

EchoStar's *Extension Request* is nothing more than its latest gambit to further its Merger prospects. This type of disingenuous behavior has become EchoStar's trademark, and it should not be countenanced further by the Commission. The Commission should revoke EchoStar's Ka-band license and award it to a new licensee.

**Steven T. Berman, Senior Vice President
Business Affairs and General Counsel**

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COOPERATIVE
2121 Cooperative Way, Suite 500
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June 17, 2002

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In The Matter Of

VisionStar Incorporated

**Application For Modification of
Authority To Construct, Launch
And Operate A Ka-band Satellite
System In The Fixed Satellite
Service**

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) **SAT-MOD-20020430-00075**
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To: The Commission

AFFIDAVIT OF STEVEN T. BERMAN

Steven T. Berman, having first been duly sworn, does hereby attest and affirm as follows:

1. I am the Senior Vice President, Business Affairs and General Counsel for the National Rural Telecommunications Cooperative (NRTC).
2. I am familiar with the above captioned application for modification of VisionStar Incorporated (VisionStar) to extend its construction and launch and operation milestones.
3. I further declare that NRTC is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity.
4. I have personal knowledge of the assertions of fact presented in the foregoing Petition to Deny of NRTC and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on 06/17/02.

FURTHER AFFIANT SAYETH NOT.



Steven T. Berman
Senior Vice President, Business Affairs
and General Counsel
NATIONAL RURAL TELECOMMUNICATIONS
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US OFFICE PRODUCTS

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
The Meaning of National Pricing	<p>“We offer nationwide pricing today and we’re willing to commit to this going forward so that rural areas will get the advantages of competitive prices occurring in urban areas.”</p> <p>-<i>Ergen House Judiciary Testimony</i>, Dec. 4, 2001 p. 13.</p>	<p>“The ability to offer local promotions for installation and equipment will not undermine the effectiveness of national pricing as a constraint.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 69.</p>
Vertical Integration	<p>“Unlike most large cable operators, [EchoStar] has no ownership stake in any programming producer, and the Applicants do not intend to pursue a strategy of vertical integration with programmers post-Merger.”</p> <p>-<i>Application</i>, Dec. 3, 2001, p. 6.</p>	<p>“The Applicants hereby advise the Commission that on December 14, 2001, [EchoStar Communications Corporation] signed definitive agreements relating to a transaction with Vivendi Universal, S.A . . . Under the Agreement, Vivendi will make a \$1.5 billion investment in [EchoStar Communications Corporation] . . . As part of the transaction [EchoStar Communications Corporation] has also agreed to carry 5 new Vivendi channels.”</p> <p>-<i>Vivendi Letter</i>, Dec. 18, 2001.¹⁸</p> <p>“We’re not opposed to taking a minority interest in a content provider on certain occasions.”</p> <p>-Charlie Ergen, <i>EchoStar Investment Call</i>, March 4, 2002.</p>
Favorable Programming Deals	<p>“Because of their relatively small market shares, EchoStar and DIRECTV have not enjoyed the market position necessary to obtain favorable programming deals available to cable.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 125.</p>	<p>“[W]e have I think historically always been able to reach agreement with the particular programmers to something we think is fair for our consumers, and at a price that we think is fair.”</p> <p>-Charlie Ergen, <i>EchoStar Investment Call</i>, March 4, 2002.</p>
Entry Barriers to the DBS Market	<p>“There are significant entry barriers to the DBS and/or High Power DBS market.”</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>“[O]ther [satellite] companies have ample opportunity to use satellite spectrum and orbital locations . . . to introduce additional competition in the MVPD market.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 49.</p>

¹⁸ Ex Parte Notice, Submitted by Counsel for General Motors Corporation and Hughes Electronics Corporation and Counsel for EchoStar Communications Corporation, Docket No. 01-348, p. 2 (December 18, 2001) (*Vivendi Letter*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
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¹⁸ Ex Parte Notice, Submitted by Counsel for General Motors Corporation and Hughes Electronics Corporation and Counsel for EchoStar Communications Corporation, Docket No. 01-348, p. 2 (December 18, 2001) (*Vivendi Letter*).

ECHOSTAR/DIRECTV "FLIP-FLOP" CHART

"We have a track record of doing exactly what we say we'll do."⁸

-Charlie Ergen.

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
The Availability Of Cable For Rural Consumers	<p>"Millions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and EchoStar, there is no competition at all."</p> <p>-EchoStar Memorandum, Nov. 6, 2000, p. 12.⁹</p> <p>"71% of DIRECTV customers live in areas able to receive cable television service."</p> <p>-DIRECTV 2001 Cable Comments, June 25, 2001, p. 13.¹⁰</p>	<p>"First, nearly every household in America with a television is passed by cable: according to the FCC, 96.6 percent of TV households are passed by cable."</p> <p>-Willig Declaration, Dec. 3, 2001, p. 24.¹¹</p> <p>"[P]robably almost nobody watching this tonight [via satellite] doesn't have the opportunity to subscribe to cable if they'd like to."</p> <p>-Charlie Ergen, <i>Charlie Chat</i>, Nov. 12, 2001.¹²</p>
Carriage Of All Local Stations	<p>"We will comply with must-carry on a single dish and carry all stations in all markets."</p> <p>-Charlie Ergen, <i>Judiciary Testimony</i>, March 6, 2002.¹³</p>	<p>"However, the merged entity does not intend to carry all channels in every market unless the decision below is upheld."</p> <p>-SBCA Petition, March 7, 2002.¹⁴</p>

⁸ *Ergen Makes His Case*, Satellite Business News, December 21, 2001, p.10.

⁹ Memorandum of Law In Support of Request for Rule 56(f) Continuance to Respond to DIRECTV Defendants' Motion For Summary Judgment, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed Nov. 6, 2000) (*EchoStar Memorandum*).

¹⁰ Comments of DIRECTV, submitted August 3, 2001, in response to Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-191 (released June 25, 2001) (*DIRECTV 2001 Cable Comments*).

¹¹ Declaration of Dr. Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, p. 24 (December 3, 2001) (Attachment A to the *Application*) (*Willig Declaration*).

¹² SEC Form 425, filed by EchoStar Communications, Inc., *Transcript of "Charlie Chat,"* November 12, 2001, p.6 (November 16, 2001) (*Charlie Chat*).

¹³ Testimony of Charles W. Ergen before the Senate Judiciary Committee, March 6, 2002 (*Judiciary Testimony*).

¹⁴ *SBCA, et al. v. FCC, et al.*, 275 F.3d 337 (4th Cir. 2001), Petition for A Writ of Certiorari, U.S. March 7, 2002, No. 01-___, n. 2 (*SBCA Petition*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
The Number of DMAs That Will Be Served	<p>“[With the merger] [w]e would commit to the top hundred markets.”</p> <p>-<i>Ergen House Judiciary Testimony</i>, Dec. 4, 2001.¹⁵</p>	<p>“And as the Applicants announce here for the first time, the merger will bring [DBS services to] <i>every one of the 210 television Designated Market Areas in the United States.</i>”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. ii (emphasis in original).</p>
Competition Between EchoStar And DIRECTV	<p>“DIRECTV and EchoStar react primarily to each other when setting equipment and service prices.”</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p> <p>“EchoStar is DIRECTV’s closest competition.”</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>“Executives at EchoStar and DIRECTV indicated that they monitor the pricing of the other firm, but that such pricing plays little (if any) role in their own pricing decisions.”</p> <p>-<i>Application</i>, Dec. 3, 2001, fn. 5.</p> <p>“[T]he data show that the DBS services of the Applicants do not fiercely compete against each other, and the loss of existing competition from the merger is correspondingly limited.</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 41.</p>
DBS Customer Churn	<p>“Many, if not most, consumers who would switch away from EchoStar if it raised its prices relative to all other subscription programming services would turn to DIRECTV.”</p> <p>-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>“‘[T]he objective of each firm is to gain market share by luring customers away from the leading cable providers,’ not the customers of the other DBS firm.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 43.</p>

¹⁵ See *Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market, Oversight Hearing Before the House Committee on the Judiciary*, 107th Congress, Serial No. 50, p. 66 (December 4, 2001) (statement of Charles Ergen, President and CEO, EchoStar Communications Corporation) (*Ergen House Judiciary Testimony*).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
<p>Customers Abandoning the DBS Platform</p>	<p>“Absent a merger, there is a profound risk that DBS will devolve from its current position in the MVPD market as a quality and innovations leader to a lesser alternative that will cause its customers to abandon the DBS platform.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 38.</p>	<p>“DIRECTV in the U.S. expects to have a stellar year, by bringing over a million new subscribers.”</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.¹⁶</p> <p>“Based on the quarter-to-date performance of DIRECTV U.S., we expect to significantly exceed our guidance for net new subscriber additions in the first quarter [of 2002] . . .”</p> <p>-Jack Shaw, <i>Hughes Press Release</i>, March 21, 2002.¹⁷</p> <p>“Total revenue for the quarter was 1.15 billion, an increase of 13% over last quarter, and 43% better than the same period a year ago. Revenue for the year was 4 billion, an increase of 47% over 2000. Continued subscriber growth and higher revenue per subscriber were the key drivers behind this increase. We currently expect 2002 revenue to be approximately 20 to 25% higher than 2001 revenue.”</p> <p>-Michael McDonnell, CFO, EchoStar, <i>EchoStar Investor Call</i>, March 4, 2002.</p>
<p>Competition Against Cable</p>	<p>“In the unlikely event that the merger does not receive regulatory approval, I am absolutely convinced that HUGHES will be a very strong company, with many new strategic options available to increase value.”</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>“[T]he two firms must merge to stay competitive with . . . cable operators.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 47.</p>

¹⁶ SEC Form 425, filed by Hughes Electronics Corporation, *Transcript Of The Fourth-Quarter And Year-End Earnings Call* (January 15, 2002) (*Hughes Investment Call*).

¹⁷ “DIRECTV U.S. to Substantially Exceed First Quarter 2002 Expectations With Over 325,000 Net New Customers,” Press Release of Hughes Electronics Corporation, March 21, 2002 (*Hughes Press Release*).

ORIGINAL

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
Analog Cable Versus DBS	<p>“Old, analog, rotting miles of cable . . . Once you’ve experienced digital satellite, you’re not rushing out to get cable.”</p> <p style="text-align: right;">-Charlie Ergen, <i>Denver Post Interview</i>, Oct. 5, 1997.¹⁹</p>	<p>“Even analog cable operators historically have had tremendous advantages over DBS operators . . .”</p> <p style="text-align: right;">-<i>Opposition</i>, Feb. 25, 2002, p. 36.</p>
C-Band As Competition To DBS	<p>“Indeed, the size and cost of these dish antennas have rendered C-band technology largely obsolete.”</p> <p style="text-align: right;">-<i>EchoStar Amended Complaint</i>, April 5, 2001, p. 10.²⁰</p>	<p>“[C-band] products remain very attractive, particularly in areas where dish size is not important.”</p> <p style="text-align: right;">-<i>Application</i>, Dec. 3, 2001, p. 40.</p>
The Cable Industry’s Rollout of Digital Cable	<p>“Where [the cable industry] has come out in general [with digital cable], as they have done, and advertised in a market, they really raised the awareness about digital television in the marketplace. We have seen strong customer growth, and an increase in the total market. It increases for us.”</p> <p style="text-align: right;">-Roxanne Austin, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>“If EchoStar and DIRECTV are to continue to succeed, they must match . . . the dire competitive threat posed by the [digital] upgrade of these incumbents’ systems.”</p> <p style="text-align: right;">-<i>Opposition</i>, Feb. 25, 2002, p. 38.</p>
The Cable Industry’s Bounty Programs	<p>“[D]igital cable is profoundly threatening to DBS. Among other things, digital cable: . . . has led the large cable multiple system operators to target DBS much more aggressively than in the past, including with . . . “dish bounties,” and other satellite specific promotions.”</p> <p style="text-align: right;">-<i>Opposition</i>, Feb. 25, 2002, p. 37.</p>	<p>“The [bounty program] is a very poor economic model for them . . . I think it’s a very poor financial model for them. We will probably watch that, and if we see somebody doing something stupid, we’ll take advantage of it . . .”</p> <p style="text-align: right;">-Charlie Ergen, <i>EchoStar Investment Call</i>, March 4, 2002.</p>
The Product Market	<p>“DBS is in a separate product market from alternative sources of programming, including cable television.”</p> <p style="text-align: right;">-<i>EchoStar Memorandum</i>, Nov. 6, 2000, p. 12.</p>	<p>“EchoStar and DIRECTV compete in the market for Multichannel Video Program Distribution (MVPD).”</p> <p style="text-align: right;">-<i>Opposition</i>, Feb. 25, 2002, p. 33.</p>

¹⁹ *Ergen On The Edge*, Denver Post, October 5, 1997, J-1 (*Denver Post Interview*).

²⁰ Amended Complaint, *EchoStar Communications Corporation, et al. v. DIRECTV Enterprises, Inc., et al.*, Civ. Action No. 00-K-212, p. 12 (D.Co. filed April 5, 2001) (*EchoStar Amended Complaint*).

Issue	Flip	Flop
Competitive Broadband Offerings	<p>“[F]rom the Hughes standpoint, we truly believe that broadband is here. And we have competitive offerings, if you just go to the satellite-based offering that we have, a competitive offering.”</p> <p>-Jack Shaw, <i>Hughes Investment Call</i>, Jan. 17, 2002.</p>	<p>“[T]he merger of EchoStar and Hughes will <i>create</i> for the first time a truly competitive broadband alternative to DSL and cable modem service . . . consumers today located in areas served by DSL or cable modems lack access to effective satellite broadband competition.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 80 (emphasis in original).</p>
Consumer Broadband Services	<p>“[U]sing Ka-band satellite systems, will satisfy growing consumer demand for broadband services, and will be a significant step towards bridging the digital divide between urban and rural areas.”</p> <p>-<i>EchoStar/VisionStar Application</i>, Dec. 15, 2000, p. 9.²¹</p>	<p>“Nor could [EchoStar or DIRECTV] standing alone deploy on a timely basis an advanced residential broadband service of mass scale and appeal at an affordable price.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, pp. 80-81.</p>
The Critical Mass For Broadband Deployment	<p>“The combination of EchoStar and VisionStar will help create the critical mass, scale efficiencies and realistic chances of commercial success that will help both companies to deploy Ka-band satellites as expeditiously as possible.”</p> <p>-<i>EchoStar/VisionStar Application</i>, Dec. 15, 2000, p. 5.</p>	<p>“EchoStar currently does not have access to sufficient spectrum, orbital locations or capital resources to achieve (our) targets. All of these limitations, however, can be overcome by combining the resources of [Hughes and EchoStar] once the merger is approved.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 101 (discussing EchoStar’s limited Ka-band development).</p>
The Use of Theoretical Analysis	<p>“[P]roper competition analysis is limited to alternatives that are ‘practical in the business situation faced by the merging firms’ and should not rely on alternatives that are ‘merely theoretical.’”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 8.</p>	<p>“The Commission has reported that it is technically feasible for a new terrestrial service, which the Commission has dubbed Multichannel Video Distribution and Data Service (MVDDS) to share spectrum allocated to DBS in the 12.2 – 12.7 GHz band.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 53.</p>

²¹ Application for Consent to Transfer of Control Over Authorization, File No. 200-SAT-P/LA-95 (filed December 15, 2000) (EchoStar/VisionStar Application).

<u>Issue</u>	<u>Flip</u>	<u>Flop</u>
Regulation vs. Competition	<p>“Regulation as a tool for facilitating broadband deployment . . . has historically led to market inefficiencies.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 115.</p>	<p>“New EchoStar will commit to a [regulated] nationwide pricing policy for basic broadband services that will translate effective competition in urban areas into benefits to all households for broadband service, just as it will for MVPD services.”</p> <p>-<i>Opposition</i>, Feb. 25, 2002, p. 118.</p>
A Monopoly’s Willingness To Provide Innovative Services	<p>“[T]he proposed merger offers the possibility of substantial efficiency improvements . . . which would directly benefit DBS consumers by providing an expanded array of services.”</p> <p>-<i>Willig Declaration</i>, Dec. 3, 2001, p. 12.</p>	<p>“As is well documented in the literature of economics, monopolists do not invest the full amounts required for economic efficiency when they are provided with monopoly returns on their investments.”</p> <p>-<i>Willig Letter</i>, Dec. 11, 2001.²²</p>

US OFFICE PRODUCTS

**Ka-Band Licensees With Milestones
That May Be Adjusted Through Commission Action**

EXHIBIT B

COMPANY	ORBITAL SLOT	COMMENCE CONSTRUCTION	COMPLETE CONSTRUCTION	LAUNCH AND OPERATE (FCC)	ITU 'BRING INTO USE DATE'
NetSat 28	95° W.L.	--	August 2003	September 2003	November 2004
VisionStar	113° W.L.		April 2002	May 2002	May 2005
Loral Space & Communications	89° W.L.	May 1998	April 2002	May 2002	November 2004
	81° W.L.	May 1998	April 2002	May 2002	November 2004
	47° W.L.	May 1998	April 2002	May 2002	November 2004
	78° E.L.	May 1998	April 2002	May 2002	November 2004

**Ka-Band Licensees With Milestones
That May Be Adjusted Through Commission and ITU Action**

COMPANY ⁶⁵	ORBITAL SLOT	COMMENCE CONSTRUCTION	COMPLETE CONSTRUCTION	LAUNCH AND OPERATE (FCC/ITU)	POSSIBLE EXTENDED ITU 'BRING INTO USE DATE'
Hughes Communications, Inc.	131° W.L.	August 2002	--	March 9, 2003*	March 2005
KaStarCom. World Satellite, LLC	111° W.L.	August 2002	--	March 9, 2003*	March 2005
Lockheed Martin Corporation	129° W.L.	August 2002	--	March 9, 2003*	March 2005
	51° W.L.	August 2003	--	March 9, 2003*	March 2005
Loral CyberStar, Inc.	147° W.L.	August 2002	--	March 9, 2003*	March 2005
PanAmSat Corporation	133° W.L.	August 2002	--	March 9, 2003*	March 2005
Pacific Century Group, Inc.	71° W.L.	August 2003	--	March 9, 2003*	March 2005
Pegasus Development Corporation	107° W.L.	August 2002	--	March 9, 2003*	March 2005
TRW, Inc.	15° E.L.	August 2002	--	March 9, 2003*	March 2005

*The Licensee may apply to the International Telecommunication Union (ITU) -- through the FCC -- for an extension of this date. In order to receive an extension, the Licensee must make a showing of various due diligence requirements. The ITU may extend the Bring Into Use date by two years under the conditions specified in ITU Radio Regulations Articles S11.44B through S11.44I.

⁶⁵ A "--" symbol is inserted in those instances where the FCC has not established a milestone date.

ORIGINAL

Certificate of Service

I HEREBY CERTIFY that on this 17th day of June, 2002, a true and correct copy of the foregoing Petition to Deny of the National Rural Telecommunications Cooperative in the Matter of Application of VisionStar Incorporated (SAT-MOD-20020430-00075), was submitted via hand delivery to the Federal Communications Commission and served via courier, electronic mail or First Class Mail upon the following:

Served via courier:

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
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Washington, D.C. 20554

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The Honorable Kathleen Q. Abernathy
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BEFORE
FEDERAL COMMUNICATIONS
Commission
Washington, D.C.

William F. Caton
Acting Secretary
445 Twelfth Street, S.W., Room TW-B204
Washington, D.C. 20554

ORIGINAL

In The Matter Of)
)
SES AMERICOM, Inc.)
)
Petition For Declaratory Ruling)
To Serve the U.S. Market Using)
BSS Spectrum from the 105.5° W.L.)
Orbital Position)

SAT-PDR-20020425-00071

To: The Commission

ORIGINAL

COMMENTS OF THE
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SUMMARY

The frequencies requested by SES currently are used in the United States to provide DBS service to more than 18 million subscribers from the 101° W.L., 110° W.L. and 119° W.L. orbital positions. NRTC currently distributes DBS programming transmitted from the 101° W.L. location to more than 1.8 million subscribers throughout rural America. As the first order of business in evaluating the *SES Petition*, the Commission must ensure that, based on objective interference criteria, no existing DBS subscribers are subject to harmful interference as a result of the proposed operation of the SES satellite at the 105.5° W.L. orbital position.

NRTC supports the *SES Petition* as a potential new platform to provide additional competition in the MVPD and broadband markets, if all existing DBS subscribers can be protected from harmful interference and all other associated technical and regulatory issues can be resolved. NRTC expresses no opinion as to whether SES's attempt to short space a satellite licensed by the Government of Gibraltar between two U.S. DBS orbital positions (101° W.L. and 110° W.L.) is technically feasible and can overcome any existing domestic and international regulatory hurdles.

Notwithstanding the possibility of competition from the SES platform at some uncertain point in the future, SES will not provide substantial market impact within the two-year timeframe required under the *Merger Guidelines* of the U.S. Department of Justice and the Federal Trade Commission. The Commission, therefore, cannot consider the service proposed in the *SES Petition* to be a competitive alternative to EchoStar and DIRECTV that is sufficient to justify their proposed Merger.

To the contrary, SES's open platform promises to make available to EchoStar and DIRECTV additional capacity for the provision of MVPD and broadband services -- *without* the

necessity of an unlawful and anticompetitive Merger. To the extent that EchoStar and DIRECTV have argued that their Merger is necessary so that they may obtain access to additional spectrum for the provision of new and innovative services, the *SES Petition* provides a new and less intrusive alternative.

* * *

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

In The Matter Of)
)
SES AMERICOM, Inc.)
) **SAT-PDR-20020425-00071**
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To: The Commission

**COMMENTS OF THE
NATIONAL RURAL TELECOMMUNICATION COOPERATIVE**

The National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby submits these Comments generally in support of the Petition for Declaratory Ruling (*SES Petition*) filed in the above-captioned proceeding by SES AMERICOM, Inc. (SES). SES seeks a determination that it is in the public interest to offer satellite capacity in the 12.2-12.7 and 17.3-17.8 GHz bands to third parties for the provision of direct broadcast satellite (DBS) services from a foreign licensed satellite located at the 105.5° W.L. orbital position.¹

NRTC is pleased that SES, an experienced satellite service provider, has determined to offer the prospect of additional competition in the multichannel video program distribution (MVPD) and broadband markets. As described below, however, millions of subscribers currently rely on these frequencies to receive DBS service. If SES can protect all of these existing subscribers from harmful interference by a satellite operating at the proposed orbital

¹ Petition for Declaratory Ruling, SES AMERICOM, INC., April 25, 2002. See Federal Communications Commission Report No. SAT-00110, *Satellite Space Applications Accepted for Filing*, SAT-PDR-20020425-00071 (released May 17, 2002).

location,² and if all other existing domestic and international regulatory issues can be resolved in connection with SES's efforts to "short space" a foreign licensed satellite between two U.S. DBS orbital positions, NRTC would welcome the introduction of SES's "open access" platform (AMERICOM2Home).

Notwithstanding the possibility of competition from the SES platform at some point in the future, however, SES will not provide significant impact in the MVPD market within the next few years. Under established legal guidelines, the benefits proposed by the *SES Petition* are too distant in time and too speculative for the Commission to consider in connection with the proposed merger (Merger) of EchoStar Communications Corporation (EchoStar), General Motors Corporation (GM) and Hughes Electronics Corporation (Hughes) (collectively, the Applicants).³ To the contrary, the *SES Petition* provides a new and less intrusive alternative than the proposed Merger for the Applicants to obtain access to additional spectrum capacity.

I. NRTC BACKGROUND

1. NRTC is a not-for-profit cooperative comprised of 705 rural electric cooperatives, 128 rural telephone cooperatives and 189 independent rural telephone companies located throughout 46 states. Since 1986, NRTC's mission has been to provide advanced telecommunications technologies and services to rural America. NRTC has long represented the views of rural Americans before the FCC, the National Telecommunications and Information Agency (NTIA), and the United States Congress.

² Any degradation in the technical quality of the signal currently received by DBS subscribers is unacceptable and should be considered "harmful."

³ Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation, Transferor; and EchoStar Communications Corporation, Transferee, For Authority to Transfer Control, File Number 01-348, p. 6 (filed December 3, 2001) (*Merger Application*). See also Cable Service Bureau Action, EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control, CS Docket No. 01-348, DA 01-3005 (released December 21, 2001).

2. In 1994, NRTC assisted in capitalizing the launch of the DIRECTV satellite business. Through a Distribution Agreement between NRTC and Hughes Communications Galaxy, Inc. (DIRECTV's predecessor-in-interest), NRTC received exclusive program distribution and other rights to distribute DIRECTV's DBS programming services throughout much of rural America. NRTC, its members and affiliates currently distribute DIRECTV programming to approximately 1,800,000 rural households. NRTC also distributes satellite Internet access services pursuant to agreements with StarBand Communications, Inc. and Hughes Network Systems. Additionally, NRTC provides dial-up Internet access, 220 MHz wireless services, long distance telephone services, automated meter reading and other telecommunications services to its members and affiliates who in turn provide these services to rural consumers.

3. Since its inception, NRTC has championed the rights of rural Americans to enjoy fair and nondiscriminatory access to the same programming that is available to consumers in more populated urban areas. As early as 1989, NRTC was active in Commission and Congressional efforts to prohibit discrimination against distributors of satellite programming to rural America.⁴ In 1992, NRTC advocated passage of the Program Access provisions of the Cable Television Consumer Protection and Competition Act of 1992, which were designed in part to prevent discrimination against rural consumers.⁵

4. As the Commission is well aware, NRTC has strongly opposed the Merger of EchoStar and DIRECTV on the grounds that it would eliminate MVPD competition in rural America, thereby depriving rural Americans of choice, raising their prices for programming, and

⁴ See Notice of Inquiry, *Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming*, 4 FCC Rcd 3833 (1989).

⁵ 47 U.S.C. § 628. See also First Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 72 RR 2d 649, 8 FCC Rcd 3359 (1993).

lowering the quality of service they receive.⁶ NRTC has taken this position even though the Merger arguably would be economically beneficial to NRTC by eliminating EchoStar as its competitor in the territories defined in the Distribution Agreement with DIRECTV and leaving NRTC as the sole source for MVPD services in much of rural America. However, NRTC believes that competition assures choice, lowers prices and leads to higher quality service and innovation. NRTC is not prepared to abandon its rural constituency just because a particular merger may provide financial benefits to NRTC. Consequently, NRTC is pleased that SES, an experienced satellite service provider, has determined to offer the prospect of additional competition in the MVPD and broadband markets.

II. COMMENTS

5. SES proposes to create an open platform at 105.5° W.L for the carriage of DBS services by third parties that contract with SES to distribute television programming and other content to consumers.⁷ Based on its successful satellite operations in Europe, SES indicates that some of these content providers might choose to offer “free-to-air” channels supported by advertisers, along with pay-per-view movies and sporting events. With equipment upgrades, consumers may gain access on a subscription basis to bundles of higher level program offerings, including customized niche markets, as well as integrated and two-way broadband services provided from SES’s “neighborhood” of Ka-band or other Ku-band satellites at 105° W.L. SES states that if the Commission were to rule favorably on its petition in 2002, its satellite “could be launched as early as 2004.”⁸

⁶ NRTC’s objections to the proposed Merger are detailed in the Petition to Deny of the National Rural Telecommunications Cooperative, *In the Matter of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation*, CS Docket No. 01-348 (February 4, 2002) (*NRTC Petition*) and related pleadings.

⁷ *SES Petition*, p. 5.

⁸ *Id.*, p. 12.

A. Current DBS Subscribers Must Be Protected From Harmful Interference.

6. SES's proposed open platform would serve as a welcome alternative to the manner in which DBS and high speed Internet services are provided to U.S. consumers today. By establishing a broad-based, open platform through a more efficient use of the limited DBS spectrum resource, SES promises to bring additional services to rural and other areas of the country that rely heavily on satellite distribution technology to receive modern telecommunications services. Assuming, as described below, that all existing technical and regulatory issues can be resolved -- *and that all existing DBS subscribers can be protected from harmful interference* -- NRTC supports SES's efforts to obtain FCC approval for its new and creative service.⁹

7. Rather than using the currently authorized nine degree DBS orbital spacing, SES proposes to locate its satellite at 105.5° W.L., only four and one-half degrees from each of two U.S. DBS orbital positions (101° W.L. and 110° W.L.).¹⁰ These frequencies presently are used in the U.S. to provide DBS service to more than 18 million subscribers. Before ruling on the *SES Petition*, the Commission must resolve all domestic and international issues related to SES's attempt to short space a foreign licensed satellite between two U.S. DBS orbital positions.¹¹

8. Of particular importance in the Commission's evaluation of the *SES Petition* is the protection of millions of DBS subscribers who currently receive programming services from the authorized 101° W.L. and 110° W.L. orbital positions. While SES's short spacing proposal offers to provide tremendous spectrum efficiencies and public interest benefits, it has not yet

⁹ As mentioned, any degradation in the technical quality of the signal currently received by DBS subscribers is unacceptable and should be considered "harmful." *Supra*, n. 2.

¹⁰ *SES Petition*, pp. 6-11.

¹¹ NRTC takes no position on whether the *SES Petition* satisfies all relevant technical and regulatory issues.

been established with any certainty that four and one-half degree spacing will not cause harmful interference to the millions of existing DBS subscribers. Current DBS subscribers should not be required to suffer any decrease in the technical quality of their programming services, nor should they be expected to incur any additional costs or inconvenience as a result of the *SES Petition*.

9. As a distributor of DBS services to more than 1.8 million subscribers throughout rural America, many of whom are often located in areas where other MVPD services are not available except *via* satellite, it is particularly important to NRTC that the protection of existing DBS users from harmful interference remain paramount in the Commission's consideration of the *SES Petition*. The *SES Petition* should not be granted until it is established as a technical matter, using objective interference criteria, that SES's proposed operation will not harm existing subscribers.

10. In addition to satellite-to-satellite interference issues, any harmful terrestrial interference also must be considered in connection with the *SES Petition*. The Commission's recent decision to authorize the new Multichannel Video Distribution and Data Service (MVDDS)¹² was based largely on the results of an independent test conducted by the MITRE Corporation that considered an interference environment consisting of only three full CONUS DBS orbital positions.¹³ The MITRE Report did not consider an additional DBS satellite located

¹² See *In the Matter of 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; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, FCC 02-116 (released May 23, 2002) (*MVDDS Order*).

¹³ The MITRE Corporation, "Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band" (April 23, 2001) (*MITRE Report*).