

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

In re Applications of

ECHOSTAR COMMUNICATIONS CORPORATION,
GENERAL MOTORS CORPORATION,
HUGHES ELECTRONICS CORPORATION,

Transferors,

and

ECHOSTAR COMMUNICATIONS CORPORATION,

Transferee,

For Authority to Transfer Control

To: The Commission

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) CS Docket No. 01-348
) File Nos. SAT-T/C-20011204-
) 00104 et seq. and SES-TC-
) 20011204-02261 et seq.
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PETITION TO DENY

Respectfully submitted,
THE WORD NETWORK

By: /s/ William D. Silva

William D. Silva

Law Offices of William D. Silva

5335 Wisconsin Ave., N.W.

Suite 400

Washington, D.C. 20015-2003

202-362-1711

January 25, 2002

corporation, with a new ownership structure, and the merged entity will be renamed EchoStar Communications Corporation (“New EchoStar”). The grant of these applications will result in the merger of the two DBS systems which serve 90% of those receiving satellite programming and the only facilities based DBS providers with full CONUS coverage. Substantial and material questions of fact exist which prevent the Commission from determining that the proposed transactions will serve the public interest and require that these applications be designated for hearing. In support, the following is shown:

1. The Word Network is a two year old, non-profit network providing 24 hours of non-commercial educational programming each day. The network provides national and regional ministries, gospel music, live special events, inspirational movies and educational interviews and talk shows. The Word Network is family friendly with a very large, loyal and devoted following. Its audience is primarily urban and African American. The Word Network is currently available to 10 million DirecTV homes, about 4 million cable homes and six million homes via over-the air television, including low power television stations. It is also part of the Armed Services Network seen by men and women in uniform in 165 countries. The Word Network is also carried in the countries of Nigeria, South Africa and a number of other African countries through an alliance partnership with a ministry in Nigeria. Despite repeated good faith efforts, EchoStar has refused to carry the Word Network. See Declaration of Kevin Adell, President of the Word Network. The Word Network has standing to participate in this matter as a programmer and on behalf of its many viewers who may be adversely affected if the Commission grants the captioned applications. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C.Cir. 1966); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470

(1940).

2. Before it can grant the subject applications, the Commission must make an affirmative finding that a grant will serve the public interest, convenience and necessity. Communications Act of 1934, as amended, 47 U.S.C. §§ 214, 309, and 310. In merger cases such as this, the Commission has stated that the public interest determination goes beyond the traditional antitrust analysis engaged in by the Department of Justice and the Federal Trade Commission and includes consideration of whether “the merger violates our rules, or would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy.” *Application of Tele-Communications, Inc. and AT&T Corp.*, 14 FCC Rcd 3160, 3169 (1999)(“*AT&T/TCP*”). See also, *Application of Nynex Corporation and Bell Atlantic Corporation*, 12 FCC Rcd 19985, 20008-9 (1997)(“*Bell Atlantic/Nynex*”). The Applicants have failed to address the impact of the merger on an important federal communications policy, the DBS set aside, and substantial and material questions exist, *inter alia*, as to whether the merger will undermine this policy and the objectives it is designed to achieve.

The DBS Set Aside

3. Section 25 of the 1992 Cable Act, provides that:

The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.

47 U.S.C. § 335(b)(1). The purpose of this set aside is to assure public access to diverse sources of information. As the Court stated in upholding the validity of this provision:

Section 25, then, represents nothing more than a new application of a well-settled government

policy of ensuring public access to noncommercial programming. This section achieves this purpose by requiring DBS providers to reserve a small portion of their channel capacity for such programs as a condition of their being allowed to use a scarce public commodity. The set-aside requirement of from four to seven percent of a provider's channel capacity is hardly onerous, especially in light of the instruction, in the Senate Report, that the FCC "consider the total channel capacity of DBS systems operators" so that it may "subject DBS systems with relatively large total channel capacity to a greater reservation requirement than systems with relatively less total capacity." S. Rep. No. 92, *supra*, at 92, reprinted in 1992 U.S.C.C.A.N. at 1225.

Time Warner Entertainment Co., L.P., v. FCC, 93 F.3d 957, 977 (D.C. Cir 1996), reh. denied, 105 F.3d 723 (D.C. Cir.1997). The premise of this legislation and the court's interpretation of the DBS set aside was that there would be a number of DBS systems; at least more than one. *Id.* The affect of the instant merger, if permitted, would be to create an effective monopoly with only one DBS operator, the New EchoStar, and this undermines the purpose of the set-aside provision and well-settled government policy.¹

Grant of the Application Will Disserve the Public Interest

4. The Applicants claim that a grant of the pending application will "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. With the spectrum that will be freed up by the

¹ As a result of this merger, 90 percent of the satellite television market will be concentrated in one company. See letter from The Honorable Max Baucus to FCC dated December 26, 2001. According to the Applicants, the combined entity will serve approximately 15 million subscribers. Declaration of Dr. Robert D. Willig, p. 27. ("Willig Declaration") In addition, the Commission found that DirecTV and EchoStar are among the ten largest providers of multichannel video programming service and that DBS represents 15.4 percent of the national MVPD market and was growing. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*, CS Docket No. 00-12, FCC 01-01 (rel. Jan. 8, 2001) p 7.

combination, New EchoStar can serve as an attractive outlet for independent programmers.”²

Consolidated Application for Authority to Transfer of Control, Summary, p. ii. The Applicants, as noted above, have failed to address the impact of this merger on the DBS set-aside *per se*, but they claim that, “[I]f anything, this merger may increase competition among program providers.” Willig Declaration, p. 27. The rationale is that there will be more channels available, since the two DBS competitors currently duplicate much of their programming, and without this duplication, there will presumably be more space available to those currently frozen out of carriage. However, this is not necessarily correct as it relates to the non-commercial educational programmers who are carried on the set-aside channels since there is a built in scarcity and the New EchoStar will be the sole gate keeper. Only those non-commercial educational programmers which the New EchoStar selects to carry will have access.

5. This is of concern to the Word Network based upon its past experience with EchoStar. As set forth in the attached Declarations of Kevin Adell, President of the Word Network, and Bishop Charles H. Ellis, III, the Word Network has repeatedly sought carriage on the EchoStar system for naught. It has gone to great lengths to meet all of EchoStar’s requirements, but has never been able to meet whatever criteria EchoStar unilaterally imposes on those it bestows the right to be carried on its set aside channels. A review of the programming EchoStar does carry raises questions as to whether it

²See however, amendment of December 18, 2001, in which the Applicants report that ECC has entered into an agreement with Vivendi Universal S.A. (“Vivendi”), a “content provider.” The deal with Vivendi, according to the Applicants will permit “the creation of an attractive outlet for new independent programming and additional voice diversity.” Amendment of December 18, 2001, p. 2.

is excluding programmers who direct their non-commercial educational programming at the African American community.

6. Fortunately, the Word Network has been able to obtain carriage on DirecTV without which it would be completely frozen out of the DBS market. If this merger is approved, a situation will be created similar to the one recently described by the court in ruling on the Commission's horizontal ownership limits in cable. Thus, the court stated:

The Commission is on solid ground in asserting authority to be sure that no single company could be in a position single-handedly to deal a programmer a death blow. Statutory authority flows plainly from the instruction that the Commission's regulations "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint action of operators of sufficient size, the flow of video programming from the video programmer to the consumer." 47 U.S.C. § 533(f)(2)(A)(emphasis added). Constitutional authority is equally plain. As the Supreme Court said in *Turner II*: "We have identified a corresponding 'government purpose of the highest order' in ensuring public access to 'a multiplicity of information sources.'" 520 U.S. at 190 (quoting *Turner I*, 512 U.S. at 663); see also *Time Warner Entertainment Co. v. Federal Communications Commission*, 93 F.3d 957, 969 (D.C. Cir. 1996). **If this interest in diversity is to mean anything in this context, the government must be able to ensure that a programmer have at least two conduits through which it can reach the number of viewers needed for viability -- independent of concerns over anticompetitive conduct.**

Time Warner Entertainment Co., L.P., v. FCC, 240 F.3d 1126, 1132 (D.C. Cir. 2001)(emphasis supplied). At least two conduits are also necessary to ensure that DBS programmers are not dealt such a "death blow." The alternative, to insure diversity, would be for the government to provide standards for the sole DBS operator to use in making programming decisions on the set-aside channels.

However, this runs counter to the legislative intent and to the statute itself. Thus, Section 335(b)(3) provides in pertinent part that, "The provider of direct broadcast satellite service shall not exercise editorial control over any video programming provided pursuant to the section." 47 U.S.C. §

335(b)(3). The existence of competition itself serves to ensure that no DBS operator can unfairly impede the flow of video programming on these set aside channels. Without competition, non-commercial educational programmers will be at the mercy of the sole gate keeper and promoting diversity, the government purpose and public policy served by the set aside, will be achieved only at the whim of the sole DBS carrier.

7. In conclusion, substantial and material questions of fact exist as to whether the proposed merger “violates ... [Commission] rules, or would otherwise frustrate ... [Commission] implementation or enforcement of the Communications Act and federal communications policy.” *Application of Tele-Communications, Inc. and AT&T Corp., supra.* Specifically, the grant of these applications will result in the merger of the two DBS systems which serve 90% of those receiving satellite programming and the only facilities based DBS providers with full CONUS coverage. The merged entity, New EchoStar, will be the sole gate keeper for non-commercial educational programming on the set-aside channels, an unhealthy situation in its own right, but particularly so in light of its predecessor’s record in excluding the Word Network. Accordingly, these applications must be designated for hearing on issues to determine the impact of the merger on non-commercial educational programmers and their ability to gain access to the set aside channels controlled by New EchoStar.

Respectfully submitted,
THE WORD NETWORK

By: /s/ William D. Silva
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Law Offices of William D. Silva
5335 Wisconsin Ave., N.W.
Suite 400
Washington, D.C. 20015-2003
202-362-1711

January 25, 2002

DECLARATION OF KEVIN ADELL

I, Kevin Adell, hereby declare under penalty of perjury as follows:

1. I am President of the Word Network.

2. The Word Network is a two year old, non-profit network providing 24 hours of non-commercial educational programming each day. The network provides national and regional ministries, gospel music, live special events, inspirational movies and educational interviews and talk shows. The Word Network is family friendly with a very large, loyal and devoted following. Its audience is primarily African American. The Word Network is currently available to 10 million DirecTV homes, about 4 million cable homes and six million homes via over-the-air television, including low power television stations. It is also part of the Armed Services Network seen by men and women in uniform in 165 countries. The Word Network is also carried in the countries of Nigeria, South Africa and a number of other African countries through an alliance partnership with a ministry in Nigeria.

3. The Word Network has tried many times over a two-year period, unsuccessfully, to gain carriage on the EchoStar satellite delivery system (also known as the Dish Network). In seeking carriage on EchoStar, the Word Network has followed every direction and every lead suggested by EchoStar. Most recently EchoStar recommended that the Word Network work with EchoStar to provide dishes and educational programming to outlets in communities that EchoStar serves. EchoStar said that we were one of the few networks that would make such a commitment. With the Word Network's involvement with NAMIC, The National Association of Minorities In Cable, we made a strong commitment to help schools and community centers provide computers to help alleviate some of the problems of the technical digital divide. We made the same kind of strong commitment to EchoStar, with no positive results.

4. I am enclosing copies of two rejection letters from EchoStar. I am also enclosing a letter from Bishop Charles H. Ellis, III, one of the ministers whose programs are carried by the Word Network describing his audience and the type of programs which are aired over the network. The Word Network has a policy that contributions may not be solicited during these programs.

5. It is my opinion that EchoStar is insensitive to the needs and desires of the African American Community and that this insensitivity is evidenced by its refusal to carry the Word Network or any comparable programming. The Word Network has been able to obtain carriage on DirecTV and has, therefore, not been frozen out of satellite carriage on the set-aside channels. However, if the pending applications seeking to permit the merger of these two companies are granted, non-commercial educational programmers such as the Word Network will be at the mercy of only one company in their efforts to obtain carriage. We are especially concerned that this new company will be EchoStar's successor.

1-24-02

Date


Kevin Adell



ECHO STAR COMMUNICATIONS CORPORATION

October 31, 2001

VIA FACSIMILE and US Mail
(248) 350-3422

Mr. Kevin Adell
President
The Word Network
20733 W. Ten Mile Road
Southfield, MI 48075

Dear Kevin:

EchoStar Satellite Corporation would like to thank The Word Network for applying to DISH Network as part of our public interest set-aside obligation.

After careful consideration and review of all the public interest programming applications, we regret to inform you that The Word Network has not been selected as a public interest programmer for purposes of EchoStar's 2002 set-aside obligations at this time.

Provided EchoStar is required to launch additional public interest channels the following year we welcome The Word Network to apply again. In that case, applications for 2003 will be sent to interested candidates in summer 2002.

Thank you again for your interest in DISH Network.

Sincerely,

A handwritten signature in black ink, appearing to read "Angela Borrillo". The signature is fluid and cursive, written over the printed name.

Angela Borrillo
Director, Programming



ECHO STAR COMMUNICATIONS CORPORATION

VIA FACSIMILE AND US MAIL

October 17, 2000

Mr. Kevin Adell
President
The WORD Network
20733 W. 10 Mile Rd.
Southfield, MI 48075

Dear Kevin,

EchoStar Satellite Corporation would like to thank The WORD Network for applying to DISH Network for carriage on our public interest platform. Due to the limited amount of set-aside channels available, we cannot offer all of our applicants carriage at this time. Listed below are the newly selected applicants, and their designated orbital location.

119°

Rural Broadcasting Network

110°

California Community Colleges Satellite Network
International Leadership University Vision

61.5°

Alternative Education Network
Panhandle Area Educational Consortium
South Asian TV

We regret to inform you that The WORD Network has not been selected at this time. However, The WORD Network is one of several applicants that have been placed on the alternate list, and will be contacted should any channels become available prior to the 2001 public interest application process.

Please feel free to contact Cindy Johnson (303) 723-2680 or me with questions or inquiries.

Thank you again, we look forward to talking with you in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Angela Borrillo". The signature is fluid and cursive, written over the typed name.

Angela Borrillo
Director of Programming
303-723-1905 (T)
303-723-1999 (F)

Greater Grace Temple of the Apostolic Faith, Inc.

19190 Schaefer Hwy. • Detroit, Michigan 48235 • Business Office 313 342 2300 • Fax 313 342 0280

DR. CHARLES H. ELLIS, III
Pastor

January 15, 2002

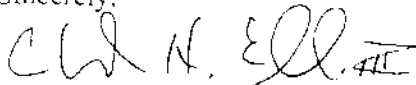
Michael Powell, Chairman
Federal Communications Commission
Washington, DC 20554

Dear Chairman Powell:

I was disappointed to hear that *The Word Network* has applied for carriage repeatedly on EchoStar and have been turned down. As senior Pastor of Greater Grace Temple, our church currently has 10,000 members and our mission is to reach out to individuals not only in our congregation but also nationally. Currently airing on *The Word Network* gives us an opportunity to touch millions. Our ministry is a teaching ministry that reaches all ages, including homebound Americans that can't come to church services. We have been satisfied with results of our carriage on *The Word Network*. We are comfortable with *The Word Network* because it is commercial free and carries relevant PSAs that relate to our audience. Also, our ministry does not solicit funds, but rather give people an opportunity to receive tapes/books of our ministry to help in their daily lives.

The Word Network has taken our same mission to reach out to the African American Community with religious programming. However, it appears that African American programming and religion is purposely (and unfairly) being excluded from the EchoStar line-up. African Americans represent the second largest ethnic group in the United States. Nearly 13% of the nation's population represent this segment. EchoStar currently doesn't carry enough programming on their basic line-up to meet the needs of African Americans, especially in the religious category. We appeal to you to take a look at this situation.

Sincerely,



Bishop Charles H. Ellis, III
Senior Pastor

CHE3/jb



THE VISION SHALL COME TO PASS

BOARD OF DIRECTORS: Charles H. Ellis, III, Chairman • Mark E. H. Hays, Secretary • Willie King, Treasurer
Lynette E. Green • Raymond D. Williams • James H. Williams • James H. Williams • James H. Williams

CERTIFICATE OF SERVICE

I, William D. Silva, hereby certify that true and correct copies of the foregoing Petition to Deny were served on the following individuals by first class mail, postage prepaid on this 25th day of January 2002 :

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In addition, copies were filed electronically on the following persons on this 25th day of January 2002 at the e-mail addresses indicated below:

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/s/ William D. Silva
William D. Silva