April 14, 2020

VIA ELECTRONIC FILING

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

Re: Mitigating Orbital Debris in the New Space Age, IB Docket No. 18-313

Dear Ms. Dortch:

AT&T Services, Inc. on behalf of DIRECTV Enterprises, LLC and its other affiliates ("AT&T"); EchoStar Satellite Services, LLC; Hughes Network Systems, LLC; Intelsat License LLC; and SES Americom, Inc. (collectively, "the U.S. GSO Operators") submit this ex parte to highlight their concerns with respect to the indemnification requirement contemplated in the Mitigating Orbital Debris in the New Space Age draft order ("Draft Order").[1] The U.S. GSO Operators recommend expanding the Further Notice of Proposed Rulemaking ("FNPRM") proposed in the Draft Order to include a more detailed analysis regarding the implications and application of an indemnification provision, as well as adding several specific questions about the post-disposal bond addressed in the draft FNPRM.

As a result of considerable experience as publicly-traded companies in the commercial space industry, the U.S. GSO Operators have concerns regarding the breadth of the Draft Order's indemnification requirement and the disproportionate ramifications it will likely have on U.S. licensees. The Draft Order's new indemnification requirement provides that, at the application stage, a U.S. licensee must certify that they will indemnify the U.S. government against all costs associated with a claim brought under international law that stems from that particular spacecraft.[2] The ambiguity and boundlessness of this provision is stunning. As written, the indemnification provision would force prospective and current U.S. licensees to accept unlimited liability for their spacecraft—even prior to construction—regardless of fault. Further, this burden would only be borne by non-U.S.-licensees if, after a case-by-case review of a market access application, the Federal Communications Commission ("Commission" or "FCC") deems it necessary.[3] This inequity has the potential to put U.S. licensees at a staggering competitive disadvantage vis-à-vis their foreign counterparts.

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[1] *Mitigating Orbital Debris in the New Space Age*, Draft Report and Order and Further Notice of Proposed Rulemaking, FCC-CIRC2004-03 (rel. Apr. 2, 2020) ("Draft Order").
[2] *Id.* at ¶ 146.
[3] *Id.* at ¶ 162.

Moreover, the Draft Order's provision raises a number of concerns, leaving many questions unanswered. For example:

- The Draft Order does not cite any statutory authority for requiring indemnification; stating only that imposing this obligation "strengthens the incentives of applicants to mitigate risks."[4]
- The Draft Order does not identify any instance in which the government was exposed to liability as a result of an FCC-authorized satellite.[5]
- The Draft Order does not evaluate the potential impact of imposing an unlimited financial indemnity condition on only one class of licensees (domestic), such as the likelihood that entities respond by seeking licenses from foreign administrations to the detriment of the U.S. space industry.
- The Draft Order provides only limited guidance as to how or when the rule may be applied in "unusual circumstances" on a "case-by-case basis" to market access requests of foreign satellite operators.[6]
- The Draft Order does not contemplate how or whether companies can plan for unlimited liability.

As the record in response to the original notice is also devoid of any support for the adoption of an indemnification requirement, the U.S. GSO Operators strongly urge the Commission to, at a minimum, ask additional questions about the implications and application of the indemnification provision as part of the FNPRM. These questions should include:

- Would the adoption of an indemnity license condition impose new liability on U.S. space station licensees? Contrarily, based on existing rights of action available to the U.S. government, can an indemnification condition be considered merely a procedural formality? If so, what civil rights of action would this fall under? Additionally, if simply procedural in nature, does the availability of other procedural mechanisms obviate the need for this new FCC-imposed indemnification obligation?
- What economic and administrative burdens would a U.S. indemnification condition impose on U.S. entities, specifically those that are publicly traded?
- If adopted, what "standardized" language would be appropriate for inclusion in U.S. license applications? Should such language be subject to public comment prior to adoption?
- Should satellites in orbit or under construction as of November 15, 2018 be grandfathered, given that an operator's decision to launch and operate as a U.S. licensee

[4] *Id*. at ¶ 150.
[5] *Id*. at ¶ 148.
[6] *Id*. at ¶ 162.

was taken prior to receiving notice of the possibility of an indemnification condition associated with its license? Alternatively, should a later grandfather date be adopted?

- Should there be caps on an operator's potential liability (both financial and temporal) under the proposed indemnification provision, and if so, what should they be?
- If liability is caused through no fault of the licensee, are they still responsible for indemnifying the United States under the Outer Space Treaty or Liability Convention? Who would make that determination and under what standard? Would fault and no-fault expose operators to different standards of liability?
- Would the imposition of an unlimited indemnification requirement on U.S. licensees make it more or less likely that the United States would vigorously defend against a claim brought under the Outer Space Treaty or Liability Convention?

Given the considerable number of open questions regarding the indemnification requirement and the significant burden it could have on U.S. licensees, the FCC should delay consideration of the requirement as drafted, until more thorough consideration can be given to these critical outstanding issues as part of an FNPRM.

The Draft Order also proposes to adopt another new requirement in an FNPRM—a post-mission disposal bond—that would impose significant costs (up to $100 million) on U.S.-licensed satellite operators. This proposal lacks any factual support to demonstrate that there is a problem with post-mission disposal that is not already resolved through the Commission's existing authority to levy fines. The U.S. GSO Operators therefore suggest the Commission include several additional questions in the FNPRM that are essential to having a full and fair understanding of the proposed new bond requirement. These questions include:

- Are there other approaches than a bond that should be considered (e.g., corporate guarantee) and, if so, what are they? What are there pros and cons?
- What are the costs/benefits of this approach?
- What is the true cost of such a bond to a company and how will this impact a company's licensing decisions?
- What happens to the bond if there is an anomaly or if the planned disposal approach has to change for reasons out of the operator's control?
- What are other countries doing and would another method be more appropriate?
- What could the impact of this requirement be on encouraging U.S. licensing of satellite systems?
- If there is no bond for Market Access recipients, how will U.S.-licensed operators be impacted? Will there be any?
- The FCC's past experience with bonds involves a much shorter time frame between licensing and launch; here the bond would be in place for 15+ years. Does the timeframe of the proposed bond raise additional issues that the Commission should consider?

- What are the requirements should ownership of the satellite/constellation/license change over the life of the spacecraft?
- If this requirement applies to both Market Access and U.S.-licensed systems, will the availability of satellite services in the United States? Could there be a quantifiable impact on U.S. innovation from such an approach?
- Is there supporting evidence to justify doubling the bond for extending a GSO satellite's license beyond 15 years? Similarly, is there evidence to support significant increases for each year beyond Year 20?

As the U.S. GSO Operators note above, there are several outstanding and deeply concerning issues that remain with the adoption of indemnification certifications and post-mission disposal bonds. The U.S. GSO Operators strongly urge the Commission to expand the breadth of the FNRPM to include at least the questions listed in this ex parte letter regarding both the indemnification and post-mission bond issues to ensure a more fulsome discussion of the potential ramifications for U.S. licensees and the U.S. space industry writ large.

Respectfully Submitted,

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