

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In The Matter Of)
)
VisionStar Incorporated) **SAT-MOD-20020430-00075**
)
Application For Modification of)
Authority To Construct, Launch)
And Operate A Ka-band Satellite)
System In The Fixed Satellite)
Service)

To: The Commission

**REPLY OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

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SUMMARY

EchoStar's so-called justification for its Ka-band extension is an ever evolving story -- first, a flat financial market "forced" it to delay payment to its contractor; then, technical difficulties resulted in delay; and finally, EchoStar admits that other projects were simply better investment opportunities. EchoStar's *Opposition* -- long on vitriol and short on substance -- fails to rebut any of the substantive points raised in the *NRTC Petition*.

For instance, NRTC noted EchoStar's commitment of paltry resources to its VisionStar Ka-band satellite; EchoStar responds by describing how much it has dedicated to an unrelated satellite (EchoStar IX, which the Commission has since determined has no Ka-band capacity). NRTC pointed out EchoStar's February 2002 disclosure to the Securities and Exchange Commission (SEC) that it *would* have to file an extension request; EchoStar responds by speaking almost exclusively of a January 2002 SEC filing that stated only that it *may* have to file an extension.

EchoStar chastises NRTC for complaining about EchoStar's *early disclosure* to the SEC of the need for an extension, while the real issue is EchoStar's *late disclosure* to the FCC. EchoStar complains that NRTC filed its *Petition to Deny* in the EchoStar/DIRECTV Merger proceeding, but the FCC's *ex parte* rules (routinely ignored by EchoStar in its own submissions) clearly require such filings.

At a minimum, the Commission should thoroughly investigate EchoStar's claims in its *Extension Request* and *Opposition*. Among other things, the Commission should subpoena witnesses, examine documents and conduct a full investigation of why and how EchoStar was "forced" to miss payments to its satellite contractor; why EchoStar disclosed the need for an extension to the SEC months before apprizing the Commission of the same fact; and why it gave

the SEC a host of excuses for its milestone failure (including a change in satellite design) while telling the Commission that the sole reason for the extension was a stagnant financial market.

A grant of EchoStar's *Extension Request* would cause licensees from every segment of the communications industry to seek leniency from the Commission's milestone requirements due to alleged and unsubstantiated "financial droughts." Instead of compelling licensees to implement service expeditiously through strict compliance with well-established milestone requirements, a grant of the *Extension Request* instead will encourage them to seek extensions of their construction obligations as a result of vague and undocumented downturns in their respective financial markets.

As demonstrated by a series of recent Commission orders, EchoStar's claims of an industry-wide Ka-band slowdown are baseless. The Ka-band industry in fact is moving forward. No other Ka-band licensees, all of which are smaller and less financially secure than EchoStar, have sought extensions based on an alleged "flat" financial market. While other Ka-band licensees are moving forward, only EchoStar -- the so-called industry leader -- is at a standstill.

NRTC believes that EchoStar consciously determined not to fund the VisionStar satellite for the simple reason that launching a Ka-band satellite at this point would debunk EchoStar's claim that only the Merger will enable American consumers to receive broadband service by satellite. EchoStar has provided no other plausible justification for its *Extension Request*.

EchoStar has not constructed its VisionStar satellite on schedule and appears unable and/or unwilling to do so. It should not be permitted to continue warehousing a prime Ka-band orbital position. Accordingly, as with its licenses for the 83° and 121° W.L. orbital positions, the Commission should declare null and void the VisionStar Ka-band license and award it to a new licensee.

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The National Rural Telecommunications Cooperative (NRTC), by its attorneys, hereby submits this Reply to the Opposition of VisionStar Incorporated (VisionStar) in the above captioned proceeding (*Opposition*). VisionStar is a majority-owned -- 90% -- indirect subsidiary of EchoStar Communications Corporation (EchoStar).¹ On June 17, 2002, NRTC filed a Petition to Deny (*NRTC Petition*)² EchoStar's request to extend VisionStar's Ka-band construction milestones for three years (*Extension Request*).³

¹ SEC Form 10K, filed by EchoStar Communications, Inc., p. 10, February 28, 2002 (*EchoStar 10K*).

² Petition to Deny of the National Rural Telecommunications Cooperative, June 17, 2002 (*NRTC Petition*).

³ VisionStar Corporation Request for Extension of Time To Complete Construction and To Launch Fixed Satellite Service Satellite, File Nos. SAT-LOA-19950929-00156, SAT-T/C-20001215-00163 (filed April 30, 2002); *See also* Federal Communications Commission Report No. 00110, *Satellite Space Applications Accepted for Filing*, SAT-MOD-20020430-00075 (released May 17, 2002) (*IB Public Notice*) (in its *Extension Request*, EchoStar requests an extension of its construction completion date for its Ka-band satellite from April 2002 to April 2005 and an extension of its launch date from May 2002 to May 2005). *See also* Order And Authorization, *VisionStar, Inc. Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service*, 13 FCC Rcd 1428, DA 97-980 (released May 9, 1997) (*VisionStar Authorization*); *See also* Order And Authorization, *Application of VisionStar, Incorporated, Licensee, Shant Hovnanian, Transferor And Echostar Visionstar Corporation, Transferee*, 24 CR 1326, (released October 30, 2001) (*EchoStar/VisionStar Order*).

The *NRTC Petition* raised several well reasoned and fact-based arguments as to why the Commission should deny EchoStar's *Extension Request*, declare its Ka-band license null and void, and award the license to a new licensee. EchoStar's *Opposition* -- long on vitriol and short on substance -- fails to rebut any of the substantive points raised in the *NRTC Petition*.⁴

For instance, NRTC noted EchoStar's commitment of paltry resources to its VisionStar satellite; EchoStar responds by describing how much it has dedicated to its EchoStar IX satellite to be located at a completely different orbital position. NRTC pointed out that as early as February 2002 EchoStar told the Securities and Exchange Commission (SEC) that it *would* have to file an extension request; EchoStar ignores the February 2002 filing and responds by noting that in a January 2002 SEC filing, EchoStar stated only that it *may* have to file an extension.

EchoStar's evolving story surrounding its *Extension Request* -- first, that a flat financial market "forced" it to delay payment to its contractor;⁵ then, that technical difficulties resulted in delay;⁶ and ultimately, that it was simply a sound business decision because other projects were deemed more profitable⁷ -- cannot be accepted. EchoStar has offered no legitimate justification to extend the milestone requirements. The *Extension Request* should be denied.

⁴ EchoStar largely ignores the facts and legal arguments raised in the *NRTC Petition* and instead engages in a personal attack on NRTC and its counsel. As the old legal adage so aptly states, "When the facts are against you, argue the law. When the law is against you, pound the table and attack your opponent." Upon a review of the record, NRTC believes the Commission will reach the same conclusions set forth in the *NRTC Petition*.

⁵ *Id.*, p. 3.

⁶ *Opposition*, p. 6.

⁷ *Id.*, p. 3.

I. COMMENTS.

A. **EchoStar's Failure To Construct Its VisionStar Satellite Was The Result Of A Business Decision By EchoStar, Not A "Drought Of Funds" Affecting The Entire Ka-Band Satellite Industry.**

1. As a justification for its failure to achieve its VisionStar milestones, EchoStar's *Extension Request* cited only an allegedly bleak financial environment facing the entire Ka-band industry.⁸ As a result of the flat financial market, EchoStar claims that it was somehow "forced" to delay payment to its satellite contractor.⁹ Through its *Opposition*, however, EchoStar now offers an entirely different explanation.

2. In addressing NRTC's primary argument -- that EchoStar easily could have funded the VisionStar satellite but chose not to -- EchoStar states in its *Opposition* that companies "like EchoStar, are accountable to their shareholders and must independently justify their investments in such programs, without regard to whether cash flow may be available for other profitable endeavors."¹⁰ In other words, even though EchoStar had ample funding available for VisionStar, it should be free *not* to construct the system in accordance with Commission milestones if other projects offered better investment opportunities.¹¹ Rather than a flat financial market, EchoStar now argues that the milestones should be extended because VisionStar was not deemed sufficiently profitable.

3. EchoStar's argument completely ignores Commission precedent. Licensees are not free to ignore Commission construction requirements because they may wish to spend their

⁸ *Extension Request*, pp. 2-8.

⁹ *Id.*, p. 3.

¹⁰ *Opposition*, p. 3.

¹¹ Setting up yet another strawman argument, EchoStar challenges NRTC's commitment to Ka-band development rather than adequately explaining its own lack of commitment. Although EchoStar states that it is unaware of NRTC making any financial commitment to a licensed Ka-band system (*Opposition*, n. 7), NRTC in fact has offered, committed and provided financial support to certain Ka-band licensees.

money elsewhere. EchoStar should be well aware of this, since the same flawed reasoning was rejected by the Commission when it revoked EchoStar's direct broadcast satellite (DBS) slot at 175° W.L. In that instance, the Commission stated that "an uncertain business situation or an unfavorable business climate, in general, has never been an adequate excuse for failure to meet a construction timetable."¹²

4. In that same proceeding, the Commission observed that EchoStar "elected to defer construction of a satellite for the 175° W.L. location in favor of a full-CONUS location."¹³ The Commission ultimately concluded that "[t]he obstacles that EchoStar claim resulted in delays in implementing a satellite at the 175° W.L. orbit location are not obstacles beyond its control. Rather, they are business decisions made by EchoStar for implementing its fleet."¹⁴

5. This conclusion is just as applicable with respect to EchoStar's VisionStar license, particularly when the Commission examines EchoStar's comments in its *Opposition* regarding expenditures towards its EchoStar IX satellite. EchoStar points out that it has obligated \$75.4 million to its EchoStar IX satellite and has made "significant launch payments in November 2001, January and April 2002."¹⁵ Stated another way, from the very moment the Commission awarded the prime 113° W.L. orbital slot to EchoStar in October 2001, EchoStar has seen fit to ignore VisionStar's construction milestones while investing heavily in a satellite that will be launched into the 121° W.L. orbital slot "years ahead" of its milestones.¹⁶

¹² Memorandum Opinion and Order, *EchoStar Satellite Corporation, Directsat Corporation, Direct Broadcasting Satellite Corporation*, DA 02-1164, ¶10 (released May 16, 2002) (*EchoStar 175 Order*) (referencing *United States Satellite Broadcasting Co., Inc.* 3 FCC Rcd. 6858, 6860 (1988)).

¹³ *EchoStar 175 Order*, ¶10.

¹⁴ *Id.*, ¶13.

¹⁵ *Opposition*, p. 3.

¹⁶ *Opposition*, p. 3

6. EchoStar never addresses *why* it placed a priority on building out the 121° W.L. orbital slot over satisfying the Commission’s earlier milestones for the 113° W.L. orbital slot. Its decision to do so, however, is clearly business related and does not warrant an extension.

7. Regardless of EchoStar’s failure to prioritize its satellite projects in accord with the Commission’s milestone requirements, recent Commission action has rendered moot its proposed ‘solution’ involving the EchoStar IX satellite.¹⁷ On July 1, 2002, the Commission rendered null and void EchoStar’s authorization to construct, launch and operate its satellites at the 83° W.L. and 121° W.L. orbital positions (*EchoStar Cancellation Order*), because the EchoStar IX satellite “does not assure that the Ka-band transponders will ever be operational.”¹⁸ In fact, the Order noted that the construction of the Ka-band payload is not even guaranteed. As such, the EchoStar IX satellite, built for the 121° W.L. orbital position, cannot be seriously considered with respect to the 113° W.L. orbital position, since the Commission already has determined that the satellite does not even carry any cognizable Ka-band capacity.

8. In fact, the Commission’s action in declaring null and void EchoStar’s Ka-band license for the 121° W.L. orbital position simply illustrates another instance of EchoStar’s well-known tendency to speak out of both sides of its mouth at the same time.¹⁹ In its *Extension Request*, EchoStar states that it has “shown its commitment to developing the Ka-band by making significant, early investments [in EchoStar IX] and demonstrating its intention to

¹⁷ See *Extension Request*, p. 4. EchoStar indicated that EchoStar IX -- originally designed for the 121° W.L. orbital slot -- could be moved temporarily to the 113° W.L. orbital slot.

¹⁸ Memorandum Opinion and Order, *In The Matter Of EchoStar Satellite Corporation*, DA 02-1534, ¶7 (released July 1, 2002) (*EchoStar Cancellation Order*).

¹⁹ See EchoStar/DIRECTV “Flip Flop” Chart (*NRTC Petition*, Exhibit A).

proceed with Ka-band deployment.”²⁰ Despite their claim, the Commission has now been forced to conclude that the EchoStar IX satellite actually carries no Ka-band capacity whatsoever.²¹

9. EchoStar dismisses as “outrageous”²² NRTC’s recommendation that the Commission conduct a full investigation into the claim that EchoStar was somehow “forced” to delay payments to its satellite contractor.²³ NRTC’s recommendation is not outrageous in any respect. To the contrary, it is EchoStar’s conduct and its constantly evolving story surrounding the delay in constructing the VisionStar satellite that is outrageous. EchoStar’s aggressive funding of its EchoStar IX satellite -- contrasted with its blatant neglect of its VisionStar obligations -- shows that EchoStar was willing to launch a broadband satellite, but not before a decision is made by the Commission with respect to its proposed merger with Hughes.²⁴

B. Granting An Extension To EchoStar Based On An Alleged “Drought Of Funds” Is Unworkable And Will Create Dangerous Precedent.

10. Through its *Extension Request*, EchoStar asks the Commission to create an entirely new regulatory loophole for obtaining a milestone waiver: an alleged unfavorable economic climate in a particular segment of the communications industry. Creation of such a loophole is wholly impractical and would create a dangerous, unworkable precedent for the Commission, opening the door for countless similar requests from the Ka-band satellite industry and elsewhere. Moreover, the Commission would be faced with the daunting task of somehow

²⁰ *Extension Request*, p. 4.

²¹ *EchoStar Cancellation Order*, ¶7.

²² *Opposition*, p. 7.

²³ *NRTC Petition*, pp. 13-14.

²⁴ Consistent with EchoStar’s strategy of demonstrating that satellite broadband will never become reality unless the proposed Merger is approved, NRTC pointed out in the *NRTC Petition* that EchoStar: (1) bemoans the lack of funding for Ka-band broadband satellites, but (2) advises the Rural Utilities Service (RUS) that the federal loan guarantee program is *not* necessary to bring local television and broadband services to rural America. *NRTC Petition*, p. 36; *DBS Services Sees No Need For Guarantee*, Satellite Business News, June 14, 2002. EchoStar failed to address this inconsistency in its *Opposition*.

forming practical and objective criteria that would establish that a particular market is sufficiently “flat” to warrant an extension of well-established Commission requirements.

11. Will the Commission hire a team of economic experts, who -- like weathermen -- will ascertain when and where a financial drought is occurring? Or instead, will the Commission develop a series of complicated economic formulas that somehow will uncover the presence of an adequately unfavorable economic climate in a particular sector of the industry? How broadly -- or how narrowly -- will each sector of the industry be defined? What will differentiate an ‘unfavorable’ economic condition from one that is merely ‘lagging?’ More importantly, how will the Commission differentiate a business sector downturn from a bad business decision, since both suffer from the same warning signs: fallow spectrum, immobile licensees and a lack of adequate financing?

12. EchoStar provides no answers to these or a host of other similar questions. EchoStar simply states as fact -- with no verification or objective analysis whatsoever -- that the financial community’s “resulting reticence to invest substantial new capital in Ka-band satellite projects”²⁵ has devolved to such a degree that EchoStar should not be held accountable for Commission milestones that it accepted when it received its license less than six months before filing its *Extension Request*.²⁶

13. Creation of such a regulatory loophole is fraught with risk. The Commission recently stated in the *Nextwave* case that “a decision creating a massive loophole in a regulatory regime is more important than one keeping it shut.”²⁷ The Commission already has seen that “[d]ozens of licensees that acquired spectrum through the auction process have filed for

²⁵ *Extension Request*, p. 2.

²⁶ *EchoStar/VisionStar Order*, ¶30.

²⁷ *Federal Communications Commission v., NextWave Personal Communications Inc.*, 254 F.3d 130 (D.C. Cir. 2001), Reply Brief For The Federal Communications Commission, February 2002, No. 01-653, p. 3 (*FCC Reply*).

bankruptcy protection and now regularly invoke the [*Nextwave*] decision . . . to retain their licenses despite failing to meet regulatory payment obligations.”²⁸ In fact, its latest accounting shows that 337 licensees with payment obligations of a combined \$6.9 billion have declared bankruptcy.²⁹

14. A grant of EchoStar’s *Extension Request* would cause licensees from every segment of the communications industry -- Fixed Satellite Service, Multichannel Video Data Distribution Service, Broadcast Satellite Service, Specialized Mobile Radio, and others -- to cite perceived “financial droughts” within each of their respective industries. Pointing to EchoStar’s newly created loophole, other licensees will invariably seek waivers of Commission construction requirements. Instead of compelling licensees to implement service expeditiously through compliance with well-established milestone requirements, the Commission will instead be encouraging them to seek extensions of their construction obligations based on undefined economic criteria.

C. EchoStar Offers No Explanation Of Its Delay In Notifying The Commission Of Its Failure To Construct Its VisionStar Satellite.

15. EchoStar provides no explanation as to why it waited more than two months after publicly disclosing that it would need an extension before notifying the Commission of that fact. Instead of providing answers, EchoStar’s *Opposition* attempts to mischaracterize the dispute by proclaiming that there is “nothing reprehensible about . . . early disclosure” to the SEC.³⁰ The problem, however, is not caused by EchoStar’s *early disclosure* to the SEC -- but by its *late disclosure* to the FCC. EchoStar’s response ignores its gross failure to *disclose anything*

²⁸ *FCC Reply*, p. 2, n. 1.

²⁹ *FCC Reply*, n. 1.

³⁰ *Opposition*, p. ii.

whatsoever to the Commission after notifying the SEC months beforehand that it “will have to ask the FCC for an extension.”³¹

16. The fact that a licensee of a scarce Ka-band authorization will miss a crucial FCC milestone is important information that the Commission deserves to receive as soon as it becomes available -- not months after the same information has been disclosed to the SEC.³² When the Commission granted EchoStar’s transfer of control of the VisionStar license in October 2001, it made perfectly clear to EchoStar that “given the tight schedule,” EchoStar was required “to notify the Commission of any changes in the . . . contract milestones or the milestone payment schedule.”³³ The Commission felt this requirement was necessary “to ensure that the spectrum covered by this transferred license is put to use expeditiously.”³⁴ Despite these unambiguous requirements to notify the Commission of any changes in the milestone schedule, EchoStar chose to ignore them until the last possible moment.

17. These were not milestone requirements thrust on an unsuspecting First or Second Round Ka-band licensee. Instead, through a lucrative business transaction, EchoStar acquired the VisionStar license with a full understanding of the milestone schedule. Despite this knowledge, however, no more than a few months after acquiring the license EchoStar was disclosing to the public that it would need an extension from the FCC.

18. In its *Opposition*, EchoStar dedicates little more than a footnote in an attempt to explain its February 28, 2002 disclosure to the SEC (*SEC Filing*) that it will have to ask the FCC

³¹ *EchoStar 10-K*, p. 10 (stating that EchoStar “will not complete construction or launch of the satellite by [its milestone] dates and will have to ask the FCC for an extension.”).

³² *See e.g.*, 47 C.F.R. § 1.65 (stating that applicants are responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Applicants are required to notify the Commission of any changes “as promptly as possible and in any event within 30 days”).

³³ *EchoStar/VisionStar Authorization*, ¶23.

³⁴ *Id.*, ¶23.

for an extension.³⁵ EchoStar tries to skirt this issue by claiming that “it did not give up on the possibility, however slim, that the need for an extension might be averted.”³⁶ The *SEC Filing*, however, recognizes no wiggle-room for any such leeway: EchoStar unequivocally stated to the SEC that it “*will* have to ask the FCC for an extension.”³⁷ There is no conditional language whatsoever. EchoStar offered the SEC no promise of any continuing last-minute efforts to finance the project up to and including the last day of the last month for completion of construction of the satellite.³⁸ The fact of the matter is that EchoStar cannot reconcile these two factual scenarios: it told the SEC that it *would* have to file an extension at the FCC, and it failed to inform the Commission of the same thing until months later.³⁹

19. EchoStar’s transgression in the current instance is almost identical to the situation for which it was recently admonished by the Commission in *Young Broadcasting*.⁴⁰ In that proceeding, the Commission found that EchoStar “failed in its duty of candor” by publicly

³⁵ *Opposition*, n. 13.

³⁶ *Id.*, p. 6.

³⁷ *EchoStar 10-K*, p. 10 (emphasis added), *Opposition*, n. 13 (EchoStar focuses its *Opposition* almost entirely on its January 28, 2002 SEC filing, where it indicated that it *may* need to request an extension. EchoStar dedicates little more than a footnote to explaining its February 28, 2002 disclosure to the SEC, which made clear that it *will* need to file an extension request).

³⁸ EchoStar makes a wholly unsubstantiated claim that it has made “substantial progress” towards implementation of its VisionStar satellite. *Opposition*, p. 8. Despite this alleged progress, however, EchoStar does not explain why it requires a three year extension of the construction and launch milestones. In stark contrast, other Ka-band licensees that were granted extensions provided substantive, detailed proof of their legitimate progress towards system implementation (See e.g. Memorandum Opinion and Order, *In The Matter Of Astrolink International LLC*, DA 02-1431, ¶4 (released June 18, 2002) (stating that in support, “Astrolink submitted photographs of the completed payload, assembly and antenna . . . [and] that 95 percent of the spacecraft bus hardware and software is complete and all remaining necessary parts are on hand.”) (*Astrolink Order*).

³⁹ In addition, in disputing NRTC’s observation that EchoStar gave the SEC different reasons for its need for an extension (*NRTC Petition*, p. 6), EchoStar’s *Opposition* makes a blatant misstatement. Specifically, it claims that NRTC “deliberately disregards some of the most important language from the passage it quotes.” *Opposition*, p. 5. EchoStar then cites the allegedly missing language (in italics): “*among other things . . . changes in the VisionStar satellite design due to the recent failure of the Astrolink Ka-band satellite venture . . . it is unlikely that [EchoStar] will meet these Ka-band milestones and we may need to request an extension from the FCC.*” *Opposition*, p. 5. For the benefit of the Commission and EchoStar, the specific ‘missing’ language can be found at *NRTC Petition*, pp. 4, 6.

⁴⁰ Memorandum Opinion and Order, *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, 16 FCC Rcd. 15070 (CSB August 6, 2001) (*Young Broadcasting*).

disclosing information for which it had previously sought confidentiality from the Commission.⁴¹

The elements of lack of candor that were so apparent in *Young Broadcasting* are equally apparent with respect to EchoStar's failure to inform the Commission of its need for an extension.⁴²

20. Now that its bluff has been called, EchoStar is desperately back-peddling in an attempt to reconcile its unequivocal admission to the SEC with its stark silence at the Commission. As has occurred so many times before,⁴³ the Commission will be forced to ask EchoStar why it has demonstrated -- again -- a lack of candor with the Commission.⁴⁴

⁴¹ *Young Broadcasting*, ¶12 (Indeed, it was the adversary in that proceeding -- not EchoStar -- that first brought these disclosures to the Commission's attention. *Id.*).

⁴² Both the Commission and the U.S. Court of Appeals for the District of Columbia have repeatedly declared that "lack of candor" under the Commission's Rules has as an essential element an "intent to deceive" the Commission. *See In re Application of Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983); *In re Family Broadcasting, Inc.* 16 FCC Rcd. 4330 (2001) ("lack of candor is concealment, evasion or other failure to be fully informative, accompanied by an intent to deceive the Commission") (citing *Fox River*); *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994) (an "intent to deceive [is] an essential element of a misrepresentation or lack of candor showing") (quoting *Weyburn Broadcasting Ltd. v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir 1993)) (citations omitted). *See also Opposition*, n. 11.

⁴³ *NRTC Petition*, pp. 10-14.

⁴⁴ Regarding the topic of full disclosure, EchoStar faults NRTC for filing the *NRTC Petition* as an ex parte presentation in the Merger proceeding, claiming that it was a "pretext for airing again NRTC's . . . arguments." Parties actually are *required* to file an ex parte notice with the Commission with respect to "any communication (spoken or written) directed to the merits or outcome of a proceeding made to a Commissioner . . . or other decision-making staff-member, that, if written, is not served on the other parties to the proceeding" (*See* 47 C.F.R. 1.1201; *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, p. 2 (released December 21, 2001)). Over the last several months, EchoStar has been peppering decision makers at the Commission in various pending dockets with arguments in favor of its proposed Merger with Hughes, while failing to submit the filings as ex parte presentations in the Merger proceeding (*See e.g. Extension Request*, p. 3, n. 5, arguing that "one of the motivating factors behind the proposed merger of EchoStar and Hughes is the ability of the combined companies to better finance and execute a Ka-band broadband system."); *See also* Comments EchoStar submitted April 29, 2002 in response to, Public Notice, *AT&T Corp. and Comcast Corp. Seek FCC Consent For A Proposed Transfer of Control*, DA 02-733 (released March 29, 2002), pp. 2, 7, 8 (stating that "the EchoStar-Hughes will create the critical mass needed to begin to counter . . . the overwhelming strength that AT&T Comcast would be able to muster . . ."; and, "Perhaps nothing more clearly illustrates the need for EchoStar and Hughes to stay competitive through their merger than the AT&T-Comcast consolidation;" and finally, "the broadband benefits to flow from the EchoStar-Hughes merger are not only more concrete and more directly related to the transaction in question, they become all the more necessary precisely because of the acceleration of cable broadband deployment cited by the Applicants"). This is just a sampling of documents that -- while clearly directed to the merits of the proposed Merger -- EchoStar failed to file in the Merger docket as required by the Commission's rules.

D. The Ka-Band Industry Is Moving Forward, Despite EchoStar's Recalcitrance.

21. The Commission recently released a series of orders showing that EchoStar's claims of an industry-wide slowdown are baseless. Despite EchoStar's claims of financial market stagnation,⁴⁵ the Ka-band industry in fact is moving forward despite EchoStar's recalcitrance.

22. On June 18, 2002, the International Bureau determined that six of the eight First Round Ka-band Licensees with December 2001 or January 2002 construction targets had satisfied their respective milestones (*Ka-Band Notice*).⁴⁶ Only two licensees were absent from the list, one of which was EchoStar, due to its failure to provide the necessary contractual information to the Commission.⁴⁷ EchoStar eventually provided information which the Commission recently determined was inadequate to demonstrate that EchoStar had commenced construction of a Ka-band satellite at the 121° W.L. orbital position, as required.⁴⁸

23. The *Ka-Band Notice* flies in the face of claims by EchoStar of a stagnant financial market: Ka-band licensees in fact are commencing construction of their satellites. They are entering into non-contingent contracts, while satellite manufacturers are aggressively competing for their business. While other Ka-band licensees are implementing their respective business plans, only EchoStar is choosing to stand still.

⁴⁵ The exact scope of the financial market's stagnation is impossible to determine in comparing EchoStar's *Extension Request* with its *Opposition*. In its *Extension Request*, EchoStar states that the alleged drought of funds has impacted the *entire* Ka-band satellite industry, claiming that "public and private funding sources have called into question whether *any* of the current licensees has the resources to develop and execute a truly effective Ka-band broadband system." *Extension Request*, pp. 2-3 (emphasis in original). Yet in its *Opposition*, EchoStar states that other First and Second Round Ka-band licensees "are not directly and immediately affected by the current financial conditions that necessitated [the *Extension Request*], and therefore "there truly are no "similarly situated" Ka-band licensees." *Opposition*, p. 8.

⁴⁶ Public Notice, *First Round Ka-Band Licensee Compliance with Construction Implementation Milestone*, Report No. SPB-179, DA 02-1432 (released June 18, 2002) (*Ka-Band Notice*).

⁴⁷ *Ka-Band Notice*, n. 1.

⁴⁸ *EchoStar Cancellation Order*, ¶7. The remaining Licensee is Motorola, Inc., which has its own extension request pending at the Commission. The proposed assignment has undergone a detailed review and is currently pending resolution.

24. On the same day it released its *Ka-Band Notice*, the International Bureau released additional Orders further illustrating the progress of the Ka-band industry to date. In the Orders, the Commission found that Astrolink International, LLC (Astrolink) and Teledesic, LLC (Teledesic) either had substantially completed construction of their satellites or were well on their way of doing so. The Order pertaining to Astrolink's milestones noted that "its spacecraft is 90 percent complete, and that the payload hardware and software and the antenna are 100 percent complete."⁴⁹ Far from being stymied by an industry-wide, stagnant financial market, as EchoStar claims, Astrolink informed the Commission that it is "positioned to complete construction and launch its spacecraft by June 2005, the required deadline."⁵⁰

25. In addition to EchoStar's *Extension Request*, only two other First Round Ka-band licensees are seeking milestone extensions. In stark contrast to EchoStar, the remaining modifications seek moderate milestone extensions -- consisting of months, not years. Loral Space & Communications Limited (Loral) seeks a ten month extension (*Loral Extension*) and Motorola, Inc. (Motorola) and Teledesic are jointly seeking a 90 day tolling deadline for the Motorola Ka-band license (*Motorola Extension*). More important than the limited additional time they are seeking, is what is noticeably absent from their requests: neither references -- in any way -- a stagnant financial market as a justification for any extension. Instead, both requests are based entirely on unanticipated technical problems or administrative delay.

26. For example, the *Loral Extension* does not cite financial problems as a basis for delaying the construction and launch of its satellite. Instead, it speaks exclusively of unforeseen technical issues that are delaying the satellite's construction. While EchoStar pouts about the hesitancy of the financial community to invest in "technology [that] remains unproven," the

⁴⁹ *Astrolink Order*, ¶4.

⁵⁰ *Id.*

Loral Extension illustrates that Loral is far beyond the investment phase and well into completing construction.

27. Loral, with only \$229 million of cash and available credit on hand,⁵¹ has been able to commence construction of its satellite to such a degree that it requires only a ten month extension. EchoStar, on the other hand, with \$4.5 billion available in cash, cash equivalents and securities on hand as of March 2002, says that it needs a three year extension to construct a single satellite because its financing has dried up.⁵²

28. The *Motorola Extension* is equally revealing for what it does not say. Motorola and Teledesic seek a milestone extension based solely on administrative -- not financial -- issues. Nowhere do they discuss the existence of a barren financial market, or their inability to obtain financing. Instead, they simply ask for an additional ninety days from the time the Commission acts on their pending assignment application.

29. Finally, and perhaps most revealing, is the complete lack of support that EchoStar's *Extension Request* garnered from the Ka-band community. EchoStar argues that the lack of support somehow illustrates that "no other satellite company has expressed a willingness to implement a system at the VisionStar orbital location."⁵³ Such misplaced logic certainly did not apply when the Commission recently declared null and void EchoStar's Ka-band licenses for the 83° W.L. and 121° W.L. orbital positions.⁵⁴

30. Given the prime location of the 113° W.L. orbital slot, which is accessible throughout the continental United States by a single dish viewing both the EchoStar and DIRECTV DBS

⁵¹ See *Loral Space & Communications, 2001 Annual Report*, p. 2.

⁵² SEC Form 10-Q, filed by EchoStar Communications, Inc., p. 23, May 6, 2002.

⁵³ *Opposition*, p. 9.

⁵⁴ See *EchoStar Cancellation Order*.

satellites, a more likely explanation for this silence is that the slot is currently licensed to EchoStar. NRTC firmly believes that parties will express their interest in the slot once the VisionStar license is similarly rendered null and void by the Commission.

31. Had EchoStar's claims regarding a stagnant financial market cutting across the entire Ka-band industry been valid, other similarly situated licensees likely would have submitted comments in support. The silence, however, is deafening. Not one Ka-band First or Second Round Licensee filed in support of EchoStar's claims, nor did any other party acknowledge the existence of an economic plague on the entire Ka-band industry. Other than EchoStar -- the largest and most financially secure of all Ka-band licensees -- most Ka-band licensees are working diligently to satisfy their construction milestones, as required by the Commission's rules.

II. CONCLUSION.

32. EchoStar consciously determined not to fund the VisionStar satellite for the simple reason that launching a Ka-band satellite at this point would debunk EchoStar's claim that only the Merger will enable American consumers to receive broadband service by satellite.

33. As the Commission noted in its recent *EchoStar Cancellation Order*, the milestone schedule is designed "to ensure that licensed entities are proceeding with construction and will launch their satellites in a timely manner, and that the orbit spectrum is not being held by licensees unable or unwilling to proceed with their plans."⁵⁵ EchoStar has not constructed its VisionStar satellite on schedule and appears unable and/or unwilling to do so. It should not be permitted to continue warehousing a prime Ka-band orbital location. Accordingly, the Commission should declare the VisionStar license null and void and award it to a new licensee.

⁵⁵ *EchoStar Cancellation Order*, ¶ 5.

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July 3, 2002

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 3rd day of July, 2002, a true and correct copy of the foregoing Reply 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:

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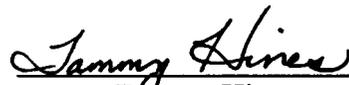
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