Law and Communications Policy Seminar
at

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April 17, 2002

Via Electronic Filing

William F. Caton
Secretary
Federal Communications Commission
445 Twelfth Street, SW TW-A325
Washington, DC, 20554

Re: *Ex Parte* Notice, CS Docket 01-348

Dear Mr. Caton:

In accordance with §1.1206 of the Commission's rules, we hereby submit this letter to report that on April 16, 2002, Anna Sumner, Morgan Streetman, Gregory Manter, Sara Lester and Aaron Futch of the Law and Communications Policy Seminar at Duke Law ("the Seminar students") and Professor William J. Freedman, supervisor to the Seminar students, met with:

Susan Eid (Legal Advisor to Chairman Powell)
Jordan Goldstein (Senior Legal Advisor to Commissioner Copps)
Bryan Tramont (Senior Legal Advisor to Commissioner Abernathy)

At the meeting, the Seminar students discussed their views on the proposed merger between EchoStar and Hughes Electronics Corporation ("the Applicants"). The Seminar students explained that the Applicants have not met their burden of demonstrating that the merger, on balance, is in the public interest. In order to approve the merger, the Commission must be convinced that public benefits will flow from the merger and overcome any presumption of harm arising from increased ownership concentration. The Seminar students explained that, because the merger would establish a virtual monopoly in the DBS market and EchoStar has a track record of disingenuousness behavior and repeated violations of the Communications Act and FCC Rules, the public interest weighs against a conditioned approval of the merger. The Seminar students emphasized that conditions would likely prove to be an ineffective mechanism for safeguarding the public interest. According to the Seminar students, the public interest necessitates that the merger be blocked.

Respectfully submitted,

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THE LAW & COMMUNICATIONS POLICY SEMINAR AT DUKE UNIVERSITY SCHOOL OF LAW'S OPPOSITION TO THE ECHOSTAR/DIRECTV MERGER

The Law and Communications Policy Seminar at Duke University School of Law seeks to examine and apply the "public interest, convenience, and necessity" language appearing in the Communications Act and, using open Commission dockets, to apply the Act's tenets and Commission's jurisprudence to pending matters. The seminar concludes the merger application as proposed, rather than as altered by non-binding post-application statements of the applicants, failed to demonstrate the merger is necessary to or on balance serves, the public interest.

- **The proposed merger would result in a Commission-created monopoly or permanent duopoly that harms consumers.**
  - Authorizing license transfers that create a monopoly for much of America contravenes both the pro-competition and reduced regulatory agenda of the 96' Act. Monopolies don't compete and in the DBS space would require new and extensive regulations in the form of merger conditions.
  - Regardless of whether the relevant market is DBS providers or MVPD providers, neither monopoly nor a duopoly represents an efficient allocation of market power.
  - No new technology has the regulatory approval nor investment backing and roll-out capability to create competition in areas with non-digital cable or no cable at all.
  - A monopoly is not necessary to standardize CPE.

- **Spectrum efficiency concerns do not necessitate a merger to monopoly.**
  - The Commission currently has no general spectrum policy.
  - A piecemeal spectrum policy does not promote easy and across-the-board enforcement.
  - Spectrum policy must be balanced against the huge downside of a monopoly.
  - A monopoly is not necessary to avoid program duplication.
  - A monopoly is not necessary to reach all DMAs.
  - A monopoly is not the missing ingredient for stimulating the satellite delivered broadband.

- **The public interest, as currently applied, will not be served by this merger.**
  - The current view of the public interest standard suggests that the public interest should be viewed through the lens of the market.
  - According to the market model, the Commission should not intervene unless market forces are insufficient to satisfy the public interest.
  - Given that in some areas, New Echostar would have no competitors – neither DBS nor cable – it is impossible that the public interest could be served by the creation of a monopolistic market. By not respecting the market, the merger contravenes the policies of the Communications Act of 1996.
  - The Commission should therefore intervene in the merger to ensure that the public interest standard is met.

- **Conditions are ineffective means to cure the harms.**
  - A national pricing scheme could not be applied fairly to all consumers.
  - The number of DBS markets could be expanded without the merger.
  - Echostar's use of secondary satellites for minority and public interest programming should be, and has been, addressed by the Commission regardless of whether the license transfer is approved or not.
  - Monitoring and enforcing conditions is difficult, and presses the Commission into a policing role.

- **Echostar's past record as a licensee suggests future misconduct.**
  - Echostar and DirecTV have been able to stockpile close to the entire DBS spectrum, making it nearly impossible for any new players to enter the DBS market.
  - Echostar's recent deal with Vivendi Universal suggests that Echostar is willing to engage in the kind of vertical integration it claimed it would avoid.
  - Echostar has conveniently changed its view of the "relevant market" in order to best defend its position in this merger.
  - Echostar has continually exhibited a lack of candor in its dealings with the Commission.
  - Echostar has recently been sanctioned by the Commission for violating the Communications Act and the Commission's rules in a manner that deprived citizens of access to local broadcast news.
  - Echostar has recently been admonished by the Commission for failing to comply with discovery deadlines and observe procedural due process minima in its ex parte notice obligations.