at 105.5° W.L., and it is unclear if any additional harmful interference would be generated as a result.[14]

11. Assuming that all current DBS subscribers can be protected from any harmful interference and that all other technical and regulatory issues can be satisfactorily resolved in regard to the operation of a foreign licensed satellite equidistant between two U.S. DBS orbital positions,[15] NRTC supports the *SES Petition* as a potential new and innovative source of MVPD and broadband competition.

B. The Benefits Proposed By The *SES Petition* Are Too Distant In Time And Too Speculative To Be Considered In Connection With The Proposed Merger Of EchoStar And DIRECTV.

12. Pursuant to the *Merger Guidelines* of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC), the Commission cannot consider SES's proposed new satellite platform in evaluating the proposed Merger of EchoStar and DIRECTV.[16] Only new entrants that will be established as significant competitors within two years may be factored into the evaluation of the proposed Merger:

> In order to deter or counteract the competitive effects of concern, entrants quickly must achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved *within two years from initial planning to significant market impact.*[17]

---

[14] *MVDDS Order*, ¶¶54-85, Appendix B; *See MITRE Report* at Section 5 for all simulation results.

[15] SES's proposed operation from the 105.5° W.L. orbital position is based on a license issued by the Government of Gibraltar. Before the Commission may authorize a non-U.S.-licensed satellite to provide service to the U.S operations from this location, it also must determine whether the *SES Petition* satisfies the "ECO-Sat" test. *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, 12 FCC Rcd 24094, 24134 (1997). *SES Petition*, pp. 16-21.

[16] U.S. Department of Justice and Federal Trade Commission, Revisions to Horizontal Merger Guidelines (1997), reprinted in 4 Trade Reg. Rep. § 3.2, (CCH) (1997) (*Merger Guidelines*).

[17] *Id.* (emphasis added).

Although SES asserts that its satellite could be launched as early as 2004 if the Commission were to rule favorably on the *SES Petition* in 2002, it would be impossible for SES to achieve the required "significant market impact" within the requisite two-year period.[18] Any meaningful competition from SES's platform undoubtedly would take much longer to occur, if it occurs at all.[19]

13. First, as mentioned above, the *SES Petition* raises new and novel (and as yet unanswered) questions related to the assignment of licenses and the allocation of domestic and international frequencies and orbital positions. It is highly unlikely that the Commission will resolve all of these issues and rule favorably on the *SES Petition* in 2002, so that SES may launch its satellite in 2004.

14. The Commission has not yet conducted any studies or otherwise determined that the proposed service will not cause harmful interference to the services currently received by more than 18 million authorized DBS subscribers. Nor has the Commission yet established that the proposed service satisfies all domestic and international regulatory requirements.

15. Even if SES somehow were to overcome these issues and launch its satellite in 2004, it still would not be in a position to offer a level of competition sufficient to justify the proposed EchoStar/DIRECTV Merger under the *Merger Guidelines*. There is a vast difference between launching a satellite and providing significant market impact.[20]

16. A review of the DBS industry's entry into the MVPD market suggests that it would take well more than two for SES to achieve significant market impact. Despite authorizing DBS

---

[18] SES has not yet even selected a satellite vendor at this point. *Business Wire*, Question 15.

[19] Courts also have made clear that only substitutes that constrain pricing in "the reasonably foreseeable future" and only products that can enter the market in "a relatively short time" can be considered as reasonably interchangeable in the context of a proposed merger. *U.S. v. Microsoft*, 253 F.3d 34, 54 (D.C. Cir 2001). The proposed SES satellite passes neither test.

[20] Mark Holmes, *SES Americom Head Has Doubts*, Interspace, May 8, 2002.

service in 1982, the Commission noted that by 1994 -- twelve years later -- DBS had only 40,000 subscribers and its equipment was available in only twenty-three states.[21] Although DIRECTV launched its first satellite in 1994, the DBS industry still held less than 10% of the MVPD market by 1998.[22] It was not until 2001 that the Commission even acknowledged DBS as cable's "principal competitor."[23]

17. To suggest that SES will be a viable competitor to EchoStar and DIRECTV within two years, as required by the *Merger Guidelines*, is unrealistic. As history has shown, it took almost twenty years for DBS to go from an authorized service to cable's "principal competitor;" once launched, it took more than four years for DBS to obtain less than a 10% share of the MVPD market. It cannot be assumed that SES will somehow achieve significant MVPD market impact within the required two-year timeframe.

18. Even if SES did launch its satellite in 2004, as it hopes, SES's system at that point would consist of only a single DBS satellite with 32 channels. In stark contrast, EchoStar and DIRECTV already are each thriving as independent competitors.[24] A combined EchoStar/DIRECTV entity would consist of at least 15 satellites, 96 channels, three full-CONUS orbital positions and a likely embedded base of up to 20 million subscribers.[25] In a post-Merger

---

[21] First Report, *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, ¶¶62, 65 (released September 28, 1994).

[22] Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, ¶7 (released December 23, 1998). Even today, with almost a 20% share of the MVPD market, EchoStar and DIRECTV claim that they must merge in order to provide significant competition to cable.

[23] Seventh Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 CR 1414, ¶61 (released January 8, 2001).

[24] *See* Ex Parte Reply to Opposition 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, pp. 36-41 (April 4, 2002).

[25] *NRTC Petition*, pp. 5-6.

world, SES would face an EchoStar/DIRECTV behemoth that no doubt would present an insurmountable obstacle to SES's rapid market penetration.

19. As Chairman Powell recently stated in ruling-out the *SES Petition* as a competitive force to be reckoned with as part of the Merger proceeding:

> I don't know that [SES has] that big an impact on where we might be going [in regard to the proposed Merger] just because there's an announcement about something...You can't credit, at a deep level, proposals if they're not real, functioning things in the market that you can measure.[26]

20. NRTC agrees with the Chairman. Clearly, the satellite platform proposed in the *SES Petition* is not a "real, functioning" competitive force to EchoStar and DIRECTV -- and will not be within the near future. While the SES platform holds potential, it does not offer the type of significant competition that can be factored into the Commission's evaluation of the proposed Merger.

C. SES's Proposed Open Platform Would Make Additional Spectrum Available To EchoStar And DIRECTV And Contradict Their Stated Need To Merge.

21. To the extent that EchoStar and DIRECTV feel that they are spectrum constrained as independent companies and must merge in order to obtain additional capacity for the provision of local channels and other services, SES's open platform could afford them, as separate competitors, full access to all DBS frequencies from a new full-CONUS orbital position. Given the proposed location of the SES satellite, it is even possible that neither company would need to replace receiving equipment or make significant capital investments to lease capacity from SES.

22. NRTC recognizes that any such use is speculative, but EchoStar and DIRECTV are obvious candidates for obtaining new capacity through SES, especially since new receiving

[26] Benjamin Pole, *Washington Footprint*, Satellite Business News, p. 23, May 22, 2002 (*Powell Interview*).

equipment likely would not need to be installed at subscribers' homes.[27] The possibility that EchoStar and DIRECTV could use capacity on the SES satellite further demonstrates that the proposed Merger is not the only means by which the companies can obtain access to additional spectrum for the provision of local television and other services.[28] Beyond SES, as NRTC has pointed out in the Merger proceeding, there are countless joint venture and other avenues that remain available to the parties.[29] As reported in a recent trade press article:

> There is no doubt that if their deal is blocked, EchoStar and DirecTV could still find a way to share some spectrum to offer local channels in smaller markets, assuming of course, they can put the companies' egos aside.[30]

ORIGINAL

III. CONCLUSION

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 heavily used U.S. DBS orbital positions. In particular, the Commission must ensure that the DBS service currently being provided to more than 18 million DBS subscribers from authorized orbital positions is not subject to harmful interference from operations of the SES satellite at the proposed position.

Assuming that harmful interference and all other technical and regulatory issues can be resolved, NRTC supports the *SES Petition* as a potential new and innovative source of MVPD

---

[27] The 105.5° W.L. slot lies halfway between the 101° W.L. and 110° W.L. slots currently used by EchoStar and DIRECTV. Receive antennas apparently would not need to be re-pointed in order to receive signals from the SES satellite. Whether new set-tops would be necessary will depend on the digital transmission standard and its interoperability with the standards used by EchoStar and DIRECTV. By agreeing to access the SES platform early on, EchoStar and DIRECTV have the ability to affect the construction parameters and protocols that the satellite would employ.

[28] In announcing the filing of the SES Petition, SES made clear that in order to provide full local programming, it would need some access to the EchoStar and/or DIRECTV satellite systems for its AMERICOM2Home subscribers. According to SES, the access could be accomplished as a technical matter, if the other DBS companies were willing to work cooperatively with SES. *Business Wire*, Question 9.

[29] *See NRTC Petition*, 63-65.

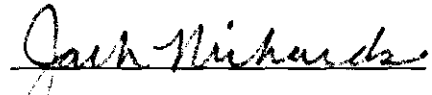
ORIGINAL

and broadband competition. Under no stretch of the imagination, however, can the *SES Petition* be construed to provide a level of competition that would justify the proposed merger of EchoStar and DIRECTV. While promising, the SES proposal offers nowhere near the significant market impact required for consideration under the *Merger Guidelines* of the DOJ and FTC. As Chairman Powell has recognized, "you can't credit, at a deep level, proposals if they they're not real, functioning things in the market that you can measure."[31]

Respectfully submitted,

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

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE
2121 Cooperative Way, Suite 500
Herndon, VA 20171



Jack Richards
Kevin G. Rupy
Keller and Heckman LLP
1001 G Street, NW
Washington, D.C. 20001
(202) 434-4210

June 17, 2002

---

[30] Bob Scherman, More Thoughts on the Road to Monopoly, Satellite Business News, p.9, May 8, 2002.

[31] *Powell Interview*, p.23.

ORIGINAL

Certificate of Service

I HEREBY CERTIFY that on this 17th day of June, 2002, a true and correct copy of the foregoing Comments of the National Rural Telecommunications Cooperative in the Petition for Declaratory Ruling SES AMERICOM, Inc. (SAT-PDR-20020425-00071), 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
445 Twelfth Street, S.W., Room 8-B201
Washington, D.C. 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-B115
Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-A302
Washington, D.C. 20554

The Honorable Kevin J. Martin
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-A302
Washington, D.C. 20554

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

Peter A. Tenhula
Senior Legal Advisor to Chairman Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Susan Eid
Legal Advisor to Chairman Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Senior Legal Advisor to Commissioner Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Suzanna Zwerling
Media and Consumer Protection
Legal Advisor to Commissioner Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Paul Margie
Spectrum and International Legal Advisor to Commissioner Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Bryan Tramont
Senior Legal Advisor to Commissioner Abernathy
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

ORIGINAL

Sam Feder
Senior Legal Advisor to Commissioner Martin
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Catherine Crutcher Bohigian
Legal Advisor on Cable and Mass Media Issues
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Donald Abelson
Chief, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Anna M. Gomez
Deputy Bureau Chief, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

William H. Johnson
Deputy Chief, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Tom Tycz
Chief
Satellite and Radiocommunications Division, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A624
Washington, D.C. 20554

Cassandra Thomas
Deputy Chief
Satellite and Radiocommunications Division, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A624
Washington, D.C. 20554

Rosalee Chiara
Satellite and Radiocommunications Division, International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A624
Washington, D.C. 20554

Fern Jarmulnek
Satellite & Radiocommunication Division
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A767
Washington, D.C. 20554

Jennifer Gilsenan
Chief
Satellite Policy Branch
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor
Room 6A767
Washington, D.C. 20554

Jonathan Levy
Office of Plans and Policy
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Gary M. Epstein
James H. Barker
Arthur S. Landerholm
Latham & Watkins
555 11th Street, N.W.
Suite 1100
Washington, D.C. 20004
Counsel for General Motors Corporation and Hughes Electronics Corporation

Pantelis Michalopoulos
Philip L. Malet
Rhonda M. Bolton
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
Counsel for EchoStar Communications Corporation

Phillip L. Spector
Laura B. Sherman
Diane C. Gaylor
Patrick S. Campbell
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Street, NW, Suite 1300
Washington, D.C. 20036
Counsel for SES AMERICOM, Inc.

Served via electronic mail:
W. Kenneth Ferree
Chief, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

James Bird
Office of General Counsel
445 12 Street, S.W.
Room 8-C824
Washington, D.C. 20554

Barbara Esbin
Cable Service Bureau
445 12 Street, S.W.
Room 3-C458
Washington, D.C. 20554

ORIGINAL

Marcia Glauberman
Media Bureau
445 12th Street, S.W.
Room 3-A738
Washington, D.C 20554

Julius Knapp
Office of Engineering and Technology
445 12th Street, S.W.
Room 7-B133
Washington, D.C. 20554

JoAnn Lucanik
International Bureau
445 12th Street, S.W.
Room 6-C416
Washington, D.C. 20554

David Sappington
Office of Plans and Policy
445 12th Street, S.W.
Room 7-C452
Washington, D.C. 20554

Royce Sherlock
Media Bureau
445 12th Street, S.W.
Room 3-A729
Washington, D.C. 20554

Douglas W. Webbink
Chief Economist
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W., 6th Floor West
Washington, D.C. 20554

Qualex International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Served Via First Class Mail:
Nancy J. Eskenazi
SES AMERICOM, Inc.
Associate General Counsel
4 Research Way
Princeton, NJ 08540

Tammy Hines

Tammy Hines