1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE 202.434.4100
FACSIMILE 202.434.4646
WWW.KHLAW.COM

March 13, 2002

Via Electronic Filing and First Class Mail

Jack Richards
(202) 434-4210
Richards@khlaw.com

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

Re: Ex Parte Notice;
CS Docket Number 01-348

Dear Mr. Caton:

On behalf of our client the National Rural Telecommunications Cooperative (NRTC),[1] the purpose of this letter is to object to a recent attempt by EchoStar Communications Corporation (EchoStar), General Motors Corporation and Hughes Electronics Corporation (Applicants) to modify the scope of the Commission's pending request for additional information in the above captioned matter (*Information Request*).[2] We also object to the Applicants' continued failure to comply with the Commission's ex parte requirements and request appropriate admonitions.

In an ex parte notice dated March 5, 2002 (*March 5 Letter*) -- just one day before the date for filing information responsive to the *Information Request* -- the Applicants notified the Commission of "the procedures they plan to follow."[3] As discussed below, the Applicants' self-imposed procedures vary significantly from those required by the *Information Request*.

On March 11, 2002, the Applicants met with Commission staff. According to the Applicants ex parte notice of the meeting, dated March 12, 2002 (*March 12 Letter*), the participants "discussed the parameters for the search process set forth in a letter filed by the Applicants on March 5, 2002, including definitions and procedures designed to coordinate it as

[1] *See* Petition to Deny of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (filed February 4, 2002).

[2] Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (February 4, 2002).

[3] Letter from Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation, to W. Kenneth Ferree, Chief, Cable Services Bureau (March 5, 2002).

closely as practicable with Applicants' ongoing efforts to respond to requests for additional information under the Hart-Scott-Rodino Act."[4]

There is no indication in the *March 12 Letter*, however, of the parameters, definitions and/or procedures that were "discussed" during the meeting. Nor is there any indication as to the resolution of any such discussions. The public is unable to determine, for instance, whether the Commission will insist that the Applicants comply with the terms and conditions of the *Information Request* -- or whether the Applicants will be permitted to change them pursuant to their *March 5 Letter*.

The Commission's rules governing ex parte filings are clear. Any ex parte notice disclosing an oral presentation to the Commission "must contain a summary of the *substance* of the ex parte presentation and *not merely a listing* of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required."[5]

The Applicants' *March 12 Letter* does not comply with these requirements. It advises only that the *March 5 Letter* was "discussed;" it fails to state the substance or resolution of the discussions. The Applicants already have been admonished by the Commission to comply with the Commission's ex parte rules in this proceeding, and they should not be permitted to continue disregarding them.[6]

Regarding the *March 5 Letter* itself, the Applicants' unilateral modification of the terms and conditions of the *Information Request* should not be countenanced. The Applicants do not even request the Commission's permission before modifying the scope of the *Information Request*. Rather, they simply advise the Commission that they have decided *on their own* to "conform" the Commission's search parameters to those being used by the Department of Justice (DOJ) in its request for documents under the Hart Scott Rodino (HSR) Act.

The FCC, however, is not investigating the proposed merger for the same purpose as DOJ. While the Commission is conducting a public interest analysis pursuant to the Communications Act of 1934, as amended, the DOJ is conducting an antitrust analysis under HSR.

The Commission is not governed by the same statutory standards as DOJ, need not use the same procedural vehicles as DOJ, and is not required to accept as part of its public interest review limitations that DOJ may consider appropriate for purposes of its antitrust review. Indeed, the Commission decided this very matter when it established the appropriate areas of inquiry in its *Information Request*. The Applicants are not at their liberty to disregard the

---

[4] Letter from Pantelis Michalopoulos, Counsel for EchoStar Communications, to William F. Caton, Secretary (March 12, 2002).

[5] 47 C.F.R. § 1.1206(b)(2) (emphasis added).

[6] *See* Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation (March 7, 2002) (*Admonition Letter*).

express requirements of the *Information Request* and to dictate to the Commission that they will provide documents only upon terms and conditions that have been established by DOJ -- especially since the Commission's merger review processes are open to the public, while DOJ's are not.

The Commission should promptly reject the Applicants' attempts to narrow the scope of the *Information Request*. The Applicants should not be permitted to: 1) restrict access to certain documents under the guise of confidentiality; 2) reduce established time frames; 3) limit the range of services to be reviewed; 4) limit the geographic scope of various services; 5) prevent access to relevant documents; or 6) limit to certain individuals and documents the scope of the Commission's request. Each of these issues is discussed below in further detail.

Confidentiality

Of great concern to NRTC is the Applicants' attempt to restrict access to relevant documents under the guise of confidentiality. The Applicants state that due to the self-proclaimed "sensitivity" of certain materials, they will respond to the *Information Request* "by referring the Commission to specific items being provided to the [DOJ]."[7] The Applicants do not explain *why* the Commission's procedures are somehow inadequate, or *how* the DOJ's treatment of confidential documents is somehow superior to the Commission's. They only make an ambiguous reference to the sensitivity of certain materials and imply that the FCC's processes are inadequate to deal with it while DOJ's are not.

The Commission already has established a *Protective Order* in this case that sets forth an appropriate regulatory framework to protect confidentiality.[8] The *Protective Order* mirrors others successfully employed by the Commission in other important merger cases. It strikes a balance between the Applicants' proprietary rights and the public's right to review pertinent information.[9] The Commission also has in place rules to govern how such materials will be handled -- and they do not allow the Applicants to decide on their own which information will be produced and which will not.[10]

The Applicants should not be permitted to circumvent the Commission's processes governing confidentiality by "cross referencing" material submitted to DOJ. Such actions would effectively hamper the ability of the Commission and the public to review all materials relevant to the proposed merger and instead would cloak them in unwarranted secrecy.

When considering the Applicants' unilateral decision to tamper with the scope and nature of the *Information Request*, the Commission should keep in mind that EchoStar already has a

---

[7] *March 5 Letter*, p. 2.

[8] *See* Order Adopting Protective Order, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348, DA 02-27 (released January 9, 2002) (*Protective Order*).

[9] *Id.* at fn. 1.

[10] *See* 47 C.F.R. §§ 0.457, 0.459.

blemished record in complying with the Commission's requirements regarding confidentiality. In a separate proceeding, EchoStar was recently found to have "failed in its duty of candor to the Commission" and admonished for its "casual" treatment of the Commission's confidentially requirements.[11] Additionally, in the current proceeding, the Applicants already have been admonished once by the Commission for their failure to comply with basic Commission rules governing the production of documents.[12]

Relevant Time Frames

The Applicants contradict the time frames set forth in the *Information Request*, stating that they will only provide information or projections regarding broadband services for January 1, 2000 through December 31, 2004. The *Information Request*, however, asks for information related to broadband for each of the last four years. Therefore, under the terms of the *Information Request*, the Applicants should provide responsive broadband information beginning on February 4, 1998, not two years later.[13]

The Applicants rationalize their unilateral decision to cut back on the scope of the *Information Request* by claiming that their time frame matches the one imposed by the DOJ. This claimed "justification," however, is totally irrelevant. As discussed above, the Commission's review of the proposed merger is not tied to DOJ's. The *Information Request* clearly asks for information for each of the last four years. The Applicants should not be permitted to dictate their own timeframe.

Relevant Service

The Applicants attempt to exclude "land-based broadband services (e.g. DSL) and sale of central office equipment to common carriers" from the scope of the *Information Request* by limiting the applicability of the capitalized terms "Relevant Services" and "Services." The only reference to "relevant services" in the *Information Request* is found in Section IV.A.7, which makes no distinction between land-based broadband and satellite based broadband services.[14] Nor is there any exclusion in the *Information Request* for the sale of equipment to common carriers.

---

[11] Memorandum Opinion and Order, *EchoStar Satellite Corporation v. Young Broadcasting, Inc., et. al*, 16 FCC Rcd., ¶ 12 (2001). When EchoStar withdrew its request for confidential protection of documents long after publicly disclosing their contents, the Commission found that EchoStar's actions constituted an "abuse of the Commission's processes." *Id.*

[12] *See Admonition Letter*.

[13] *See Information Request*, p. 2 (Section IV, Services Offered); p. 3 (Section VI, Prices); p. 4 (Section VII, Revenues,); and p. 4 (Section IX, Broadband Services).

[14] Nowhere in the *Information Request* is the capitalized term "Relevant Services" listed and defined. With respect to "Services" *the Information Request* references this term in various areas. It is first referenced in the header of Section IV (Services Offered); the header of Section VI(A) (Service Prices); Section VI(B)(a) (Service initiation or termination,); and Section VI(B)(d) (Service contracts). "Services" should be defined no differently than "relevant services" and should include terrestrial broadband services.

The Applicants provide no justification as to why land-based broadband services are any less relevant to the Commission's *Information Request* than satellite broadband services, nor do they explain why the sale of equipment to common carriers should be excluded. This is merely another attempt by the Applicants to unilaterally manipulate and limit the scope of inquiry.

Geographic Scope

The Applicants intend to limit their responses solely to operations within the United States. The *Information Request*, however, contained no such geographic limitation. Especially in light of the Applicants' recent claims regarding the feasibility of DBS service from foreign orbital slots, documents relating to their existing and proposed operations outside of the United States should be produced.[15]

Request For Analyses

The Applicants claim that to the extent they have been asked to produce analyses, assessments and considerations of plans, cost and other matters, they will produce only "final and draft plans, reports, etc., but not informal discussions and comments such as e-mails and notes."

This is another attempt by the Applicants to short-circuit the Commission's legitimate efforts to obtain relevant information. Informal discussions and comments such as e-mails and notes were not excluded under the terms of the *Information Request* -- and they may well be more revealing in the long run than formalized plans and final reports. By way of analogy, no court would ever allow its subpoena to be circumvented by a party that refused to produce relevant e-mails and notes on the grounds that they represented only "informal discussions and comments."

Document Review

The Applicants state that they will only review key documents collected from certain individuals specified in response to DOJ's requests under the HSR Act. Other than these select individuals and documents, the Applicants apparently do not plan to search their files and produce other responsive documents.

This is a major short-circuiting of the *Information Request*. The Applicants should not be permitted to avoid the production of documents relating to the Commission's public interest review simply because DOJ does not require them for its antitrust review. The Commission is entitled to review all information that it -- not DOJ, and certainly not the Applicants-- deems relevant to its public interest analysis.

---

[15] *See* Opposition to Petitions to Deny and Reply Comments, filed by Applicants, *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, p. 49 (February 25, 2002).

The Applicants' *March 5 Letter* is a transparent, eleventh-hour attempt to keep a wide range of documents hidden from the Commission and the public. The *Information Request* is reasonable, appropriate and necessary in order to ensure that the Applicants' proposed merger receives the full and open scrutiny that it so richly deserves. NRTC encourages the Commission to promptly reject the Applicants' unilateral "plan" to modify its explicit terms and conditions.

The Applicants should be admonished to comply fully with the *Information Request*. Further, the Applicants' latest apparent violation of the ex parte rules should be referred to the Office of General Counsel for further action, as the Commission indicated in its *Admonition Letter*.

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

Sincerely,

/s/ Jack Richards

Jack Richards

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Donald Abelson
James Bird
Catherine Crutcher Bohigian
Rosalee Chiara
Susan M. Eid
Barbara Esbin
W. Kenneth Ferree
Claudia Fox
Jennifer Gilsenan
Eloise Gore
Thomas Horan
Fern Jarmulnek
Julius Knapp
JoAnn Lucanik
Paul Margie
Jackie Ponti
Ellen Rafferty
David Sappington

Royce Dickens Sherlock
Donald Stockdale
Bryan Tramont
Thomas S. Tycz
Marcia Glauberman
Douglas W. Webbink
Qualex, Inc.
Pantelis Michalopoulos
Counsel for EchoStar Communications Corporation
Gary M. Epstein
Counsel for General Motors Corporation and Hughes Electronics