has been assigned 500 MHz of spectrum for Ka-band orbital slots located at 121° W.L. and 83° W.L.,[160] and holds a 20% interest in Celsat America, Inc., which is licensed for the other 500 MHz at those two slots. EchoStar also received FCC approval to acquire 90% of the stock of VisionStar, Inc., which has been licensed for 1000 MHz at 113° W.L.[161] Hughes has been licensed for 1000 MHz of spectrum for orbital slots located at 101° W.L. and 99° W.L.,[162] and PanAmSat has been licensed for 1000 MHz of spectrum at 103° W.L.[163] Collectively, New EchoStar would control six full-CONUS Ka-band slots.

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[156] *See* StarBand website at <www.starband.com>, visited January 6, 2002; *PCWorld Article*.

[157] *See Hughes Ex Parte*.

[158] *Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service Space Stations in the Ka-Band*, DA 01-1693, ¶1 (released August 3, 2001) (*Second Round Order*).

[159] *See Second Round Order* at Appendix.

[160] The licenses are held by EchoStar Satellite Corporation, a subsidiary of EchoStar Communications Corporation.

[161] The stock is held by EchoStar VisionStar Corporation, a subsidiary of EchoStar Communications Corporation.

[162] The authorizations are held by Hughes Communications Galaxy, Inc., a subsidiary of Hughes Electronics Corporation.

[163] *See Second Round Order* at Appendix. As noted in that Order, both Hughes and PanAmSat also have authorizations for additional slots outside the full-CONUS arc.

2. Approval Of The Merger Would Be Inconsistent With The Public Interest In Ensuring Competitive Access To Broadband Services.

106. As discussed above, the FCC evaluates satellite transactions by examining whether competition will lessen in the relevant product market as well as in the relevant geographic market.[164] Applying the standards and precedent established by the FCC and the courts to the proposed Merger, the relevant product market is broadband and the relevant geographic market is local. The effect of the proposed merger will be monopolistic market concentration in each of these markets, with harmful consequences to a huge number of rural Americans. The Merger would hinder the deployment of broadband to rural Americans and undermine present and future competition in the provision of broadband services.

a. Broadband Is A Discrete Product Market.

107. The product market for satellite services would consist of those services which are close substitutes (*i.e.*, "reasonably interchangeable") for one another.[165] The Commission has consistently recognized that broadband services are not "reasonably interchangeable" with narrowband services.[166] Most recently, the Commission recognized the existence of a distinct broadband market, stating that:

> We find particularly significant the fact that high-speed Internet access services include features unavailable over narrowband, such as access to high-bandwidth content that is impractical over dial-up connections. Analysts agree that over time the Internet will become a more absorbing experience, in which dynamic content supplements and supplants static pages of information. Even at present, the experience of "surfing" the Internet is more immediate and efficient over high-speed connections, at which users can move between texts as if they were flipping pages of a book. Increasingly the Internet is also becoming a

[164] *See* ¶¶ 4-6, *supra*.
[165] *See* Note 13, *supra*.
[166] *Id.*

> multimedia experience, complete with film and audio clips as well as other high-bandwidth applications. . . . The existence of high-speed transmission is necessary to spur development of such applications, and consumers with narrowband connectivity are unable to experience (or in some cases even access) such content in the manner intended, *i.e.*, rapidly and in real-time.[167]

The Commission further cited the "high consumer costs involved in switching to a high-speed platform" and the "always-on" nature of broadband services as evidence of a discrete broadband product market.[168]

108. For purposes of the proposed transaction, it is not necessary for the Commission to analyze whether the markets for "high-speed services" and "advanced telecommunications capability" are separate. It is enough to recognize that they are both "broadband."

b. New EchoStar Would Monopolize The Local Geographic Broadband Market.

109. As is the case with the video market, the relevant geographic market for broadband services is local. As the Commission has stated:

> A consumer's choices are limited to those companies that offer high-speed Internet access services in his or her area, and the only way to obtain different choices is to move. While high-speed ISPs other than cable operators may offer service over different local areas (*e.g.*, DSL or wireless), or may offer service over much wider areas, even nationally

[167] *AOL/Time WarnerOrder*, ¶69 (footnotes omitted). In reviewing the AOL/Time Warner merger, the Department of Justice also found that broadband services occupy a distinct market separate from narrowband services. Among other things, DOJ stated that narrowband services are not a substitute for broadband services since "[m]uch of this broadband content will not be readily accessible or attractive to narrowband users, because of the much longer times that are needed to transmit the data through narrowband facilities." *DOJ Consent Decree* at ¶22 (Competitive Impact Statement).

[168] *Id.*, ¶¶70-72. In the *AT&T/Media One* merger, Professors Janusz A. Ordover and Robert D. Willig argued that broadband and narrowband services occupied the same market, although they noted the advantages of broadband. *See* Reply Comments of AT&T Corp. and MediaOne Group, Inc., Declaration of Janusz A. Ordover and Robert D. Willig. The Commission did not address this issue in its order approving the AT&T/MediaOne transaction, but implicitly contradicted this position in the AOL/Time Warner transaction. *See AOL/Time* Warne, ¶72, n.211. *See also* Jerry A. Hausman, J. Gregory Sidak and Hal J. Singer, *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, 18 Yale J. on Reg. 129 (2001).

> (*e.g.*, satellite), a consumer's choices are dictated by what is offered in his or her locality.[169]

110. In many local markets, competition between cable modem and DSL services has made broadband affordable.[170] This is not the case in rural America, where many residents may not have access to these services. As stated in the *Yankee Broadband Report*, "[b]y 2005, at least 15% of U.S. households will still be unable to procure cable modem or DSL service; thus, satellite-based solutions will carry greater appeal for these end users."[171] Regardless of which statistics are more accurate, it is indisputable that a very large number of rural Americans do not have access to cable modem or DSL services, leaving satellite as their only available choice.

111. MMDS, a fixed-wireless alternative for bringing broadband to urban and rural markets, has yet to emerge as a major competitor to cable modems and DSL. The fixed-wireless industry, including WorldCom, Sprint, Nucentrix Broadband Networks (Nucentrix) and others, has invested several billion dollars and several years in attempting to develop fixed wireless systems using MMDS frequencies to serve urban and rural subscribers.[172] However, Sprint and Nucentrix recently announced their intention to freeze or scale back deployment of broadband services pending advancements in second-generation equipment with improved line-of-sight capabilities.[173] For rural Americans in markets that are not served by MMDS operators, fixed-wireless broadband cannot emerge as a viable broadband option in the near term, and satellite Ku-band systems remain the only broadband alternative for many of those potential subscribers.

[169] *AOL/Time Warner Order* at ¶75.

[170] *See*, *e.g.*, Comments of Minnesota Department of Administration.

[171] *Yankee Broadband Report,* p. 4.

[172] *See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, 2001 FCC LEXIS 5046 ¶10 (September 24, 2001).

[173] *See, e.g.*, Note 90, *supra.*

3. The Proposed Merger Would Eliminate Ku-Band Broadband Competition In Rural America.

112. In light of the numerous local markets in rural America that have no access to cable modem or DSL, rural Americans in these areas will have access only to the StarBand and DIRECWAY services offered by EchoStar and Hughes. For these existing Ku-band services, the combination of EchoStar and Hughes would constitute a merger to monopoly. Furthermore, in those rural areas that are served by another provider, three competitors will often be reduced to two, substantially decreasing competition.

113. The effect on competition is predictable: higher prices. Of those Americans able to receive broadband services, only about 10% have chosen to subscribe. Focal Communications Corporation and Pac-West Telecomm, Inc. (Focal/Pac-West) jointly demonstrated to NTIA that the price of high-speed services is an impediment to 36% of those interested in subscribing.[174] They conclude that "price appears to be a key obstacle to broadband penetration."[175] The Minnesota Department of Administration similarly stated that "[s]everal cable companies have deployed cable modem service in rural towns and provide competitive broadband service to DSL, positively influencing affordability."[176] The Comments filed by the Competitive Telecommunications Association are even more specific:

> the lack of advanced services competition has resulted in monopoly pricing by ILECs. Once the ILECs succeeded in eliminating their xDSL competitors through shoddy provisioning and other misconduct, the ILECs immediately raised rates by $10/month. . . . The primary flaws in today's market – monopoly prices and a lack of innovation – are the price that this country must pay for permitting the ILECs to monopolize the wireline portion of the broadband market. A competitive market environment is the only practical and

[174] *See* Comments of Focal/Pac-West.

[175] *Id.*

[176] Comments of Minnesota Department of Administration.

> effective solution to the demand-side problems that plague the broadband industry today.[177]

Based on these experiences, the absence of competition in the broadband market has and will lead to higher prices. Many markets in rural America have no cable modem or DSL service now and will not in the foreseeable future. StarBand and DIRECWAY are the only choices. Combining these two services will eliminate competition entirely in these markets, leading to monopoly pricing from the only technology capable of meeting demand for rural broadband services.

114. The Applicants ignore this reality, arguing that "satellite systems offer instantaneous deployment to low-population density and low-income areas that may not have enough demand to justify a terrestrial build-out."[178] This lack of demand, however, is directly linked to the price at which broadband services are offered, which in turn is a reflection on the current lack of competition.[179] The elimination of a competitor through the Merger will exacerbate -- not improve -- the price problem. It is the presence of competition that will lead to lower prices and drive an increase in broadband subscribership. In rural areas, this competition can only come from multiple satellite providers.

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[177] Comments of Competitive Telecommunications Association.

[178] Application, p. 44. The Applicants state that less than one percent of DBS customers subscribe to satellite-delivered broadband services. *Id*., p. 45.

[179] StarBand and DIRECWAY offer their services at approximately $70/month (*See* Joint Engineering Statement at 14 *See also* Spring, Tom, *Hughes Sweetens Satellite Sound, Sights*, PCWorld.com, http://www.pcworld.com/resource/printable/article/0,aid,53506,00.asp (visited January 25, 2002), while the average price of DSL service is $51.67/month and the average price *of* cable modem service is $44.22/month (*See Sam Ames,* Study: Broadband fees climbed in 2001, News.com website at <www.news.com> (visited January 17, 2002). Such pricing may explain why StarBand's "take rate" is low.

4. The Proposed Merger Would Stifle Ka-Band Competition.

a. EchoStar's Aggregation Of Six Full-CONUS Ka-Band Slots Would Violate FCC Rules.

115. Contrary to the assertions of EchoStar and Hughes,[180] the proposed Merger would violate Commission rules. As noted above, the combined entity would control six full-CONUS Ka-band slots -- 83° W.L., 99° W.L., 101° W.L., 103° W.L., 113° W.L. and 121° W.L. -- along with 22 non-CONUS slots. Commission rules prohibit the assignment of additional Ka-band satellites to licensees that are not using their initially-assigned satellites. Specifically, Section 25.140(f) states that:

> Each applicant found to be qualified pursuant to this section may be assigned no more than one additional orbital location beyond its current authorizations in each frequency band in which it is authorized to operate, provided that its in-orbit satellites are essentially filled and that it has no more than two unused orbital locations for previously authorized but unlaunched satellites in that band.[181]

116. By their own admission,[182] neither EchoStar nor Hughes/PanAmSat have constructed any of its satellites, some of which were authorized more than four years ago.[183] EchoStar has initiated construction of one Ku/Ka-band hybrid satellite "with limited spot beam

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[180] See, *e.g.*, Application, p. 3.

[181] 47 C.F.R. §25.140(f).

[182] See Application, pp. 4, 46 (noting that EchoStar's first satellite with Ka-band capacity, EchoStar IX, is expected to be launched in 2002 and that Hughes' SPACEWAY system aircraft is expected to begin deployment in 2003).

[183] See *EchoStar Communications Corporation*, Form 10-Q at 28 (filed October 23, 2001) (noting that the company is funding the construction phase of EchoStar IX, a hybrid Ku/Ka-band satellite) and Hughes Network Systems Web Site at <http://www.hns.com/products/advanced_platforms/spaceway/overview.htm> (noting 2002-2003 as planned launch for SPACEWAY).

capabilities,"[184] but since the filing of the Application has said that it will delay by a year the projected launch of the Hughes SPACEWAY Ka-band project.[185]

117. The Commission adopted Section 25.140(f) for an obvious reason: to prevent warehousing of orbital assignments.[186] But there can be little doubt that warehousing will be the result of this transaction. EchoStar and Hughes/PanAmSat have made scant, if any, progress in launching a Ka-band business since 1997, and the added inventory of orbital assignments will only exacerbate the problem. Moreover, EchoStar and Hughes themselves have complained about the high capital costs required to build Ka-band satellites, raising substantial questions about whether all of those satellites will be constructed. Against this backdrop, EchoStar's announced delay in launching SPACEWAY is an ominous sign.

b. The Merger Would Prevent Ka-Band Competition From Emerging In Rural America.

118. Given their failure to make use of their current Ka-band licenses to date, it is hard to believe the Applicants' hyperbolic claim that "the merger will promote exponentially the efforts of both companies to implement truly next-generation broadband systems in a fashion that, absent the merger, would likely be significantly less beneficial to the public."[187] EchoStar and Hughes also contend that their combination will allow them to develop a "critical mass" of subscribers to share the "tremendous fixed costs" that have deterred other Ka-band licensees

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[184] Joint Engineering Statement, p. 15.

[185] See *Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market, Oversight Hearing Before the House Committee on the Judiciary*, 107th Congress at 12-13 (December 4, 2001) (statement of Charles Ergen, President and CEO, EchoStar Communications Corporation) (noting that EchoStar has begun work on a Ka-band system that will be ready for launch in 2002 at the earliest); and Andy Pasztor, *EchoStar's Chairman Confounds Industry With Plans for Combination with Hughes, The Wall Street Journal* at A3 (December 26, 2001).

[186] *See Satellite Orbital Spacing*, 54 RR2d 577, 602 (1983).

[187] Application, p. 47.

from proceeding with satellite construction plans.[188] They further argue that they can improve "cross-technology competition" and thus enhance the competitive position of broadband satellite offered as part of a bundled video/Internet package.[189] To the contrary, the merger would stifle competition, squander scarce and valuable spectrum resources and deter any new competition in the foreseeable future.

119. By controlling six valuable orbital resources, the combined entity would add to the significant barriers to entry faced by other entities. EchoStar and Hughes actually make this point themselves in describing the tremendous capital investment required and the failed plans of Astrolink and others.[190] Moreover, the proposed Merger aggravates the problem by tying up all six of the slots, although a few -- or none -- may be used. The combined entity would end up controlling all of these slots, while its size and existing market concentration will suppress any potential for meaningful facilities-based competition.

120. EchoStar and Hughes also suggest that they need to combine their Ka-band slots in order to meet their subscriber objectives.[191] This conclusion is contravened by two sources. First, the Applicants themselves make the case that three CONUS Ka-band satellites suffice for each of them to achieve a "critical mass of subscribers," stating that:

> ECC and Hughes estimate that at least 5 million subscribers would be necessary in the next five years to recover the significant up front investment and subscriber acquisition costs associated with launching and marketing such two-way broadband satellite service. Since each Ka-band orbital slot can only serve at most 1.5 to 2.0 million subscribers with the use of spot beam satellites, access to a

[188] *Id.*

[189] *Id.*

[190] *Id.*, p. 46.

[191] *Id.*, p. 48.

> number of orbital locations is necessary to begin to meet even these minimum subscriber objectives.[192]

Simple multiplication shows that the necessary "number" of orbital slots is three apiece, the same number EchoStar and Hughes/PanAmSat already has. If each slot can serve 1.5 to two million subscribers, then EchoStar and Hughes/PanAmSat each can serve from 4.5 to six million subscribers standing alone.

121. Second, NRTC's technical consultant, Walter Morgan, has determined that this estimate is much lower than the number of subscribers that could actually be accommodated.[193] The *Morgan Declaration* reports that the three EchoStar Ka-band satellites and the PanAmSat satellite at 103° W.L. can serve as many as 12.7 million subscribers with broadband services. The Hughes SPACEWAY constellation can support up to 14.5 million broadband subscribers. EchoStar and Hughes simply do not need each other to achieve the critical mass of broadband customers they claim is needed to recover their costs. Contrary to their claims, the intended combination of Ka-band slots is nothing more than a blatant spectrum grab that will disadvantage potential competitors.[194]

122. Other Ka-band licensees, each with a maximum of two full-CONUS slots, will face significant new barriers to entry, in addition to those they already face in a high fixed cost, capital-intensive industry in uncertain economic times. Already, potential competitors have been frustrated in their ability to enter the market and will not be able to raise funding in the face of the EchoStar/Hughes/PanAmSat six-pack of satellites; as a result, they cannot be expected to negotiate reasonable satellite construction and launch terms.

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[192] *Id.* at Joint Engineering Statement, p. 15.

[193] *See* Declaration of Walter Morgan, attached hereto as **Exhibit O** (*Morgan Declaration*), pp. 2-3, 36-39.

[194] As an alternative to the Merger, EchoStar and Hughes can individually seek to acquire other Ka-band licenses. In light of the difficulties of other licensees cited by the Applicants, the market should be conducive to finding willing sellers on favorable terms, as was the case with EchoStar's purchase of VisionStar's stock.

123. If EchoStar and Hughes remain independent, these barriers to entry will have less of an impact, and competition in the Ka-band may yet evolve. So, while EchoStar and Hughes are both well positioned to offer broadband service in rural America, an EchoStar/Hughes combination should not be the only player able to operate in a marketplace, especially one that is still in the early stages. Competition must be given a chance.

C. THE HARMS CAUSED BY THE MERGER OUTWEIGH THE CLAIMED EFFICIENCIES AND BENEFITS.

1. In A Merger To Monopoly, Efficiencies Are Not Considered.

124. As former FTC Chairman Robert Pitofsky explained in testimony concerning this proposed Merger, "efficiencies would not be adequate to justify what is an otherwise illegal merger that leads to monopoly or near monopoly."[195] The revised *Merger Guidelines* state that "efficiencies almost never justify a merger to monopoly or near monopoly."[196] Rather, "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great."[197] Efficiencies are occasionally taken into account in permitting mergers because antitrust regulation should not prevent consumers from benefiting from efficiencies. If a merger creates a monopoly, however, consumers are extremely unlikely to benefit because there is no competition or regulation preventing a monopoly from converting efficiencies to profit.

2. The Merger Is Not Needed To Enhance Local To Local Service.

125. EchoStar should not be allowed to merge with Hughes in order to provide local to local service or to achieve other efficiencies absent a showing that these efficiencies can not be

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[195] Prepared Statement of Robert Pitofsky before the Committee on the Judiciary of the U.S. House of Representatives, December 4, 2001, p. 7.

[196] U.S. Department of Justice and Federal Trade Commission, *Revisions to Horizontal Merger Guidelines*, §4 (1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶13,104 (1997).

[197] *Id.*

achieved by other means. EchoStar and Hughes are each currently able to reach substantially more markets with local television service using existing capacity or additional capacity that could be deployed or made available through more efficient use. Even accepting *arguendo* the Applicants' claim that the proposed Merger would create efficiencies, the Applicants fail to demonstrate how such efficiencies are achievable through merger. In connection with a recent merger, the FCC observed:

> Claimed efficiencies, however, must be merger-specific, and, therefore, efficiencies that could be achieved through means less harmful to the public interest than the proposed merger cannot be considered true benefits of the merger. In addition, efficiencies resulting in reductions in marginal costs -- as opposed to fixed or overhead costs -- are more likely to offset competitive harms by counteracting the merged firm's incentive to elevate price.
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> * * *
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> Applicants have not demonstrated, or even stated, that these cost savings would be passed through to consumers in the form of lower prices or new or improved services.[198]

The net effect of this Merger would be a drastic reduction in competition in price, service, program choices, features and technical quality, all to achieve efficiencies obtainable without the merger.

a. Local To Local Service Can Be Extended To Markets With Existing Satellite Capacity.

126. Presently, EchoStar and Hughes provide local to local service to a total of 41, DMAs, 35 of which overlap.[199] EchoStar and Hughes claim that spectrum capacity constraints prevent them from increasing the number of DMAs they each can serve with local channels.[200]

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[198] *See GTE/BellAtlantic Merger Order*, 15 FCC Rcd 14032, ¶¶240, 242 (June 16, 2000).

[199] *See* Application, p. 28; *Willig Declaration*, p. 14, n.19; Joint Engineering Statement, p. 9 and Exhibit 2. *See also* Exhibit M.

[200] The Application is not the first time EchoStar and Hughes have advanced empty technical infeasibility arguments. In the proceeding implementing sports blackout requirements for satellite carriers, the FCC flatly (continued . . .)

By combining their spectrum and orbital resources, they say they can eliminate redundant transmission of local programming and thus free up capacity to provide local channels to 100 or more DMAs -- although they stop short of making any specific commitments to do so.[201]

127. A number of potential solutions to the challenge of providing nationwide local to local service would cost only a fraction of the cost of effecting the proposed merger while avoiding the costs imposed by a monopoly. Even with existing facilities utilizing Ku-band frequencies, NRTC's technical consultant has concluded that EchoStar and Hughes, standing alone, can provide local to local service in 80 DMAs and 110 DMAs, respectively, *using only satellites already in orbit or satellites currently on order*.[202] If Hughes launches just one additional satellite beyond those on order, with spot beam technology on only three additional frequencies, Hughes will be able to serve a total of 187 DMAs.[203] And, if EchoStar launches just one satellite beyond those on order, with spot beam technology on only three additional frequencies, EchoStar will be able to serve a total of 160 DMAs.[204]

128. Recent advances such as digital compression, statistical multiplexing, efficient modulation, error correction coding and noise reduction provide additional means of increasing the number of video signals that may be transmitted on a single frequency. As a result, both

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rejected EchoStar's and Hughes' claims that complying with the proposed rules would be technically and financially impossible. *See* Report and Order*, Implementation of the Satellite Home Viewer Act of 1999 (Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules)*, 22 CR 158, ¶¶63-67 (November 2, 2000). The Commission stated that the record "provid[ed] unrefuted information that the technology to implement the network station sports blackout exists." *Id.,* ¶67.

[201] Application, p. 29 (emphasis added).

[202] *Morgan Declaration*, pp. 2, 22.

[203] *Id.*, p. 2.

[204] *Id.*, p. 3.

EchoStar and Hughes could serve all 210 DMAs with their existing Ku-band capacity without the need for a merger.[205]

129. Further, the feasibility of using Ka-band technologies to provide local to local service is demonstrated in plans developed by Local Television on Satellite, Inc. (LTVS). Though shut down indefinitely following the announcement of EchoStar's and Hughes' proposed merger to monopoly, an ominous sign for other potential providers in the Ka-band, LTVS planned to use two Ka-band satellites to deliver full digital signals in 65 markets.[206] Notably, EchoStar's and Hughes' claim that they can provide local service to the top 100 markets only through a merger to monopoly also contrasts sharply with the announcement of Pegasus that its two authorizations for CONUS Ka-band orbitals will enable it to retransmit local broadcast signals to "all TV markets."[207]

130. Given its unconstructed authorizations for three Ka-band orbitals, EchoStar's claim that a merger to monopoly is necessary because it has insufficient bandwidth is questionable. EchoStar is authorized to construct and launch satellites for two full-CONUS Ka-band orbitals, and recently received authorization to acquire control of an additional

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[205] *Id.*, p. 23.

[206] SkyReport, December 21,2001, viewed at <www.skyreport.com/dec_2001/122101.htm#two> (visited January 15, 2002). The LTVS Web Site, viewable at <www.localtv-satellite.com> before the company shut down, indicated that service in 65 markets was planned. Reply Comments of NAB/MSTV/ATV, August 16, 2001, in CS Docket 00-96, at 6. *See also* Press Release, "Local TV on Satellite Hires Veteran Broadcaster as Chief Operating Officer: Satellites Will Transmit All Local Stations in All Markets, Creating Competition With Cable," Capitol Broadcasting Company, May 11, 1998.

[207] *See* Armand Musey, Salomon Smith Barney Global Entertainment, Media & Telecommunications Conference, Presentation by Pegasus CEO Marshall Pagon, January 10, 2002, at Slide 26, viewable at <http://www.pgtv.com/>. Mr. Pagon recently stated to a House of Representatives subcommittee that EchoStar's spectrum-scarcity argument is "factually wrong." Testimony of Marshall Pagon before the Subcommittee on Telecommunications and the Internet of the U.S. House of Representatives Commerce Committee, December 4, 2001. Bob Phillips, CEO of NRTC, also testified before the Telecommunications Subcommittee on December 4, 2001, noting that local to local service has been shown to be feasible in all 210 DMAs.

unconstructed CONUS orbital Ka-band authorization.[208] Once launched, to the extent the capacity is not used for broadband services, these Ka-band satellites will be able to provide local to local service.

b. The Applicants' Plan Will Not Provide Local To Local Service To Rural Subscribers.

131. EchoStar's and Hughes' own statements illustrate that the Merger does not contemplate expanding local television service to rural America in DMAs beyond the top 100. This is no consolation to the millions of rural Americans who most need local service.

132. Any plan to expand local service to only 100 markets has no effect on the ability of the approximately 15 million Television Households in the remaining 110 DMAs, representing 14% of total Television Households, to receive local channels via DBS.[209] That the vast majority of these DMAs contain large rural areas is not surprising, and shows that many rural Americans would continue to have no access to local channels after the merger. Those who are able to receive local channels are unlikely to have a choice of providers.

133. New EchoStar's promised increase in local service ignores many of the rural consumers served by NRTC members and affiliates and those in other rural territories not served by NRTC. As demonstrated in the map attached at Exhibit A, many NRTC territories are in DMAs that will never have access to local to local service under the Applicants' current plan to serve the top 100 DMAs. It is these DBS subscribers, located in small and rural communities where cable is not available, that are most in need of satellite-delivered access to local television stations. The Applicants' plan to provide local channels to fewer than half the television markets

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[208] *See* Section II. B, *supra*.

[209] Number of household derived from *Nielsen Media Research Local Universe Estimates for the 2001-2002 Broadcast Season*, Copyright 2002, Nielsen Media Research, viewed 1/15/02 at http://www.nielsenmedia.com/DMAs.html. Note that DMAs are ranked on the basis of TV households, not "households" or "housing units" as used by other sources.

in the U.S. is not, of itself, a sufficient public interest reason for regulators to authorize a monopoly.

134. Competition between the DBS providers has spurred local to local service and will continue to do so without the merger. EchoStar's and DIRECTV's efforts to match the other's local retransmissions wherever they were introduced, is at the core of what service does exist.[210] After the proposed merger, New EchoStar will have *no* competition pushing it to extend local service to new rural areas. This circumstance is likely to worsen with the continuing decline of locally owned cable systems in rural areas, which lack the financial resources to transition to digital.[211]

135. EchoStar's discussion of the purported benefits of the Merger to rural subscribers ignores local to local service in the rural areas for which New EchoStar would become the monopoly multichannel video programming distributor.[212] DIRECTV itself states that 50% of its subscribers live in rural areas and 29% of its subscribers live in areas not able to receive cable service.[213] The inescapable conclusion is that, if the proposed merger were approved, a substantial portion of New EchoStar's subscribers would not receive local to local service from *any* provider, whether DBS or cable, because there will be no competitive necessity to expand local to local service beyond the top 100 markets.

[210] The substantial overlap in the DMAs to which both EchoStar and Hughes provide local service is evidence of the cross-elasticity of demand between EchoStar and Hughes. That is, when one initiates local service in a DMA, the other responds by also entering that market. *See* Exhibit M hereto. Along with the consistent pattern of pricing parallels discussed *supra,* this practice show that the two companies directly compete with one another in providing programming.

[211] *See* ¶¶46-47, *supra*.

[212] Application, pp. 33-34.

[213] Comments of DIRECTV, Inc., August 3, 2001, at 13, in response to *Notice of Inquiry, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 01-129.

c. New EchoStar's Promise To Extend Local Service Should Be Viewed Skeptically.

136. The Applicants' promise to extend service to the top 100 DMAs is especially suspect in light of the Applicants' record of grudging and resisting compliance with the local signal carriage requirements of the Satellite Home Viewer Improvement Act of 1999 (SHVIA).[214] Section 76.66(b) of the FCC's rules, which implements the SHVIA carriage obligation, requires satellite carriers to retransmit the signals of all qualified local television stations that elect must-carry status in markets where local signals are carried beginning on January 1, 2002.[215] EchoStar and Hughes have strenuously sought to avoid this requirement, refusing carriage to numerous local television stations without providing adequate reasons for doing so.

137. EchoStar's "form letter" responses to broadcasters containing a checklist of potential "reasons" for refusing carriage from which the writer could select, for example, clearly disregarded the FCC's rules.[216] EchoStar also sought to derail carriage of local stations by claiming in its denial letters that broadcasters should have provided proof of signal quality in their must carry election notices..[217] Even after the FCC clearly rejected this reasoning on reconsideration, EchoStar responded with resistance. In the Philadelphia area, for example, EchoStar issued an "Important Notice" requiring station engineers to appear at its local receive

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214 Pub. L. No. 106-113 113 Stat. 1501 (November 29, 1999).

215 47 C.F.R. § 76.66(c).

216 *See, e.g.*, *Christian Television of Palm Beach Co., Inc.*, "Complaint," CSR-5744-M. *See also* Order on Reconsideration, *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage*, 16 FCC Rcd 16544 (2001) (Signal *Carriage Reconsideration Order*), ¶59.

217 The Commission emphasized that it "did not require broadcast stations to provide information about signal quality nor require each station electing must carry to first prove to the satellite carrier that its signal is of good quality." *Signal Carriage Reconsideration Order* at ¶ 57.

facility to demonstrate proof of signal quality.[218] EchoStar and Hughes also refused carriage of a station that was in the process of improving its over-the-air signal.[219] Another complaint alleges that Hughes misled broadcasters as to whether local to local service was provided in their market.[220] EchoStar and Hughes also improperly attempted to deny carriage to a broadcaster that had offered to provide a good quality signal via fiber or microwave feed if necessary.[221]

138. This pattern of frustrating the Congressional mandate requiring carriage of all local television stations in markets where local service is provided reveals New EchoStar's true colors. Despite the Applicants' lip service to expand local to local service, New EchoStar's promises should be viewed skeptically by the FCC.[222]

d. There Are Alternatives for Obtaining The Efficiencies Claimed By The Merger.

139. EchoStar's and Hughes' promise to expand local to local service to the top 100 DMAs ignores other solutions for providing local channels to all 210 DMAs, without need for a merger to monopoly. These possibilities include joint ventures, contracts with third parties and capacity sharing.

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[218] *See Brunson Communications, Inc.*, "Must Carry Complaint," CSR-5751-M at Exhibit F.

[219] *Entravision Holdings, LLC v. EchoStar Communications Corporation*, Memorandum Opinion and Order (WVEN(TV), Daytona Beach, FL), DA 01-2886, released December 13, 2001; *Entravision Holdings, LLC v. DIRECTV,Inc.*, Memorandum Opinion and Order (WVEN(TV), Daytona Beach, FL), DA 01-2887 (released December 13, 2001).

[220] *See Aerco Broadcasting Corp.*, "Complaint for Carriage," CSR-5734-M (submitting evidence disproving Hughes' claim that it did not deliver local television signals in San Juan, PR).

[221] *See Entravision Holdings, LLC v. DIRECTV, Inc.,* Memorandum Order and Opinion (WJAL-TV, Hagerstown, MD), DA 01-2857 (released December 10, 2001).

[222] EchoStar also has been sanctioned by the FCC for an abuse of process in connection with responses it has made to requests for carriage by broadcasters. In *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, EchoStar claimed that Young refused to negotiate, acted to delay negotiations, engaged in take-it-or-leave-it bargaining and illegally tied carriage of a network affiliate with two independent stations. The Commission rejected EchoStar's legal argument. The Commission stated that "EchoStar's conduct in filing material with the Commission requesting confidentiality, while concurrently engaging in a public debate over the issues raised in this proceeding and publicly disclosing selected portions of the alleged confidential material, constitutes an abuse of the Commission's processes." 16 FCC Rcd 15070 (2001), ¶12.

140. In circumstances where a combination would be illegal but economies of scale are available, competitors may enter into arm's length joint ventures.[223] Such ventures are structurally separate to prevent anticompetitive or other illegal effects, but allow consumers and venture partners to benefit from products or services not otherwise available. EchoStar and Hughes could team up to provide local service in smaller markets by establishing a joint venture for this purpose. EchoStar and Hughes alternatively could contract for additional channel capacity while maintaining their competitive services. This practice already is common in the market for satellite services, including DBS, where all participants are constrained to some extent by facilities currently in orbit and time lags inherent in adjusting existing space facilities.

141. Pooling of capacity is another potential means by which EchoStar and Hughes could separately provide nationwide local to local service without resorting to monopoly. The Applicants complain that, without the Merger, EchoStar is forced to wastefully duplicate much of Hughes' local programming.[224] However, EchoStar and Hughes could avoid uplinking and downlinking identical signals by entering into a cooperative venture. A local to local cooperative venture could deliver local signals to both EchoStar and DIRECTV subscribers.[225] Such an arrangement would permit the two companies to take advantage of the local to local synergies they claim their merger will provide without subjecting consumers to a DBS monopoly.

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[223] *See, e.g., In the Matter of General Motors Corporation, et al., Consent Order, Etc. In Regard to Alleged Violation of Sec. 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act*, Docket C-3132 , Decision, April 11, 1984.

[224] Application, pp. 4, 27.

[225] EchoStar and Hughes could make use of receive dishes capable of receiving signals from two or three orbital locations to provide nationwide local to local access. Though subscriber dishes most often are "pointed" at one orbital location, both EchoStar and Hughes have offered dishes that are capable of receiving signals from two or even three orbital locations (101° W.L., 110° W.L., and 119° W.L.). For example, the DIRECTV Web Site states, "The DIRECTV Multi-Satellite System . . . features an 18 x 24-inch oval dish, which allows reception from all three DIRECTV orbital locations – 101, 110 and 119 degrees West Longitude." *See* DIRECTV Web Site, <www.direcTV.com:80/howtoget/howtogetpages/0,1076,90,00.html>.

142. These possible joint ventures, agreements with third parties and capacity sharing agreements illustrate that there are many alternative solutions for the delivery of local programming short of the creation of a DBS monopoly in rural America.

3. Other Efficiencies Claimed By The Applicants Will Not Be Realized.

143. None of the other alleged efficiencies of the Merger provides a sufficient basis for the Commission to conclude that a grant of the Application would be in the public interest.

a. The Merger Would Slow Deployment Of HDTV And ITV Services.

144. Permitting a merger to monopoly or a cable/DBS duopoly will hinder development of satellite-delivered high definition and interactive television services. As the Commission itself has emphasized, innovation is driven by competition.[226] The Applicants historically have matched each other in special pricing offers to consumers within particular local markets and closely followed each other in introducing local television service in urban markets.[227] Deployment of DBS-based advanced video services similarly will be driven by competition between EchoStar and Hughes. When a DBS carrier initiates a popular service, the other carrier will be forced to provide that service or risk losing customers to the other carrier. If the two DBS competitors are allowed to merge, the business incentive for the introduction of new services will be drastically reduced.

145. The Applicants claim that spectrum scarcity will prevent continued deployment of advanced video services.[228] However, as discussed above, ample Ku-band and Ka-band frequencies utilizing spot beams are available to permit EchoStar and Hughes to develop a full complement of local to local, competitive and innovative services. EchoStar's recent agreement

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[226] *AOL/Time WarnerOrder,* ¶¶ 205, 339, 345, Statement of Commissioner Michael K. Powell, Concurring in Part, Dissenting in Part.

[227] *See* Table 2 and Exhibit M, *supra*.

[228] Application, pp. 29-30

to carry programming and interactive television products developed by Vivendi demonstrates that EchoStar is prepared to introduce advanced video services without needing to merge.[229]

146. The Applicants' December 18, 2001 letter advising the Commission of the transaction states that EchoStar has agreed to carry five new Vivendi channels and approximately eight video channels for new interactive services. In addition, EchoStar will have access to Canal Plus "middleware" interactive technology and additional pay-per-view movies and music offerings.[230] Although the Applicants claim in their filing that the Vivendi transaction "foreshadows some of the consumer benefits that will be created by the merger, including new, interactive services," it defies reason that EchoStar and Vivendi would have entered into the agreement without full confidence that its benefits could be realized whether or not the proposed Merger is consummated.[231]

b. Innovation In Set-top Equipment Is Best Driven By Competition.

147. The Applicants also claim that the merger will facilitate efficiencies associated with common set-top equipment and a corresponding improvement in signal security.[232] In essence, the Applicants are asking the FCC to facilitate, through regulatory approval, that which they can achieve through private negotiation. Better yet, the marketplace can and should, over time, determine whether there should be a common standard, as was the case with VHS and Betamax systems. Moreover, standardization is really just a clever term for monopoly in the set-top market and its attendant reduction in product innovation. Every monopolist can extol the virtues of a single source of supply; Congress long ago decided that competition is better.

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[229] *See Hughes Ex Parte*, p. 2.
[230] *Id.*
[231] *Id.*
[232] *See* Application, pp. 35 – 36.

148. The Applicants claim that the set-top change-out will cost "a couple of billion dollars over a period of three or four years," at no cost to subscribers.[233] NRTC's internal estimate is that the cost will be more than $5 billion.[234] With the cost being twice the Applicants' projections, it defies credulity that subscribers will not pay one way or another.

c. The Merger Will Harm Retail DBS Distributors.

149. The combination of EchoStar and DirecTV threatens to harm retailers that distribute one (or both) of the DBS services. A recent report issued by Salomon Smith Barney forecasts a $50 decrease in retailer compensation, from current levels of $170 per gross subscriber to $120 per gross subscriber in 2006.[235] This drop will come from, among other things, lower commissions paid to retailers, who will have no alternative supplier. Retailers will not be able to bargain with EchoStar and DirecTV as competitors in the distribution of satellite equipment, but rather will be subject to a market dictated by New EchoStar as the monopoly supplier. This will force retailers either to abandon the DBS equipment sales business, which will make it more difficult for rural consumers to purchase and install DBS equipment, or to raise prices to cover their loss of profit margin, which will make DBS equipment more expensive. Either way, consumers lose.

d. Reduction In Customer Churn Is Not An Efficiency.

150. Customer choice also would end, as recognized by EchoStar and Hughes when they argue that an efficiency created by the Merger would be the reduction in customer

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233 Testimony of Charles W. Ergen before the Judiciary Committee of the U.S. House of Representatives, December 4, 2001, as reported by Federal News Service, cited in Marcia S. Smith, Satellite Television: The proposed merger of EchoStar and DirecTV, CRS Report for Congress (January 15, 2002), at p. CRS-10.

234 Testimony of Bob Phillips, CEO of NRTC, before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce of the U.S. House of Representatives, December 4, 2001.

235 Armand Musey, *Salomon Smith Barney DBS Industry Report*, January 17, 2002, p. 14. *See also MacAvoy Declaration*, p. 38.

"churn."[236] Reduction in churn, however, is just a euphemism for the elimination of competition. In competitive markets, customers will switch products or services when one supplier changes its price, changes its offering or changes the quality of service. By citing churn reduction as an "efficiency" of the transaction, the Applicants grossly mischaracterize the positive effects of the existing competitive marketplace.

D. THE APPLICATION CANNOT BE GRANTED AS FILED BECAUSE IT FAILS TO ADDRESS THE IMPACT OF THE ECHOSTAR/VIVENDI DEAL.

151. In their Application and supporting documents, the Applicants' loudly and repeatedly tout their lack of vertical integration with programmers as a major incentive for the Commission to approve the Merger. For instance, the Application states that:

- "(u)nlike most large cable operators, [EchoStar] has no ownership stake in any programming producer, and the Applicants do not intend to pursue a strategy of vertical integration with programmers post-Merger."[237]

- "(t)he merger will also contribute to the diversity of independent programming voices, as it will create a significant multi-channel distributor that has no strategy of vertical integration with programmers."[238]

- "…the proposed merger will not create the types of vertical relationships that raise concern in other transactions…In contrast, the Applicants do not intend to pursue a strategy of vertical integration with programmers post merger."[239]

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[236] Application, p. 36.
[237] *Id.*, p. 6.
[238] *Id.*, p.ii.
[239] *Id.*, pp. 42-43.

152. In his Declaration supporting the Merger, Dr. Willig agreed, stating that "New EchoStar would be *unaffiliated with any programming interests, and therefore would not face any disincentives to carry new programming that its subscribers would value*."[240]

153. Notwithstanding these representations to the Commission, less than two weeks after filing the Application, EchoStar and Vivendi entered into definitive agreements whereby Vivendi would make a $1.5 billion investment in EchoStar and receive an equity interest of less than 10% in EchoStar and less than 5% in New EchoStar once the Merger closed (the Vivendi Deal).[241] EchoStar/New EchoStar also received the option of acquiring a 10% ownership interest in -- and agreed to carry -- five new Vivendi channels.

154. On January 22, 2002, EchoStar announced that the Vivendi Deal had closed. Vivendi now holds an equity interest in EchoStar and will hold an equity interest in New EchoStar.

155. The Vivendi Deal creates an eight year strategic alliance in which Vivendi will develop and provide a variety of programming and interactive television services for EchoStar/New EchoStar. Vivendi holds itself out as a "world leader in media and communications" with the goal of becoming "the world's preferred creator and provider of entertainment, education and personalized services to consumers anywhere, at anytime, and across all distribution platforms and devices."[242] It is a global powerhouse in film and television production and distribution, pay television channels and services, digital television technology and Internet content. Through various agreements with Universal Studios, Inc., Universal

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[240] *Willig Declaration*, ¶43 (emphasis added).

[241] *See* Ex Parte Notice, Submitted by Counsel for General Motors Corporation and Hughes Electronics Corporation and Counsel for EchoStar Communications Corporation, Docket No. 01-348, p. 2 (December 18, 2001) (*Vivendi Letter*).

[242] *See* <http://www.vivendi.com/vu2/en/what_we_do/what_we_do.cfm> (visited January 23, 2002).

Pictures, Canal Plus and USA Networks, Inc., Vivendi holds or will hold extensive rights to television programs, feature films, cable programming and other content.[243]

156. The combined resources of Vivendi, DIRECTV and EchoStar will create the nation's first vertically integrated, full-CONUS MVPD provider with rights to 40,000 hours of television programs, 9,000 feature films,[244] 850,000 copyrights in its music publishing catalog[245] and significant cable programming interests in the form of USA Networks, Inc.[246] Canal Plus and Universal Studios own the world's second largest library of television and film titles.[247] Mr. Ergen acknowledged this huge programming potential when he promoted the new relationship with Vivendi as "very exciting news for our DISH Network customers as they will have access to more smash-hit box office movies, niche sporting events and the ability to order more movies or their favorite music at the touch of the remote."[248]

157. On December 18, 2001, the Applicants filed a brief letter with the Commission disclosing the existence of the Vivendi Deal but declining to amend their Application or to provide a copy of the definitive agreements until post-closing.[249] While acknowledging the equity investments, they characterized the Vivendi Deal as "an arrangement for the carriage of new and innovative programming," rather than "a strategy to acquire control of programming assets."[250]

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[243] *Id.*

[244] *See* <http://www.vivendi.com/vu2/en/what_we_do/factsheet_tvfilm.cfm> (visited January 23, 2002).

[245] *See* < http://www.vivendi.com/vu2/en/what_we_do/factsheet_music.cfm> (visited January 23, 2002).

[246] *See* <http://www.vivendi.com/vu2/en/what_we_do/factsheet_tvfilm.cfm> (visited January 23, 2002).

[247] *See* Vivendi Universal Annual Report Summary 2000, p. 21.

[248] Business Wire, *EchoStar, Vivendi Universal Form Strategic Alliance to Offer New Programming, Interactive Television Services for Consumers*, December 14, 2001.

[249] *Vivendi Letter* (although they provided no timeframe for the closing, they stated that they will amend their Application only after the Vivendi Deal takes effect). *Vivendi Letter*, p. 2.

[250] *Id.*, n. 2.

158. In their Opposition to Pegasus's petition seeking suspension of these proceedings until the Vivendi Deal is fully disclosed, the Applicants again declined to provide the Commission and interested parties with specific information concerning the transaction.[251] They denied any vertical integration from the Vivendi Deal, claiming that they had no strategy of acquiring interests in programmers "with the purpose of influencing management decisions for any programming service."[252]

159. The Commission, however, has made clear that vertical integration occurs when a "video programming distributor has an ownership interest in a video programming supplier or vice versa."[253] EchoStar and DIRECTV are video programming distributors. Vivendi is a video programming supplier. Pursuant to the Vivendi Deal, there is now an overlapping ownership interest between EchoStar/DIRECTV/New EchoStar and Vivendi.[254] This arrangement therefore, constitutes vertical integration under the Commission's rules.

160. There is no basis for the Applicants' claim that the Vivendi Deal does not raise vertical integration issues. The Commission's test for vertical integration is not subjective in nature nor based on the "purpose" or "strategy" of the parties, as the Applicants claim.

161. Until the Applicants amend their Application, provide copies of the relevant agreements and address in a substantive way the impact of the Vivendi Deal on the Merger, neither the Commission nor interested parties will have an opportunity to evaluate the implications of the new arrangement.

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[251] Opposition of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, CS Docket No. 01-348, January 17, 2002, amended January 18, 2002.

[252] *Id.*, p. 6.

[253] *Eighth Annual Competition Report*, ¶156. *See also* 47 C.F.R. § 76.1001.

[254] Vivendi's investment in EchoStar apparently would fall within the purview of the Commission's provisions designed to control the anti-competitive effects of vertical integration in the cable industry. These rules attribute all voting and nonvoting equity interests, including insulated limited partnership interests, of 5% or more. *See* 47 C.F.R. §§ 76.1000; 76.501, Notes 1-5.

162. The Applicants' disclosures to the Commission regarding the Vivendi Deal also raise serious character questions. The Vivendi Deal apparently was the subject of ongoing discussions and negotiations between and among the Applicants and Vivendi long before the Application was filed with the Commission.[255] The Applicants' representations to the contrary -- including specifically that they have "no ownership stake in any programming producer, and … *do not intend to pursue a strategy of vertical integration*" -- is not accurate now and appears not to have been accurate at the time it was made.[256]

163. In light of these apparently misleading statements in their Application, the Commission should assess the character qualifications of the Applicants prior to making a final decision on the merits of the Application. The need for a review of the Applicants' conduct is especially great given the Commission's well known definition of vertical integration and the apparently cognizable character of Vivendi's investment in EchoStar.

III. CONCLUSION.

There is no economic necessity for EchoStar and DIRECTV to merge in order to compete, because the market is functioning effectively now with two healthy, facilities-based competitors. The proposed Merger is clearly inconsistent with the public interest and the Commission's long established goals of promoting facilities-based competition and consumer choice in the delivery of both multichannel video programming and broadband services.

Notwithstanding the Applicants' disingenuous promise of uniform national pricing, the Merger would eliminate consumer choice and result in higher prices, less innovation and lower

[255] In December, 2001, the Wall Street Journal reported that Vivendi and EchoStar began talking more than one year ago. Mr. Ergen is quoted as saying that Vivendi had been his "No. 1 choice for a long time." Moreover, he apparently informed Hughes and General Motors, Corp. of the ongoing negotiations "months ago," and they concurred with EchoStar's intentions to join forces with Vivendi. *See* Andy Pastzor, *EchoStar Chief Looks to Vivendi to Spark Growth in His Satellite-Broadcast Business*, Wall Street Journal, December 17, 2001, A6.

[256] Application, p. 6 (emphasis added).

quality service. These consequences will be especially profound for rural America, where tens of millions of consumers will have no choice but to accept New EchoStar's programming, prices and services or to do without multichannel video programming and broadband altogether.

The Application should be denied.

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February 4, 2002

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In The Matter Of **Application Of** **EchoStar Communications Corporation, General Motors Corporation, And Hughes Electronics Corporation** **For Consent For A Proposed Transfer Of Control** **To: The Commission**	)	**CS Docket No. 01-348**

AFFIDAVIT OF STEVEN T. BERMAN

Steven T. Berman, having first been duly sworn, does hereby attest and affirm as follows:

1. I am the Senior Vice President, Business Affairs and General Counsel for the National Rural Telecommunications Cooperative (NRTC).

2. I am familiar with the application of EchoStar Communications Corporation, General Motors Corporation (GM) and Hughes Electronics Corporation, a subsidiary of GM, to transfer control of their satellite, earth station and other related authorizations to New EchoStar.

3. I further declare that NRTC is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity.

4. I have personal knowledge of the assertions of fact presented in the foregoing Petition to Deny of NRTC and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on 02/01/02.

FURTHER AFFIANT SAYETH NOT.

Steven T. Berman
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and General Counsel
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City of Herndon)
)
State of Virginia)

Subscribed and Sworn before me this the day of 1 February, 2002 by Rochelle Hawke

My Commission Expires: 8/31/03

Rochelle Hawke
Notary Public