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April 17, 2002

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Via Electronic Filing

William F. Caton
Acting Secretary
Federal Communications Commission
Office of the Secretary
445-12th Street, SW
Washington, DC 20554

Re: **Notice of Oral Ex Parte Presentation;
Application of EchoStar Communications Corporation,
General Motors Corporation and Hughes Electronics Corporation,
Transferor, and EchoStar Communications Corporation, Transferee,
For Authority to Transfer Control
CS Docket Number 01-348**

Dear Mr. Caton:

On April 16, 2002, Bob Phillips, President and Chief Executive Officer, Steven T. Berman, Senior Vice President, Business Affairs and General Counsel, and Andrew Brown, Senior Vice President, Industry and Member Relations, of our client, the National Rural Telecommunications Cooperative (NRTC), met with the Commission's staff in connection with NRTC's Petition to Deny the above-captioned Application.¹ Dr. Paul W. MacAvoy of Yale University, an economic expert acting on behalf of NRTC in this proceeding, participated in the meeting.² Stephen M. Ryan and Stephen E. Coran from Manatt, Phelps & Phillips, LLP, and the undersigned also attended the meeting on behalf of NRTC.

Members of the Commission staff who attended the meeting were:

Jim Bird (Office of General Counsel)
C. Anthony Bush (Office of General Counsel)

¹ *Petition to Deny By The National Rural Telecommunications Cooperative*, CS Docket No. 01-348 ("*NRTC Petition*") (February 4, 2002); *NRTC Ex Parte Reply to Opposition*, CS Docket No. 01-348 ("*NRTC Reply*") (April 4, 2002).

² *NRTC Petition*, Exhibit I ("*MacAvoy Declaration*"); *NRTC Reply*, Exhibit 1 ("*MacAvoy Reply Declaration*").

Neil A. Dellar	(Office of General Counsel)
Kiran Duwadi	(Media Bureau)
Marcia Glauberman	(Media Bureau)
JoAnn Lucanik	(International Bureau)
David Sappington	(Office of Plans and Policy)
Marilyn Simon	(International Bureau)
Donald Stockdale	(Office of Plans and Policy)
Douglas Webbink	(International Bureau)
Harry Wingo	(Office of General Counsel)

During our meeting, we discussed a host of deficiencies in the economic showings of EchoStar and DIRECTV (the Applicants). We pointed out that even though the Applicants have the burden of proof to demonstrate that their Application should be granted in the public interest, they have provided very little concrete data to enable the Commission or interested parties to analyze the impact of the proposed Merger on rural and other consumers.

We indicated that the Applicants have not disclosed relevant information that must be in their possession concerning the prices they charge subscribers for the bundle of DBS services (including equipment, installation, programming and discounts) in local markets throughout the country. Nor have they provided any detailed economic analysis to support their Application. In fact, the Applicants have not even identified the national price that they would charge following the Merger.

We noted the complete dearth of information from the Applicants concerning the state of multichannel video programming competition in local markets following the proposed Merger. We also emphasized that the Applicants have not disclosed to the Commission concrete data or analysis to support their promise of national pricing as a solution to the anticompetitive problems created by the proposed Merger.

Dr. MacAvoy discussed the economic analysis underlying the two Declarations he submitted in this proceeding on behalf of NRTC. In particular, he made the following points:

- As part of his analysis of the impact of national pricing, Dr. MacAvoy described the extremely conservative methodology he used in identifying 14 large, contiguous clusters of Census Blocks not passed by cable (*e.g.*, if any single home in the Census Block was passed by cable, he deemed the entire Census Block to be passed).
- Dr. MacAvoy explained the basis for his conclusion that the monopoly price could exceed current pricing levels by an average of 50% in the clusters.
- Dr. MacAvoy reiterated his opinion that the national price for programming would be above current competitive levels, although this figure could not be

precisely calculated in light of the Applicants' failure to identify the proposed national price or to disclose relevant pricing information.

- To be effective, Dr. MacAvoy explained that a national price would need to apply to every aspect of service, including equipment sales, installation, maintenance and service, not just programming alone. He estimated that at least one-third of the price would include these elements, yet the Applicants addressed none of these factors as part of their proposal.
- The Applicants' promise of national pricing is tantamount to a request for voluntary price caps, which Dr. MacAvoy characterized as unprecedented in his many years of experience as an expert economist. He pointed out that price caps have never worked well, especially with evolving technologies accompanied by high service attributes. He also raised concerns about the numerous problems in implementing and regulating a national pricing program.
- The Applicants themselves discredited their national pricing scheme by making it clear that they require the flexibility to respond to local cable promotions. The ability to change the price to meet local competition defeats the purpose of a national pricing scheme.
- The "churn" between EchoStar and DIRECTV subscribers (approximately 10%), cited by the Applicants, does not demonstrate that competition between EchoStar and DIRECTV does not exist. In fact, considering the difficulty in replacing existing DBS subscriber equipment to enable reception from the other provider, it shows significant churn from one provider to the other and *vice versa*. We also pointed out that the Applicants failed to disclose relevant information regarding the nature of their survey of customer churn. Furthermore, they failed to address the more important issue: the significant competition between EchoStar and DIRECTV for *new* subscribers as opposed to *existing* subscribers of the other company.
- Dr. MacAvoy's economic analysis showed that EchoStar and DIRECTV compete vigorously against each other, notwithstanding their claims to the contrary.

In response to a question from Commission staff, we explained that additional data from the Applicants is necessary in order to assess the economic impact of the proposed Merger. At a minimum, this data should include:

- The amount of the proposed national price.
- Any models the Applicants used to calculate the amount of this proposed national price.

- The marginal cost of each of the Applicants in at least 25 relevant categories.
- A 24 month sample, by each of the Applicants, of 50 to 150 retail locations, including transactional prices on equipment sales, installation, maintenance and service, as well as programming, for each month at each locale.
- A profitability analysis for each of the Applicants.
- The operating income margin by region, designated area or class for each Quarter during the past seven years for each of the Applicants.
- EBITDA by type of service by month (or Quarter) for the past seven years.
- All documents compiled or used by EchoStar in connection with its antitrust case against DIRECTV, including but not limited to any proof of exclusion from any market.
- Survey methodologies and results compiled or used by the Applicants to support their conclusions regarding DBS subscriber churn or to critique Dr. MacAvoy's analysis of the impact of the proposed Merger.
- Any information by either Applicant regarding what makes one DBS provider "better" than the other in terms of equipment, available programming, programming packages, pricing or service.
- Any comparisons conducted by either Applicant regarding the benefits or deficiencies of analog and digital cable, including any rate analysis.

Dr. MacAvoy and the Commission economists discussed the economic underpinnings of the Tables contained in the *MacAvoy Declaration*, including Table Two ("Marginal Cost for DIRECTV and EchoStar"), Table Three ("Representative Prices and DBS Penetration Rates For The Clusters"), and Table Four ("Regression Coefficients"). Dr. MacAvoy explained his use of the Lerner Index in calculating the impact of the proposed Merger. He also explained that the proposed Merger would clearly violate well-established antitrust standards regarding the HHI Index.

In conclusion, Dr. MacAvoy expressed his professional opinion that the economic support for the Application was grossly deficient in many respects. He concluded, based on his own economic analysis, that the proposed Merger would have a catastrophic impact on rural America.

Mr. William Caton
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KELLER AND HECKMAN LLP
LAW OFFICES

Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,

/s/ Jack Richards

Jack Richards

cc: Jim Bird
C. Anthony Bush
Neil A. Dellar
Kiran Duwadi
Barbara Esbin
Marcia Glauberman
Julius Knapp
JoAnn Lucanik
David Sappington
Royce Dickens Sherlock
Marilyn Simon
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