August 22, 2002

ELECTRONICALLY FILED

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Consolidated Application of Echostar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation for Authority to Transfer Control, CS Docket No. 01-348
NRTC Request for Additional Disclosure

Dear Ms. Dortch:

On August 15, 2002, the National Rural Telecommunications Cooperative ("NRTC") filed a letter seeking permission to -- as NRTC puts it -- "mak[e] available for review by the Department of Justice (DOJ) documents that have been submitted to the Commission" confidentially by the Applicants. *See* Letter from Jack Richards, Counsel for NRTC, to Marlene H. Dortch (Aug. 15, 2002). For the reasons set forth below, the Applicants oppose NRTC's request.

At the outset, the Applicants note that NRTC misrepresents the issue in casting its request as one for permission to make documents "available for review" by DOJ. The documents in question *are* available to the DOJ already: the Applicants believe that all of the documents that have been produced to the Commission under the protective order have also been submitted to DOJ under the Hart-Scott-Rodino Act. Rather, the issue truly posed by the request is whether NRTC should be allowed to insinuate itself into the HSR Act process and to use these confidential documents in its lobbying of DOJ.

If granted, this request would impermissibly convert the confidential HSR Act merger review process into a lopsided "semi-APA" type process: On the one hand, third-party opponents of the merger would be able to use documents filed confidentially with the Commission by the applicants in meetings with the DOJ, but on the other hand, because those presentations would be non-public, the applicants themselves would have no opportunity to rebut the merger opponents' arguments and interpretation of the documents.

Both of the protective orders issued by the Commission in this proceeding expressly provide that protective order materials may be used only for purposes of this proceeding and expressly prohibit the use of such materials in any other proceeding or for any other purpose. Paragraph 3 of the First Protective Order states:

> Persons obtaining access to Confidential Information (including Stamped Confidential Documents (as hereinafter defined)) under

> this Protective Order shall use the information solely for preparation and the conduct of this proceeding as delimited in this paragraph and paragraphs 5, 10, and 11, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings.

In the Matter of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Order Adopting Protective Order, DA 02-27 at Appendix A, Paragraph 3 (rel. Jan. 9, 2002) (emphasis added). Paragraph 3 of the Second Protective Order is identical except for its reference to "Highly Confidential" rather than "Confidential" materials. *See In the Matter of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation,* Order Adopting Second Protective Order, DA 02-964 at Appendix A, Paragraph 3 (rel. April 25, 2002). Both orders thus explicitly limit the use of confidential materials -- whether they are produced by the Applicants or by other parties -- to developing and presenting submissions designed to assist the Commission in reaching its decision on the application under the Communications Act.

NRTC claims that the protective orders permit the sharing of protective order materials with DOJ because the Commission's review of this transaction under the Communications Act is part of the same "proceeding" as DOJ's investigation under the HSR Act. By doing so, it seeks to conflate the specific proceeding before the Commission -- which is clearly delimited in the protective orders themselves by reference to CS Docket No. 01-348 and the Communications Act applications initiating that docket -- with DOJ's review under the HSR Act based on Applicants' Premerger Notification and Report Forms. However, the Commission's review of the application here is a distinct "agency proceeding" under the Administrative Procedure Act, *see* 5 U.S.C. § 551(12), whereas DOJ's review is an entirely different process subject to its own unique statutory procedures. NRTC offers absolutely no basis for concluding that in issuing the protective orders here the Commission somehow decided to ignore that distinction and its own prior decisions pointing out that Commission review of mergers is separate and distinct from any HSR Act process.[1]

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[1] The Commission has repeatedly emphasized that its Communication Act review of mergers is distinct and separate from the antitrust merger reviews conducted by DOJ and the Federal Trade Commission. *See, e.g., In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, 14 FCC Rcd. 10816, 10832 (1999) ("The Commission has emphasized that its review of transactions is distinct from and broader than that conducted by the Department of Justice or the Federal Trade Commission); *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd. 18025, 18033 (1998) ("Pursuant to our authority under the Communications Act, we are required to make an

The only reasoning NRTC offers for its expansive concept of "this proceeding" is that the Communications Act proceeding involves the same merger transaction subject to the HSR Act and that "DOJ is reviewing the same subject matter, the same facts and the same parties as the Commission." Those arguments only serve to underscore the absurdity of NRTC's claim. If all that is necessary to permit materials subject to a Commission protective order to be used before other agencies is that the same transaction, subject matter, facts and parties be involved, there is nothing that would prevent NRTC from using the Applicants' confidential materials before many agencies in addition to DOJ, including state commissions, or even before courts adjudicating NRTC's disputes with DIRECTV. What is clearly intended as a safeguard against the disclosure of commercially sensitive documents and data that applicants provide to the Commission for its review under the Communications Act would become no safeguard at all.

Nor is giving NRTC the ability to discuss protective order materials with DOJ in any way necessary to DOJ's own review of this transaction. As noted above, DOJ already has all of those materials as part of its HSR investigation, and will evaluate them thoroughly in its antitrust analysis. While private parties such as NRTC may certainly present their views to DOJ and argue for or against a transaction that is being investigated under the HSR Act, they have no right to use confidential materials produced to another agency under protective order in doing so.

Indeed, because HSR Act materials are confidential as a matter of law, those who want to lobby against a transaction before DOJ cannot obtain from the DOJ access to confidential materials produced by the parties to the transaction. What NRTC is seeking here is a right to have more ammunition in its attempt to lobby DOJ's HSR investigation than any other private party would have in any other such investigation. Any such use of the protective orders as a back door into confidential materials the parties have produced under the HSR Act would be a clear abuse of agency process.

Moreover, because the HSR Act process is a confidential one, NRTC would be able to make a completely *ex parte* presentation of protective order materials to DOJ without providing any description or disclosure to the Commission, the Applicants or other parties in this proceeding. That would fall far short of the *ex parte* notice required following any similar presentation to the Commission, and would leave the Applicants with no opportunity to evaluate whatever NRTC might disclose to DOJ and determine what to say in rebuttal. Such an approach would allow NRTC to import into the confidential HSR Act process aspects of the Commission's on-the-record proceeding that will benefit NRTC without the corresponding obligations designed

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independent determination whether a proposed merger will serve the public interest. Moreover, our public interest evaluation is distinct from, and broader than, the competitive analyses conducted by the antitrust authorities."). Where the Commission wanted to make special provision to allow use of documents submitted under the protective order in the HSR process, it knew how to say so. *See, e.g., In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, 14 FCC Rcd. 91, 96 (1998).

to ensure that there will be a level field for the Applicants. The prejudice to the Applicants from such lopsidedness is patent.

For all of these reasons, NRTC should not be permitted to disclose Applicants' protective order materials to, or discuss them with, DOJ, whether by expanding the interpretation of "this proceeding" to the point it is meaningless or by obtaining special consent under paragraph 9 of the orders. NRTC will have a full opportunity to use Applicants' protective order materials to present its case to the Commission, and can lobby DOJ's separate investigation on the same basis as any other private party that hopes to block a transaction. However, it should not be given the special rights sought by its August 15 request.

Respectfully submitted,

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cc: See Attached Certificate of Service

CERTIFICATE OF SERVICE

I, Marc A. Paul, hereby certify that on this 22nd day of August, 2002, a true and correct copy of the foregoing correspondence in the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation CS Docket No. 01-348 was submitted by electronic delivery to the Federal Communications Commission and served by first-class mail-postage pre-paid and/or electronic mail upon the following:

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