

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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Petition for Rulemaking To Amend
Eligibility Requirements in Part 78
Regarding 12 GHz Cable
Television Relay Service

CS Docket No. 99-250; RM-9257

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby files its comments in response to the above-captioned Notice of Proposed Rulemaking ("NPRM"), released on July 14, 1999 by the Commission. EchoStar is a Multi-Channel Video Programming Distributor ("MVPD") providing Direct Broadcast Satellite service to more than 2.6 million subscribers throughout the United States. To provide that service, EchoStar uses the 12.2-12.7 GHz Broadcasting-Satellite Service ("DBS") band. EchoStar or its predecessors has acquired two of its licenses in that band by paying more than \$700 million at a Commission auction. This proceeding concerns that 12.7-13.2 GHz band – the 500 MHz of spectrum immediately above the DBS band. The Commission seeks comment on opening up this band, currently allocated for Cable Television Relay ("CARS") and other services, for use by all MVPD providers.¹ EchoStar welcomes new entry into the MVPD market and applauds the Commission's proposal.

¹ See NPRM at ¶ 4 ("we broaden this Notice to include consideration of the expanded use of the 12 GHz CARS band by other MVPDs. One of the Commission's most important goals is to promote and facilitate competition in the video distribution market, and, therefore, we seek comment on whether other types of MVPDs could use the CARS band to compete more effectively with cable systems and the other MVPDs that are currently eligible to use the CARS band."). See *id.* at ¶ 15.

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The NPRM proposes to extend eligibility for the CARS band to all MVPDs regardless of technology of delivery, therefore including satellite providers such as EchoStar.² Indeed, the NPRM specifically states that MVPDs include providers of “direct broadcast satellite service.”³ Inclusion of all MVPDs would also appear to be consistent with the principle articulated in the NPRM that “use of the microwave radio spectrum should be governed by type of use rather than type of licensee.”⁴ EchoStar is particularly interested in this spectrum, as it is adjacent to the current DBS band and may be used to complement its existing offering. Since the band is currently not allocated to satellite downlinks, the Commission’s proposal may require a new allocation. In structuring the licensing process to implement its proposal, the Commission should also take into account the need of satellite MVPDs for nationwide licensing.

The band is currently available for point to multipoint service to a number of identified receive locations, but not for ubiquitous point-to-multipoint operations.⁵ While the NPRM does not currently propose lifting these restrictions on use of the CARS band,⁶ it also correctly identifies the phenomenon of increasing use of fiber optic and migration of cable operators from the band.⁷ EchoStar submits that the Commission should reassess these

² The Commission specifically is considering expanding eligibility for the band to MVPDs that provide video programming as their dominant service, and offers the example of an MVPD that offers 60 channels of video programming and 2 channels of ancillary services. *See* NPRM at ¶ 15.

³ *See* NPRM at ¶ 1, n. 1.

⁴ *See* NPRM at ¶ 15.

⁵ *See* NPRM at ¶ 2 and n. 8.

⁶ *See* NPRM at ¶ 5.

⁷ *See* NPRM at ¶ 18.

restrictions in light of the increasing availability of the CARS band. The lifting of the restriction on ubiquitous service would also be consistent with the principle that auction winners and the marketplace should be given maximum flexibility in determining the best use of a frequency band.

EchoStar also notes that ubiquitous satellite and terrestrial services cannot coexist in the same spectrum. This means that, while all MVPDs would be eligible for new licenses in the 12.7-13.2 GHz band, the Commission should award exclusive licenses, consistent with the Commission's invariable practice for auctionable services, and the spectrum should be used by the bidder who values it the most, with appropriate provisions for grandfathering existing operations. The Commission can also consider band segmentation possibilities, with a portion of the spectrum allocated to terrestrial MVPD use, and another portion allocated to satellite use.

Moreover, the Commission should consider this band as yet another possible home for the service planned by Northpoint Technology. In a pending rulemaking proceeding,⁸ the Commission is evaluating Northpoint's request that it be given access to the DBS band. As EchoStar has explained in that proceeding, such a request is an invitation for the Commission to undo a very wise conclusion that it reached when it first allocated the band for DBS services – that the ubiquitous high-power DBS service cannot share the same spectrum with terrestrial services. That conclusion, and the Commission's subsequent decision to relocate microwave services from the 12.2-12.7 GHz band, have blossomed into a gift for consumers and one of the

⁸ See ET Docket No. 98-206, Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range.

Commission's success stories – the emergence of DBS as a viable alternative to cable television. Indeed, DBS companies have been asked to pay, and have paid, hundreds of millions of dollars for the right to uninhibited use of the spectrum.

There is ample other spectrum (including the MMDS and LMDS bands) that can offer Northpoint a chance to prove its technology and to compete in the MVPD market without at the same time threatening to undermine the integrity of the DBS service and infringing the rights of DBS providers to interference-free use of the spectrum. Of course, Northpoint and all other MVPD providers should be subject to the same licensing process for use of any spectrum, including, where appropriate, auctions. Competitive parity in the MVPD markets requires access to the spectrum *on equal terms* for all MVPD providers. EchoStar does not believe that auctions are appropriate in all circumstances. On the other hand, where the Communications Act requires

resolution of mutual exclusivity by auctions, the Commission should enforce that requirement.

As DBS companies have bid and paid hundreds of millions of dollars for licenses in the 12.2-12.7 GHz band, access to this new spectrum for MVPD use should also be subject to competitive bidding, without exceptions for any MVPD provider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pantelis Michalopoulos, hereby declare that the foregoing pleading was sent this 16th day of August, 1999 by messenger to the following:

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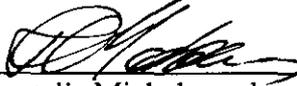
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