

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

RE: EchoStar Communications Corporation, General Motors Corporation,  
and Hughes Electronics Corporation (Docket 01-348)

February 4, 2002

**COMMENTS OF THE :**

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The Competitive Enterprise Institute is a non-profit public policy organization dedicated to the principles of free enterprise and limited government. Since its beginning in 1984, CEI has championed free market solutions to public policy problems.

The proposed merger of EchoStar and DIRECTV should be approved because it is precisely such a free market solution to the continuing problems of television competition and broadband deployment.

Indeed, it is impossible to think of a serious argument against the merger. The combined company will have a 17 percent market share versus the 80 percent share of cable. To argue that satellite transmission is a separate market is ridiculous, considering that the two modes are competing strongly against each other for the same customers, and offering similar products.

The only viewers who might be disadvantaged are rural customers of satellites who do not have access to cable, and this problem has been resolved by commitments to give these customers the benefits of the prices created by competition in other parts of the nation.

In addition, were the FCC or the Department of Justice to disapprove the merger, there is no guarantee that both companies, or either, would remain viable. The chances are excellent that the government would succeed only in reducing competition. This possibility is exacerbated by the looming presence of Internet 2, which promises speeds of 2.5 Gbs or more over fiber optic cable, and which is developing technology needed to multicast to multiple recipients without needing a separate bit stream from the origin to each end point. If the satellite companies do not see a way to recover their investment during a fairly limited window of opportunity, then they might well decide that the possibility of Internet 2 as a competitor starting in the latter part of the present decade makes further investment too risky.

A broad issue of antitrust policy also needs to be addressed. Antitrust analysis has ceased to be based on consumer welfare. While the words “consumer benefit” are mouthed constantly by those asserting that some action should be blocked, for the most part they dissimulate. The energy in the system comes from competitors who fear that they will be disadvantaged by improvements in efficiency, and that they will lose their ability to reap the advantages of their current market power. That is certainly the case here. It is not a *decrease* in competition that most opponents of the merger fear, but an *increase*.

As the Supreme Court said in *Brunswick*:

The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for ‘the protection of competition not competitors’ [citation omitted]. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.\*

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\* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Equally serious is the increasing domination of the system by what Professor Robert Reich in 1980 called, presciently, “The Antitrust Industry.”\*\* The blunt fact is that lawyers and economic consultants are harvesting rich acreages of \$500+ hourly fees. As a result, they exert constant pressure on the system to become more intrusive, more complex, and more unpredictable, and thus more dependent on this priestly class of experts.

The interests of the antitrust industry are not those of the public, of industry, or of the economy as a whole. These need predictability, consistency, simplicity, and good common sense.

Consequently, it is important not only that you approve the merger, but that you approve it quickly, and that you do so without elaborate “industrial policy” type analysis. The Commission really needs to send a message to competitors and to the antitrust industry that a new era has arrived, and that the outcomes achieved by the free market will be overturned only upon a very convincing showing.

In this matter, your opinion should be one sentence, reciting the facts about market shares and the degree of competition. That would send the right message.

SUBMITTED BY THE  
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\*\* The Antitrust Industry,” 68 *Georgetown Law Journal* 1053 (1980). See also James V. DeLong, “The New Trustbusters,” *Reason* (March 1999), <[www.reason.com/9903/fe.jd.the.shtml](http://www.reason.com/9903/fe.jd.the.shtml)>.