

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In re Consolidated Application of	)	
	)	
<b>EchoStar Communications Corporation,</b>	)	
<b>General Motors Corporation,</b>	)	
<b>Hughes Electronics Corporation,</b>	)	
Transferors,	)	CS Docket No. 01-348
and	)	
<b>EchoStar Communications Corporation,</b>	)	
Transferee,	)	
For Authority to Transfer Control.	)	
	)	

**PETITION TO DENY**

Deborah A. Lathen  
Lathen Consulting  
1650 Tysons Boulevard, Suite 1150  
McLean, Virginia 22102  
(703) 287-2431 voice  
(703) 287-2404 fax

*On behalf of Northpoint Technology, Ltd.*

February 4, 2002

## TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY .....	ii
I. INTRODUCTION .....	1
II. OVERVIEW .....	2
III. ARGUMENT.....	4
A. The Proposed Merger Fails to Meet the Public Interest Standard By Frustrating and Impairing the Commission’s Implementation of the Objectives of the Act .....	4
1. The Commission must apply remedial conditions to the Merger in order to satisfy the public interest standard. The Commission should specifically impose the requirements of Section 629 on the merged entity .....	4
2. Any grant of merger approval must be conditioned on the set-top box being open for all providers, otherwise any claimed public benefit is outweighed by the resulting harm caused by the gatekeeper effect of allowing a proprietary box .....	7
B. The Commission must impose a specific merger condition that ensures the openness of the set-top box to allow for delivery of signals by third party satellite or terrestrial providers .....	11
C. The Merger must be denied because the past bad conduct of the Applicants evinces a willingness to violate Commission policy objectives, and frustrate the objectives of the Act .....	12
IV. CONCLUSION.....	14
EXHIBIT A	

---

## EXECUTIVE SUMMARY

EchoStar and DIRECTV, the nation's only satellite service providers and most viable competitors to cable, have filed an application requesting the transfer of certain FCC licenses which would allow them to merge and become the only satellite provider of video services for millions of Americans.

In reviewing the application, the Federal Communications Commission must determine whether or not the proposed merger would serve the public interest. The answer is clear – No. The merger would not serve the public interest. Quite to the contrary, it would frustrate and impair the Commission's implementation of a key objective of the Telecommunications Act of 1996, *i.e.*, the promotion of competition in the multichannel video distribution market. The merger stands in stark opposition to this fundamental tenet. By eliminating a vital competitor from the marketplace, it would diminish competition, thereby reducing innovation and consumer choice. It would also create a satellite giant capable of wielding its vast monopoly power to thwart the entry and success of new competitors.

No serious consideration can be given to approving the merger unless certain remedial conditions are imposed on the license transfer: (1) the Commission must mandate that the merged entity is subject to all the requirements of Section 629 of the Telecommunications Act of 1996 and the rules promulgated thereunder which require that navigation devices be open and accessible to third party providers in order to assure their commercial availability; (2) the applicants must adhere to open protocols and standards that allow for the delivery of both satellite and terrestrial signals; and (3) the applicants must refrain from engaging in anti-competitive conduct designed solely to derail their competitors.

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In re Consolidated Application of	)	
	)	
<b>EchoStar Communications Corporation,</b>	)	
<b>General Motors Corporation,</b>	)	
<b>Hughes Electronics Corporation,</b>	)	
Transferors,	)	<b>CS Docket No. 01-348</b>
and	)	
<b>EchoStar Communications Corporation,</b>	)	
Transferee,	)	
For Authority to Transfer Control.	)	

**PETITION TO DENY**

**I. INTRODUCTION**

Northpoint Technology, Ltd. (“Northpoint”), pursuant to Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d), hereby files this Petition to Deny the above captioned applications to approve the transfer of control of licenses and authorizations (the “Merger”) by Hughes Electronics Corporation (“Hughes”) (and its subsidiaries and affiliates, including DIRECTV) to EchoStar Communications Corporation (and its subsidiaries and affiliates) (“New EchoStar” and collectively with Hughes, the “Applicants”). Through this Merger, New EchoStar seeks to become the largest spectrum holder in the United States, holding licenses authorizing it to operate on approximately 90,000 MHz of spectrum.

As discussed below, the application fails the public interest test, and should be denied.

---

Should the Commission decide to grant the application, however, it must mandate the following remedial conditions: (1) the Applicants must comply with Section 629 of the Telecommunications Act of 1996<sup>1</sup> and the rules promulgated thereunder which ensure the commercial availability of navigation devices such as set-top boxes by requiring that third parties be able to access and attach to them; (2) the Applicants must adhere to open protocols and standards in the set-top box that allow for the delivery of signals by other satellite or terrestrial providers; and (3) the Applicants must refrain from engaging in obstreperous behavior designed to encumber, hinder and stifle competition.

## **II. OVERVIEW**

Let us start by putting into perspective what New EchoStar will acquire if the Merger is approved. EchoStar, and its subsidiaries, currently hold licenses authorizing it to operate on at least 7,000 MHz of spectrum. Hughes, and its subsidiaries (including DIRECTV) have licenses authorizing it to operate on at least 79,000 MHz of spectrum. Thus, if the Merger is approved, New EchoStar will be the single largest spectrum licensee in the United States by a substantial margin.

There is no dispute that Americans do not have adequate choice for video services. As data from the last seven Commission reports on competition demonstrated, there is no effective competition in the video services market. As the Commission's latest report confirmed, only 419 of the 33,000 cable communities in the United States – a scant 1% of the market – provide consumers with more than one choice of video programming provider.<sup>2</sup> This is effectively no choice at all.

Cable remains the dominant provider of subscriber video services with 78% of the

---

<sup>1</sup> 47 U.S.C. § 629.

<sup>2</sup> See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, (“Eighth Annual Competition Report”), rel. January 14, 2002, at ¶ 120.

---

market, while direct broadcast satellite (“DBS”) has grown to control 18.2% of the market.<sup>3</sup>

Despite the growth in DBS subscribership, there has been no corresponding decrease in prices for subscribers. Cable price increases have exceeded the rate of inflation, and satellite pricing is higher than cable in most instances, with DIRECTV being highest of all.<sup>4</sup>

Northpoint is a new and unique company. Through the use of its innovative, patented digital wireless terrestrial transmission technology, it will provide American consumers a competitive alternative to cable and satellite at substantially lower prices. Northpoint will deploy its unique systems ubiquitously, and in some instances serve as consumers’ only provider.

However, in order for Northpoint and other new entrants to be able to provide effective competition to cable and satellite, it must have access to the set-top box. The set-top box is no longer the traditional dumb box consisting of a decoder and tuner that passes along a simple analog signal. In today’s digital world, the set-top box is evolving into a network computer capable of providing a multitude of services and functions, *e.g.*, video on demand, Internet access, and interactive television, to mention a few.

Until recently, cable operators were the sole gatekeepers of the box. Consumers were required to rent their boxes from the cable operator. The box and its components were proprietary to the operator, and not interoperable with other systems or equipment. Congress recognized that navigation devices, such as set-top boxes, which today are the means to deliver both analog and digital communications, were crucial for innovation and competition in equipment and services. The benefits of competition would bring greater choice to a broader range of consumers at better prices. In enacting Section 629 of the Act, and instructing the Commission to implement regulations to assure the commercial availability of navigation

---

<sup>3</sup> See *id.* ¶ 5-8.

<sup>4</sup> If the Merger is approved, one can assume, at a minimum, that consumers will have to pay the higher DIRECTV rate.

---

devices, Congress sought to break the cable bottleneck. The Commission recognized that commercial availability without openness was meaningless. Therefore, its rules mandate that third parties have the right to attach to navigation devices, and operators must provide interface specifications.

Any possible public benefits the proposed Merger might yield are vastly outweighed by the creation of a new monopoly with all its attendant evils. If the Merger is approved, American consumers will have a choice of the incumbent cable monopolist or the newly-created satellite monopolist. Northpoint, a new entrant and a new choice, therefore requests the Commission to deny the merger application so that true competition can grow and flourish.

In the alternative, if the Commission grants the application, in order to serve the public interest and not frustrate key objectives of the Act, it must condition the Merger on the parties' compliance with rules set forth in Section 629 and the *Navigation Report and Order*.

### **III. ARGUMENT**

#### **A. *The Proposed Merger Fails to Meet the Public Interest Standard By Frustrating and Impairing the Commission's Implementation of the Objectives of the Act***

- 1. The Commission must apply remedial conditions to the Merger in order to satisfy the public interest standard. The Commission should specifically impose the requirements of Section 629 on the merged entity.*

In order to approve the transfer of licenses sought by the Applicants, the Commission must find that the proposed transfer serves the public interest, convenience and necessity.<sup>5</sup> The Commission's public interest analysis involves an inquiry into the following issues: (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of the Commission's rules; (3) whether the transaction would substantially frustrate or impair the Commission's

---

<sup>5</sup> See 47 U.S.C. §§ 214(a), 310(d).

implementation or objectives of the Communications Act and/or other related statutes; and (4) whether the transaction promises to yield affirmative public interest benefits.<sup>6</sup> Clearly, the proposed merger fails to meet requirements (3) and (4). Unless a remedial condition is placed on it that requires the parties to comply with Commission rules and policy objectives, the Merger application must be denied.

The legislative history clearly indicates that: “[t]he direction of the 1996 Act, and that of Section 629, specifically, was to move equipment and service markets to a competitive environment.”<sup>7</sup> In June of 1998, in response to the passage of Section 629, the Commission implemented regulations that required multivideo programming distributors (“MVPDs”) to: (1) separate set-top box security functions from non-security functions; (2) permit subscribers to attach compatible navigation devices to a multichannel programming distribution system, provided they did not adversely affect the network; and (3) provide technical information concerning interface parameters that are needed to permit navigation devices to operate with multichannel video programming systems.<sup>8</sup>

In 1998, DBS was the new entrant, just as today Northpoint is the new entrant. In implementing Section 629, the Commission found that satellite providers were bound by its mandate, but provided an exemption.<sup>9</sup> The exemption was based upon the fact that DBS was an

---

<sup>6</sup> See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd. 6547 ¶ 20 (2001) (“AOL/Time Warner Order”).

<sup>7</sup> See *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket 97-60, Report and Order (“Navigation Report and Order”), 13 FCC Rcd. 14775 (1998) ¶ 87.

<sup>8</sup> See *id.* ¶ 8.

<sup>9</sup> *Id.* ¶ 64.

---

evolving service with a relatively small share of the MVPD market.<sup>10</sup> At the time of the *Navigation Report and Order*, DBS subscribership constituted only 8% of the MVPD market compared to the 87% of the market held by entrenched incumbent cable companies.<sup>11</sup> Although DBS providers were hampered by their inability to deliver local signals, in 1998 they represented the only viable competitor to cable.

The landscape of the MVPD market has drastically changed since 1998 largely due to the enactment of the Satellite Home Viewer Improvement Act, which allowed satellite providers to carry the local signals of broadcasters.<sup>12</sup> Barely four years ago, DIRECTV and EchoStar were struggling combatants against the entrenched cable monopoly. Today, DIRECTV and EchoStar are each among the ten largest providers of multichannel video programming service, joining the ranks of their cable adversaries.

The Commission's *Eighth Annual Competition Report* indicated that: "[b]etween June 2000 and June 2001, the number of DBS subscribers grew from almost 13 million households to about 16 million households, which is nearly two and a half times the cable subscribers growth rate. DBS subscribers now represent 18.2 percent of all MVPD subscribers."<sup>13</sup> In fact, the market share of EchoStar and DIRECTV grew an astounding 15% in only one year since publication of the *Seventh Annual Competition Report* in 2000.<sup>14</sup> During the same period, cable

---

<sup>10</sup> See *id.* The Commission further noted the existence of three service providers of satellite video programming – DIRECTV, EchoStar and Primestar. DIRECTV and Primestar subsequently merged reducing the number of satellite video programmers to two. The proposed Merger would therefore effectively decrease the number of DBS service providers to one with New EchoStar controlling 90% of the satellite video programming market.

<sup>11</sup> See *id.* ¶ 65.

<sup>12</sup> See Act of Nov. 29, 1999, Pub. L. No. 106-113, § 1008, 113 Stat. 1501, Appendix I (1999) (codified in scattered sections of U.S.C. titles 17 and 47) ("SHVIA").

<sup>13</sup> See *Eighth Annual Competition Report* ¶ 8.

<sup>14</sup> See *id.* ¶ 7.

---

subscribership grew a meager 1.9%.<sup>15</sup> These numbers demonstrate the explosive growth of DBS, and its viability as an equal competitor to cable. If the growth of DBS continues at this rate, it will rival cable subscribership for video services in a few years.

The proposed merged entity would become the second largest paid TV service, behind cable, having about 16 million subscribers. For most of rural America it will be the *only* service provider. As previously mentioned, today each of the Applicants is among the top ten largest MVPD providers, and through this proposed merger seek to become the one and the *only* satellite provider. The Applicants no longer will be the young David the Commission sought to assist in slaying the giant cable Goliath by exempting them from Section 629. Instead, if the Merger is consummated, David will become Goliath's monopoly brother.

The facts clearly demonstrate that the landscape has changed. Based upon DBS' explosive growth, there is no reason to continue the exemption. Irrespective of the Merger application, there is every reason to require complete compliance with Section 629 right now. Just as it was in the public interest for cable operators to allow attachments and provide interface space to other providers, the same can now be said of the new satellite giant. Furthermore, before the proposed Merger can be approved, it is imperative that Section 629 and the rules promulgated thereunder be applied to New EchoStar in their entirety. Without this condition, a key objective of the Act, *i.e.* assuring the commercial availability of navigation devices to provide consumer choice by promoting competition in the equipment and service markets, would be severely frustrated, thereby requiring the denial of the application.

---

<sup>15</sup> *See id.*

- 
2. *Any grant of merger approval must be conditioned on the set-top box being open for all providers, otherwise any claimed public benefit is outweighed by the resulting harm caused by the gatekeeper effect of allowing a proprietary box.*

The core right to attach devices that do not threaten the security of the network was first established in *Carterfone v. AT&T*, the progenitor of Section 629 and the *Navigation Report and Order*.<sup>16</sup> This landmark case held that a carrier's prohibition of the interconnection of customer provided equipment was unreasonable and unjustifiably discriminatory. By preventing a monopolist's power in one market to be extended into a secondary market, the Commission paved the way for the telecommunications equipment industry to flourish. In keeping with the *Carterfone* principles, the Commission in the *Navigation Report and Order* stated that:

To achieve the statutory requirement of alternative sources of navigation devices, we mandate that subscribers have a right to attach any compatible navigation device to an MVPD system, regardless of its source, subject to the proviso that the attached equipment not cause harmful interference, injury to the system or compromise legitimate access control mechanisms. . . This rule makes clear to subscribers that an MVPD system for which the equipment is designed is accessible. *We agree with Time Warner that the marketplace, not the MVPD, should determine the price and features of navigation devices available to subscribers.* *Navigation Report and Order* ¶ 29 (emphasis added).

In order for the marketplace to make this determination rather than a powerful monopolistic MVPD gatekeeper, the Commission also mandated that MVPDs must provide to the requesting party the technical information concerning interface parameters necessary for a navigation device to operate with the services delivered by the MVPDs system. Without these two critical conditions the MVPD would be able to maintain its choke hold on the set-top box. In the instant case, New EchoStar stands poised to be the new gatekeeper unless these same provisions are extended to it.

---

<sup>16</sup> See *Carterfone v. AT&T* (1968), 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571.

---

EchoStar uses an open system architecture developed by the “DBV” consortium (www.dvb.org). The technical standards by which EchoStar’s system operates are publicly available. By contrast, DIRECTV uses proprietary “DSS” standards and technology, thus preventing set-top boxes that work with its system from working with other MVPD systems. The incompatibility of the systems with each other and with other MVPD providers discourages customers from switching MVPD providers because they will have to purchase new equipment in order to receive a competing service. The effect of the incompatibility is to raise rivals’ costs, since competitors to DBS must offer discounts or other incentives to compensate DBS customers for the switching costs they would incur by changing providers. These switching costs also act as an entry barrier that limits effective competition to new entrants like Northpoint.

The proposed Merger would enhance the ability and incentives of the merged entity to raise prices or decrease output and innovation, especially in rural or underserved areas where DBS has a dominant or monopoly position. Additionally, the merged entity would have every incentive to adopt the proprietary standards of the DIRECTV box rather than the EchoStar non-proprietary standards, effectively shutting out new competitors. This is precisely the type of behavior that Section 629 proscribes.

Competition from new entrants like Northpoint will provide a check on the merged entity’s market power by providing consumers an additional choice for MVP services. In order to fulfill this and other policy objectives of Section 629, the Commission must condition any approval of the merger on the creation and implementation of an open standard for DBS receivers that would allow DBS customers to access services from competing wireless MVPD providers using their DBS receivers. In order to promote competition, the box must serve multiple purposes. For example, a DBS subscriber should also be able to receive other

providers' signals in the same box by simply plugging into a port. Without such a condition the merger violates a key objective of the Act, – the promotion of competition in video services and equipment – and must be denied.

At present, it is possible for other operators to transmit a signal that is receivable by EchoStar's DVB receivers. However, DIRECTV's DSS receivers cannot receive the signals of other satellite or terrestrial providers. Since the merged entity will have to harmonize its system, now is an opportune time to require that the system be open and able to receive both terrestrially and satellite delivered signals. Making sure that the set-top boxes in the harmonized system provide access to other wireless MVPD providers, as well as the formerly competing DBS system, should impose little or no extra burden on the Applicants, and will eliminate a significant barrier to effective competition. The simplest way to accomplish this goal is to mandate that all DBS set-top boxes be capable of receiving signals sent under the DVB standard, or such other open, publicly-available standard as New EchoStar may later adopt.

In fact, the Commission has every incentive to require that DBS adopts the DVB standard, whether the Merger occurs or not. For some time now, openness and interoperability have been Commission policy cornerstones. For example, the competing satellite digital audio radio services (DARS) use different technologies, yet the Commission requires each applicant for a satellite DARS license to "(c)ertify that its satellite DARS system includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction."<sup>17</sup> This requirement is clearly aimed at reducing consumer switching cost in order to promote competition among DARS providers

In the AT&T/Media One merger, the Commission expressed its propensity for the

---

<sup>17</sup> 47 C.F.R. §25.144(a)(3)(ii)(2001).

---

adherence to open protocols and standards. In that merger, the parties voluntarily agreed to adhere to standards for openness. Similarly, in the AOL/Time Warner merger, the Federal Trade Commission specifically imposed an “Open Access” condition on the merger. Considering these precedents, the Commission is well within its bounds to impose open access obligations as a condition of merger approval.

Preventing consumers from using equipment from competing providers is anticompetitive, stifles competition and innovation and results in less choice for consumers. The promotion of competition, increase in consumer choice and development of advanced technologies are the cornerstones of the Act. Without an express provision mandating compliance with Section 629 and the open protocols and standards that allow for the delivery of other satellite and terrestrial analog and digital signals, the Commission cannot find that the Merger is in the public interest. Such approval would contravene the founding principles of the Act.

**B. *The Commission must impose a specific merger condition that ensures the openness of the set-top box to allow for delivery of signals by third party satellite or terrestrial providers.***

In order for the Merger to meet the Commission’s public interest standard, it must impose remedial conditions. Specifically, the Commission should require that New EchoStar must, within 180 days of the approval of the Merger application, demonstrate that it has implemented a standard for DBS transmission, encoding, and reception of DBS signals that has been promulgated by the DVB Project or a widely-recognized standard-setting body that complies with the National Institute of Standards and Technology or International Organization for Standardization requirements for a standard setting body. For purposes of this condition, “implemented” means both the adoption of the standard and the deployment of interoperable receivers to all New EchoStar DBS subscribers, including those who at present have receivers

---

that operate with closed or proprietary standards.

At a minimum, New EchoStar must demonstrate that the adopted standard makes available to all other providers of wireless MVPD services such data as will enable the other providers to transmit information in such manner as to be received and decoded by any New EchoStar subscriber's receiver to the same extent as information transmitted by New EchoStar. New EchoStar must also demonstrate that the standard makes available to other MVPD providers any other information used by New EchoStar to implement and process transmissions of MVPD services. The adopted standard shall also ensure that New EchoStar-compatible receivers shall afford the same quality and speed in processing transmissions or information to and from the other provider as it affords to transmissions or information to and from New EchoStar of the same type.

**C. *The Merger must be denied because the past bad conduct of the Applicants evinces a willingness to violate Commission policy objectives, and frustrates the objectives of the Act.***

The Act sought to remove barriers to entry in order to promote competition in the MVPD market. This Merger stands in stark opposition to that key objective. Indeed, Applicants are the only providers of satellite service, and for many underserved rural communities, the Merger would eliminate the only competition that exists today. While Applicants have gone to great lengths to try to demonstrate that there are public interest benefits associated with the Merger, all of their efforts fail to address the one tantamount concern – currently there are two providers of satellite service, and after the Merger there would be only one.

The Applicants have been the beneficiaries of great legislative and regulatory generosity. Indeed, the Commission has granted Applicants free spectrum, and exercised its forbearance authority to carve out regulatory exceptions exclusively for the benefit of DIRECTV and EchoStar – even in the face of clearly applicable statutory provisions (such as Section 629, which

expressly applies to all MVPD providers).

Congress has also bestowed several gifts on these two companies. Most notably, in 1998 Applicants' continued existence was threatened by several court decisions finding that they had flagrantly violated broadcasters' copyrights by illegally retransmitting broadcast signals. The courts ordered the violators to cease and desist from transmitting the signals, and threatened substantial fines for continued violation of the law.<sup>18</sup> Congress came to the rescue by enacting legislation granting satellite providers the right to carry local broadcast signals.

These extraordinary efforts were undertaken by the Commission and Congress in order to assure that Americans have a choice for video services. However, the very beneficiaries of these favors have taken steps to thwart any new competitors who seek to follow in their footsteps. For eight years Northpoint has attempted to acquire spectrum so that it can offer Americans a competitive choice. At every step along the way the Applicants have erected barriers to keep them out. Ironically, Applicants have vociferously opposed a grant of spectrum to Northpoint, even though they owe their very existence to a similar grant they received. Apparently, after having thrived on the generosity of Congress and the Commission, Applicants now seek to shut the door behind them, and ensure that no new entrant can obtain the same fair chance at success they enjoyed.<sup>19</sup>

Northpoint cannot stress enough the competitive obstacles thrown in front of it by the Applicants. Northpoint's market entry has been delayed by eight years. In that same time, Applicants have grown to control nearly 20% of the nation's video market. Despite their

---

<sup>18</sup> See *CBS Inc., et al v. PrimeTime 24 Joint Venture*, Order Affirming in Part and Reversing in Part Magistrate Judge Johnson's Report and Recommendations, 9 F. Supp. 2d 1333 (S.D.F.L. May 13, 1998); *CBS Inc., et al v. PrimeTime 24 Joint Venture*, Supplemental Order Granting Plaintiff's Motion for Preliminary Injunction (S.D.F.L. June 10, 1998) (No. 96-3650-CIV); *ABC Inc. v. PrimeTime 24, Joint Venture*, 17 F.Supp.2d 467, 1998 WL 54286 (M.D.N.C., July 16, 1998) (Case No. Civ. A. 1:97CV00090)

<sup>19</sup> See Exhibit A, *Letter from Sophia Collier, President, Northpoint to the Honorable Michael K. Powell, Chairman, Federal Communications*, November 28, 2001.

---

enormous head start, Northpoint still believes that if it were allowed to compete on the same terms as Applicants, and free from Applicants' endless anticompetitive tactics, it would become a viable competitor within the next two years.

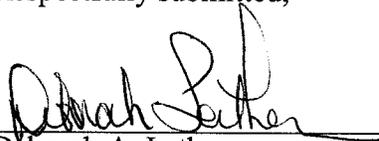
It is ironic that eight years ago, DIRECTV and EchoStar were in the identical position that Northpoint is in today. Today, they engage in the same anticompetitive behavior that they previously suffered under and fought against. The risks associated with the Merger cannot be overstated – New EchoStar will be a true monopoly in the satellite market, and it is safe to assume that it will behave like one. Indeed, based on their previous conduct, it cannot be doubted that the combined entity, with its vastly increased market power, would act as all monopolists do – it would seek to augment its power by destroying its competitors. For these reasons, the Commission must deny the merger.

#### **IV. CONCLUSION**

The creation of new products and services comes about only when market conditions exist that allow innovation and competition to flourish. The Commission first took this bold step in 1968 in the *Carterfone* decision. By unbundling telephone equipment from the monopolist's network, it spawned the creation of a multi-billion dollar telecommunications equipment manufacturing industry, and led to the development of advanced technologies that would never have been realized under a monopolist's control. Section 629 was a bold move in this same direction. It seeks to do for the MVPD market what *Carterfone* did for telephone, *i.e.* allow for competition and innovation to flourish. The landscape has changed and there is no reason to exempt the Applicants from Section 629. DBS no longer needs this protection. Today consumers need to be protected from the bottleneck that will occur if the exemption is not lifted. There is every reason to lift the exemption, and mandate open access to set-top box as described in the previously discussed proposed condition.

Therefore, Northpoint respectfully requests that the merger be denied for failure to meet the public interest because it would: (i) substantially frustrate and impair the Commission's implementation of and the objectives of the Act; and (ii) fail to yield any affirmative public interest benefits. In the alternative should the Commission grant the Merger it should only do so under the circumstances discussed herein.

Respectfully submitted,



Deborah A. Lathen  
Lathen Consulting  
1650 Tysons Boulevard, Suite 1150  
McLean, Virginia 22102  
(703) 287-2431 voice  
(703) 287-2404 fax

*On behalf of Northpoint Technology, Ltd.*

February 4, 2002

**EXHIBIT A**

---

November 28, 2001

**BY HAND**

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Dear Chairman Powell:

I was struck by your recent comment that the DBS-Northpoint sharing proceeding is “the most challenging set of issues the Commission has ever faced.” Our company shares your apparent frustration because we have been at the Commission for over seven years seeking approval to offer our services to the public.

We propose a simple solution: end the Commission’s industrial policy which favors satellites and begin to regulate all similar services seeking to use the same spectrum from the same rulebook. This “single rulebook” system would greatly simplify the DBS-Northpoint proceeding and every proceeding that follows. It would allow the Commission to stop being in the business of “picking a winner” and start to license companies in a technology-neutral manner. Ending this regulatory disparity is particularly important given the reduced competitive environment that will result from the sale of DirecTV to Echostar.

If there is any doubt that the satellite industry is king at the Commission, consider the following fact: in August 2001, the Commission granted – without competitive bidding – licenses for 66,000 MHz of spectrum in the Ka-band to 11 satellite companies.<sup>1</sup> *This single spectrum grant allocated - without an auction - more spectrum than the FCC has made available in total to all radio, television and PCS operators in the United States.* Amazingly, 2/3 of the Ka-band grant went to one entity, Hughes Electronics and its 80% owned subsidiary PanAmSat. With the planned sale of DirecTV, this spectrum

---

<sup>1</sup> See Order, Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service Space Stations in the Ka-Band Adopted August 2, 2001 adding to 84,000 MHz previously allocated in the first round order.

The Honorable Michael K. Powell  
November 28, 2001  
Page 2

could end up in the hands of Echostar, another party that has also benefited greatly from free spectrum grants.<sup>2</sup>

In the Ka-band proceeding there was no assertion that the Orbit Act prohibited competitive bidding on auctions – the Commission just set up the proceeding to make sure there wasn't one. The Commission's satellite licensing proceedings are custom designed to avoid mutual exclusivity and thus auctions.

In our own proceeding, the preference given to the satellite industry results in extraordinary market distortion. We applied on the same day as eight satellite systems who seek a total of 25,400 MHz of spectrum. All of these companies will be granted licenses without an auction. One reason in this case is that, in 2000, the satellite industry obtained legislation barring the auction for spectrum used for certain satellite services. But even before this law was passed, the Commission was actively employing the same process used this year in the Ka-band to avoid auctions for the satellite industry.

By contrast, our group of local affiliates seeks to offer a terrestrial service in 500 MHz using a new technology sharing spectrum with satellites. We have been seeking a license at the FCC for over seven years and may still face an auction – not because we are mutually exclusive with the eight satellite applicants or because there is another mutually exclusive applicant at the Commission now – but because the Commission may wait to accept our application until it has another applicant.

Some might say that our disparate treatment is the result of a Commission practice of always auctioning of ground based services. Yet, this would be inaccurate. In the year 2001 alone, the Commission granted – without an auction – 10,259 wireless licenses for both mobile and fixed microwave services.<sup>3</sup> Almost all of these licenses were awarded to large companies that sell commercial telecommunications services. By contrast, only 759 licenses were purchased through an auction.<sup>4</sup> While the spectrum awarded to these licensees was much less than that the Commission gave to the satellite industry in the same period, it was much more than we seek. The fact that 93% of the licenses awarded to ground based services this year were processed without an auction demonstrates that in no way is it typical for the Commission to use auctions to allocate spectrum to ground based companies.

---

<sup>2</sup> See Appendix C - Spectrum Granted to Echostar Without Auctions.

<sup>3</sup> See Wireless Bureau Public Notices 1/2/01 – 11/2/01.

<sup>4</sup> Period from 12/20/00 – 11/2/01 includes the re-auction of 422 licenses reclaimed from NextWave.

The Honorable Michael K. Powell  
November 28, 2001  
Page 3

The Commission's process of spectrum allocation and licensing seems arbitrary and it has what is surely an unintended effect: discrimination against small companies and new technologies. It cannot be considered desirable for the government to allow one company free use of a Federal resource, and then expect a new entrant and future competitor to pay to use the same resource. This is particularly true in our case where our efforts, and our efforts alone, have created the technological and regulatory opportunity to share this spectrum with satellite users.

To put the disparity in perspective, consider that our largest future competitor Hughes Electronics (soon to be Echostar) could be granted without an auction twelve times the spectrum that Northpoint is seeking in the very same proceeding.<sup>5</sup> After this grant, Hughes (including PanAmSat) will have 79,525 MHz of spectrum, all of which will have been granted to it without an auction. We believe this will make Hughes the largest holder of spectrum in the United States.

Using two rulebooks to regulate the same spectrum is not good for our country. By favoring the satellite industry and giving it preferential access to spectrum, the Commission relies too heavily on one solution and allows public needs to remain unmet. A prime example is the provision of local signals. The DBS industry cannot fully comply with the Satellite Home Viewer Improvement Act requirement to carry all local stations in the markets where it carries any local stations. The reason is that satellite technology – unlike the Northpoint system – is poorly suited to the task of providing local channels. Satellite capacity is limited and is best used for programming of national rather than local interest.

Echostar has announced that come January 2002 it will turn off local television stations in an undisclosed number of markets. This will mean that these DBS subscribers will have no access to the emergency alert system at a time when our nation needs this resource to be fully available. Of course some of these subscribers may have the option of switching back to cable or getting rabbit ears, but this should not be necessary when a seamless solution of satellite and terrestrial services is technically feasible.

The way to immediately enact our suggested “single rulebook” policy would be to grant our applications in the same course and manner as the satellite companies with whom we applied and will share spectrum. Almost a year ago, the Commission issued an order declaring terrestrial services based on our technology could share with the eight satellite systems in our proceeding. Northpoint further demonstrated its unique

---

<sup>5</sup> NGSO FSS applications pending.

The Honorable Michael K. Powell  
November 28, 2001  
Page 4

qualifications when it was the only party to submit equipment for Congressionally-mandated independent testing.

Northpoint is ready to go and there are no mutually exclusive applications before the Commission. Northpoint has demonstrated that it can share with eight other applicants with whom it applied in 1999. Basic fairness, as well as the public interest, convenience and necessity call out for our applications to be granted.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Sophia Collier", with a stylized flourish at the end.

Sophia Collier  
President

---

The Honorable Michael K. Powell  
November 28, 2001  
Page 5

**Appendix A**  
**Spectrum Used by Terrestrial Services in United States**

**Representative Terrestrial Spectrum Users**

	Stations/ Licenses	Use/Station (MHz)	Total spectrum allocated (MHz)
Total stations in United States			
AM radio stations	4716	0.1	472
FM radio stations	8216	0.2	1,643
Television stations	4074	6	24,444
PCS licenses	2071	10 – 30	32,550
Spectrum used			59,109

Source: FCC Broadcast Station Totals as of June 30, 2001; FCC PCS license listing

## Appendix B

### Spectrum Provided to Hughes Electronics and its Subsidiaries without Auctions

Entity	Satellite Name or Orbital Slot	Spectrum Used (MHz)
<b>Hughes Electronics</b>		
DirecTV		
	101	1,000
	110	100
	119	325
Ka-Band Licenses granted		
	131° W.L.	2,000
	101° W.L.	2,000
	99° W.L.	2,000
	49° W.L.	2,000
	26.2° W.L.	2,000
	7.5° W.L.	2,000
	164° E.L.	2,000
	111° E.L.	2,000
	103° E.L.	2,000
	101° E.L.	2,000
	54° E.L.	2,000
	25° E.L.	2,000
NGSO-FSS applications pending		5,800
Subtotal for Hughes		31,225
<b>PanAmSat (80% owned by Hughes)</b>		
Satellites in orbit serving the U.S.		
	Galaxy IR	1,000
	Galaxy IIIR (C)	1,000
	Galaxy IIIR (Ku)	750
	Galaxy IVR (C)	1,000
	Galaxy IVR (Ku)	1,000
	Galaxy V	1,000
	Galaxy VI	1,000
	Galaxy IX	1,000
	Galaxy XR (C)	1,000
	Galaxy XR (Ku)	1,000
	Galaxy XI (C)	1,000
	Galaxy XI (Ku)	1,000
	PAS-1R (C)	1,000

	PAS-1R (Ku)	1,000
	PAS-3 (Ku)	1,000
	PAS-5 (C)	1,000
	PAS-5 (Ku-1)	1,000
	PAS-5 (Ku-2)	750
	PAS-9 (C)	1,000
	PAS-9 (Ku)	800
	SBS 6	1,000
Launch pending in next quarter		
	Galaxy IIIC (C)	1,000
	Galaxy IIIC (Ku)	1,000
Ka-Band Licenses granted		
	133° W.L.	2,000
	103° W.L.	2,000
	58° W.L.	2,000
	45° W.L.	2,000
	173° E.L.	2,000
	166° E.L.	2,000
	149° E.L.	2,000
	124.5° E.L.	2,000
	72.7° E.L.	2,000
	68.5° E.L.	2,000
	40° E.L.	2,000
	48° E.L.	2,000
	36° E.L.	2,000
	Subtotal for PanAmSat	48,300
<b>Total Hughes controlled</b>		<b>79,525</b>

Source: PanAmSat web site; FCC records and Sky Report

## Appendix C

### Spectrum Granted to Echostar Without Auctions

System	Satellite Name or Orbital Slot	Spectrum Used (MHz)
Echostar DBS (Ku band)		
	61.5° W.L	525
	110° W.L	900
	119° W.L	650
	175° W.L	1,000
	Subtotal for Echostar DBS	3,075
Ka-Band Licenses granted		
	121° W.L	1,000
	83° W.L.	1,000
	Subtotal for Echostar Ka Band	2,000
<b>Total Echostar controlled</b>		<b>5,075</b>

Source: FCC records and Sky Report

Note: Slot at 110 was purchased at auction by MCI but was later transferred to Echostar with other assets in settlement of a legal claim. Echostar did not pay the Treasury anything for this slot.

**CERTIFICATE OF SERVICE**

I hereby certify that on February 4, 2002, that Northpoint Technology, Ltd.'s Petition to Deny was sent by First Class U.S. Mail to the parties on the attached Service List.

A handwritten signature in black ink, appearing to read "Deborah A. Lathen", written over a horizontal line.

Deborah A. Lathen  
Lathen Consulting  
1650 Tysons Boulevard, Suite 1150  
McLean, Virginia 22102  
(703) 287-2431 voice  
(703) 287-2404 fax

**Service List**

Pantelis Michalopoulos  
Counsel to EchoStar Communications  
Corporation  
Step toe & Johnson LLP  
1380 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795

Gary M. Epstein  
Counsel to General Motors Corporation and  
Hughes Electronics Corporation  
Latham & Watkins  
555 11<sup>th</sup> Street, N.W.  
Washington, D.C. 20004

William D. Silva  
Counsel to the Word Network  
Law Offices of William D. Silva  
5335 Wisconsin Avenue, N.W.  
Suite 400  
Washington, D.C. 20015-2003