

was expected that the proposed spin off would be completed by the end of 2003. After revisions to the initial plan and several postponements, Cablevision's board decided in December, 2004 to suspend plans for a spin off of Rainbow DBS and instead to pursue strategic alternatives for its Rainbow DBS business.

On January 20, 2005 and January 27, 2005 respectively, the Applicants entered into a Satellite Sale Agreement and a Letter Agreement whereby EchoStar would purchase certain assets from Rainbow DBS for \$200 million in cash consideration subject to several conditions, including the Commission's approval of the transaction. Copies of the agreements (redacted in part to protect certain non-public trade secrets and other sensitive information) are appended to this Application. The assets being sold include the Rainbow 1 satellite, associated earth station facilities located at Black Hawk, South Dakota, and related Commission authorizations to operate 11 DBS channels from the 61.5° W.L. orbital location, an additional two DBS channels on an STA basis, and the Black Hawk earth station facility.

Cablevision has indicated that it will continue to explore strategic alternatives, including monetization, for its remaining Rainbow DBS related assets, including programming, equipment and spectrum. It has also stated that VOOM will continue to provide service to its current customers during a transition period.

EchoStar intends to use Rainbow 1 to compliment its existing fleet of satellites, including EchoStar 3 (also at 61.5° W.L.) with additional programming including some local channels to comply with the recently enacted Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA").<sup>5</sup>

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<sup>5</sup> The recently passed *Satellite Home Viewer Extension and Reauthorization Act of 2004* requires that satellite carriers allow all local programming to be received by subscribers by

## II. PUBLIC INTEREST ANALYSIS

The proposed transaction clearly merits approval under the public interest standard set forth in Section 310(d) of the Communications Act.<sup>6</sup> To make this finding, the Commission has traditionally weighed the public interest benefits of the proposed transaction against any potential harm to determine whether, on balance, the benefits outweigh the harms.<sup>7</sup> Applying this calculus, the unavoidable conclusion is that the proposed transaction is in the public interest.

### A. Approval of the Proposed Transaction Will Promote Competition and is in the Public Interest

As the nation's second largest DBS provider and long standing licensee of the Commission, it is beyond question that EchoStar is technically, legally, and financially qualified to operate Rainbow 1 and its associated earth station facilities at Black Hawk, South Dakota. Moreover, the approval of the proposed transaction will clearly promote competition in the MVPD market, which far outweighs any potential negative effects associated with this

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means of a single satellite dish within 18 months of enactment. *See* Section 203 of the Satellite Home View Extension and Reauthorization Act of 2004.

<sup>6</sup> 47 U.S.C. § 310(d).

<sup>7</sup> *See, e.g.,* In the Matter of Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor and Telenor Satellite Mobile Services, Inc. and Telenor Satellite, Inc., Assignee, *Order and Authorization*, FCC 01-369 at ¶ 13 (rel. Dec. 18, 2001) (*citing* Application of VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and for Declaratory Ruling Pursuant to Section 310 of the Communications Act, *Memorandum Opinion and Order*, 16 FCC Rcd 9779, 9789 (2001) (*VoiceStream/Deutsche Telekom Order*); AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications For Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, FCC 99-313, *Memorandum Opinion and Order*, 14 FCC Rcd 19140, 19147 (1999) (*AT&T/BT Order*).

transaction. Normally, a careful determination of the relevant market would be a necessary component of such a competitive analysis, however, in this case, no matter what market is chosen, there are significant overall benefits to competition that will be realized upon Commission approval of the proposed transaction.<sup>8</sup>

The market for MVPD services is the appropriate product market for consideration of this transaction. For nearly a decade, both Congress and the Commission have made concerted efforts to open up the MVPD market to effective competition -- Congress with the enactment of the Cable Television Consumer Protection and Competition Act of 1992 and the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),<sup>9</sup> and the Commission with its rules implementing these laws.<sup>10</sup>

Despite significant inroads in recent years by DBS providers, according to the leading cable industry trade association, cable providers maintain a greater than 73% share of the MVPD market nationwide.<sup>11</sup> In comparison, with approximately 14 million subscribers, DirecTV is currently the nation's largest DBS provider. DirecTV has been strengthened significantly by becoming a subsidiary of News Corp, with its vast programming holdings, and

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<sup>8</sup> See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order*, 16 FCC Rcd 6547 at 6554 (2001) (In a merger context, the Commission has stated, "To obtain approval, the Applicants must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity. In this regard, we must weigh the potential public interest harms of the proposed merger against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the benefits outweigh the harms.").

<sup>9</sup> Pub. L. 106-113, 113 Stat. 1501, App. I.

<sup>10</sup> See generally 47-C.F.R. Part 76.

<sup>11</sup> See *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Comments of the National Cable and Telecommunications Association, MB Docket No. 04-227 (filed Jul. 23, 2004).

being able to convert some of the Spaceway assets to high power direct-to-home satellites. For its part, EchoStar's 10.4 million subscribers comprise a small fraction of the overall MVPD market. Even if all of Rainbow's subscriber base were attributed to EchoStar, there would be no appreciable increase in EchoStar's overall MVPD market share.<sup>12</sup>

In contrast, there would be competitive benefits to the MVPD market from the contemplated transaction. As EchoStar has previously stated, one of the most significant handicaps on the ability of DBS providers to compete on an even footing other MVPD providers is limited bandwidth.<sup>13</sup> Approval of the proposed assignment of Rainbow 1 to EchoStar will help reduce this constraint on effective competition by combining virtually all of the DBS satellite capacity at one orbital location (61.5° W.L.) with EchoStar's satellite fleet. Allowing EchoStar to acquire some additional spectrum at 61.5° W.L. should offer EchoStar greater flexibility in its service offerings and enhance its ability to compete in the market. EchoStar intends to use Rainbow 1 to complement its existing fleet of satellites, including EchoStar 3 (also at 61.5° W.L.). The addition of Rainbow 1 will permit EchoStar to offer additional programming including, among other things, some local channels that will assist EchoStar in complying with SHVERA's prohibition on certain two-dish offerings of local stations.<sup>14</sup> As the Commission knows, the recently enacted law affects uniquely EchoStar, which had developed a

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<sup>12</sup> Since EchoStar is not purchasing Rainbow's business or existing customers as part of this transaction it is not even appropriate to combine Rainbow's subscription base with EchoStar's customers. Rather, EchoStar is only buying certain DBS assets from Rainbow, with Rainbow retaining the rights to its existing customer contracts, receivers and other assets (including the leasing of transponders on another satellite).

<sup>13</sup> See, e.g., *EchoStar 2004 MVPD Competition Comments* at 5.

<sup>14</sup> Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-477, Title IX, Sec. 203 (to be codified as 47 U.S.C. § 338(g)).

two-dish satellite strategy and spent a significant amount of money pursuing that strategy. Nevertheless, EchoStar is committed to complying with this law within the required 18-month time frame. Approval of the proposed transaction could help EchoStar meet its new obligations, although it would be only part of the solution.

The addition of more channels resulting from the acquisition by EchoStar would increase competition in the relevant market to a much greater extent than a third competitor is likely to have in the foreseeable future. Regardless of any theoretical advantages that may be realized from a third entrant in the DBS market, in reality, the market has shown itself unable to sustain more than two nationwide DBS providers. This has been made evident by the recent experiences of Rainbow DBS and the Commission's auction of a substantial number of DBS channels at three western orbital locations, 175° W.L., 166° W.L., and 157° W.L., where no other new entrant qualified as a bidder.<sup>15</sup>

**B. The Transaction Will Comply with the Requirements of the Communications Act, All Other Applicable Statutes, and With the Commission's Rules**

The proposed transaction does not implicate any foreign ownership, aggregation, cross-ownership, or any other restrictions imposed by the Communications Act, Commission regulation or applicable statute. EchoStar is a current Commission licensee, and the qualifications of EchoStar are therefore a matter of record before the Commission. The acquisition of Rainbow 1 and associated assets will not in any way affect the ownership structure of EchoStar, nor will it implicate any Commission Rule or policy governing cross-ownership or MVPD programming relationships. Nor does the Commission have to waive any of its Rules or policies to grant this Application, including the use of DBS channels 23 and 24 on an STA basis.

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<sup>15</sup> See Direct Broadcast Satellite Service Licenses Auction; 2 Qualified Bidders, Public Notice, DA 04-1957 (rel. June 28, 2004).

**C. Approval of the Proposed Transaction Will Not Substantially Frustrate Or Impair the Commission's Implementation or Enforcement of the Communications Act or Other Related Statutes or Interfere With the Act's Objectives**

As part of the public interest analysis, the Commission will also consider whether approval of the proposed transaction will substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act or other related statutes or interfere with the Act's objectives. In this case, it will not. The only issue of note is that the Commission has recently determined that neither EchoStar nor any other licensee currently operating satellites at orbital locations capable of providing DBS service to the 50 U.S. states will be eligible to acquire at auction a permanent license to operate the two remaining unlicensed DBS channels at 61.5° W.L.<sup>16</sup> This decision, however, should have no impact on the proposed transaction.

*First*, the restrictions contained in the *Auction 52 Order* are applicable only to DBS channels 23 and 24 at 61.5 W.L. Thus, they have absolutely no bearing on the other 11 DBS channels that have already been assigned to Rainbow DBS.

*Second*, the *Auction 52 Order*, by its terms, only relates to the permanent authority that would be conveyed pursuant to an auction, and does not act as a bar against the assignment of the special temporary authority held by Rainbow DBS to operate on the two DBS channels pending such an auction. In granting an STA to Rainbow DBS and denying EchoStar's extension request to operate on a temporary basis over DBS channels 23 and 24, the Commission recognized that prior to the entrance of Rainbow DBS into the market, it had "reviewed the facts presented ... and determined that EchoStar's use of the unoccupied spectrum would offer sufficient public interest benefits under the circumstances of that time to satisfy the requirements

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<sup>16</sup> See *In the Matter of Auction of Direct Broadcast Satellite Licenses*, Order, AUC-03-52 (rel. Dec. 3, 2004) ("*Auction 52 Order*").

of [the Act].”<sup>17</sup> Still, the Commission concluded that granting Rainbow DBS an STA rather than EchoStar would “allow Rainbow, a new entrant in the DBS business, the opportunity to use expanded capacity for a limited period of time, in order to help initiate its DBS service.”<sup>18</sup> However, now that Rainbow DBS has made the business decision to dispose of its DBS assets at 61.5° W.L., the circumstances on which the Commission based its earlier decision to deny EchoStar’s STA extension request have changed. Accordingly, there is no longer any reason to deny EchoStar the ability to temporarily operate these two unassigned DBS channels.

*Third*, EchoStar anticipates asking the Commission to reconsider its decision to establish eligibility restrictions for Auction 52, especially in light of the changed circumstances associated with Rainbow DBS’s decision to dispose of its DBS assets at 61.5° W.L. There simply is no basis for maintaining any such restrictions in light of these changed facts.

### III. CONCLUSION

For the foregoing reasons, the Applicants respectfully request that the Commission grant this Application promptly and issue such other orders as it deems necessary or appropriate to enable the Applicants to consummate the proposed transaction.

Respectfully submitted,

ECHOSTAR SATELLITE L.L.C.

RAINBOW DBS COMPANY LLC

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<sup>17</sup> See *In the Matter of EchoStar Satellite Corporation and Rainbow DBS Company LLC*, Order and Authorization, File Nos. SAT-STA-20030617-00117 and SAT-STA-20030623-00122, DA 03-3024 at ¶ 6 (rel. Oct. 1, 2003) (“*EchoStar/Rainbow STA Order*”).

<sup>18</sup>*Id.* at ¶ 5.

# **ATTACHMENT 1**

## **Satellite Sale Agreement**

**SATELLITE SALE AGREEMENT**

**between**

**Rainbow DBS Company LLC**

**and**

**EchoStar Satellite L.L.C.**

**Dated: January 20, 2005**

**Redacted for  
Public Inspection**

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## **SATELLITE SALE AGREEMENT**

This SATELLITE SALE AGREEMENT (this "Agreement") is made and effective as of this 20th day of January, 2005 (the "Execution Date"), by and between Rainbow DBS Company LLC, a limited liability company organized under the laws of the State of Delaware ("Rainbow DBS"), and EchoStar Satellite L.L.C., a limited liability company organized under the laws of the State of Colorado ("Buyer"). Buyer and Rainbow DBS are referred to collectively herein as the "Parties" and individually as a "Party."

### **RECITALS**

WHEREAS, Rainbow DBS wishes to sell, and Buyer wishes to purchase, a certain DBS satellite known as Rainbow-1 currently in geostationary orbit at the 61.5° West Longitude orbital location ("Rainbow-1") and certain other assets relating to the ownership and operation of Rainbow-1, in accordance with and subject to the terms and conditions set forth in this Agreement.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the respective promises herein made; the representations, warranties, and covenants herein contained; and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

#### **1. DEFINITIONS**

In addition to the capitalized terms defined elsewhere herein, the following terms shall have the following meanings:

1.1 "Acquired Assets" means Rainbow-1, the Contract Rights, the Deliverable Data, the Ground Equipment, and, except as provided in Section 2.1 with respect to the Unlicensed Frequency Channels, the FCC Licenses.

1.2 "Acquired Asset Material Adverse Effect" means a material adverse effect on the use by or benefit to Buyer of any of the Acquired Assets, excluding any change or development resulting from (i) events adversely affecting any of the principal markets served by the businesses of Buyer or any of its Affiliates, or (ii) general economic conditions, including changes in the economies of any of the jurisdictions in which Buyer or any of its Affiliates conduct business.

1.3 "Actual CONUS Beam Operational Capability" means, when Rainbow-1 is configured to operate with the maximum number of CONUS beam Transponders, the sum of the periods (expressed in years and/or portions thereof, measured from Closing and determined based upon the results of the in-orbit testing contemplated pursuant to Section 4.3.9) over which it is determined that each CONUS beam Transponder operating in boost mode will remain an Operating Transponder, or until the end of the Remaining Mission

Life, whichever is earlier. Actual CONUS Beam Operational Capability shall be expressed in Transponder years (or portions thereof), *i.e.*, one (1) CONUS beam Operating Transponder for one (1) year equals one (1) Transponder year.

1.4 "Actual Spot Beam Operational Capability" means, when Rainbow-1 is configured to operate with the maximum number of spot beam Transponders, the sum of the periods (expressed in years and/or portions thereof, measured from Closing and determined based upon the results of the in-orbit testing contemplated pursuant to Section 4.3.9) over which it is determined that each spot beam Transponder will remain an Operating Transponder, or until the end of the Remaining Mission Life, whichever is earlier. Actual Spot Beam Operational Capability shall be expressed in Transponder years (or portions thereof), *i.e.*, one hundred thirty (130) spot beam Operating Transponders for one (1) year equals one hundred thirty (130) Transponder years.

1.5 "Affiliate" means, with respect to a specified Person, any other Person, directly or indirectly, controlling, controlled by, or under common control with the Person specified. "Control" (including, with correlative meaning, "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

1.6 "Agreement" shall have the meaning set forth in the Preamble.

1.7 "Buyer" shall have the meaning set forth in the preamble to this Agreement.

1.8 "Buyer Material Adverse Effect" means a material adverse effect on the business, assets, operations, prospects or condition (financial or otherwise) of Buyer and its Affiliates, taken as a whole, excluding any change or development resulting from (i) events adversely affecting any of the principal markets served by the business of Buyer or any of its Affiliates or (ii) general economic conditions, including changes in the economies of any of the jurisdictions in which Buyer or any of its Affiliates conduct business.

1.9 "Closing" shall have the meaning set forth in Section 2.3.

1.10 "Communications Act" means the Communications Act of 1934, as amended.

1.11 "Consideration" shall have the meaning set forth in Section 2.2.

1.12 "Contract Rights" means all rights and remedies of Rainbow DBS under the Lockheed Contract, including any indemnities, warranty payments, support services, Flight Operations (TT&C) and guarantees due from the manufacturer of Rainbow-1 and its subcontractors, but excluding any obligations remaining to be performed by Rainbow DBS under the Lockheed Contract.

1.13 "DBS" means direct broadcast satellite.

1.14 "Deliverable Data" means all specifications, technical drawings and data, design data, test data and test results and other data and documentation regarding Rainbow-1 provided to Rainbow DBS by the manufacturer of Rainbow-1 and/or any of such manufacturer's subcontractors; all operational and maintenance logs and data for Rainbow-1 generated or maintained by or for Rainbow DBS; and all data regarding any and all anomalies identified on or experienced by Rainbow-1, including without limitation the results of any anomaly investigations.

1.15 "Execution Date" shall have the meaning set forth in the preamble to this Agreement.

1.16 "FCC" means the Federal Communications Commission and any successor agency thereto.

1.17 "FCC Licenses" means (i) the permanent FCC authorization to construct, launch and operate Rainbow-1 in the Direct Broadcast Satellite Service over 11 frequency channels (1-21 odd) at the 61.5° West Longitude orbital location (FCC DBS8701); (ii) the FCC special temporary authority to operate the Unlicensed Frequency Channels at the 61.5° West Longitude orbital location (FCC File No. SAT-STA-20030623-00122, extension requests pending, FCC File No. SAT-STA-20040319-00081; SAT-STA-20040924-00191); and (iii) any application for modification of any of the foregoing licenses that may be required to be filed hereafter until Closing.

1.18 "Governmental Entities" shall have the meaning set forth in Section 3.1.2.

1.19 "Ground Equipment" means all personal property of Rainbow DBS situated on the real property located in Black Hawk, South Dakota, referred to in Section 4.3.6.

1.20 "Hart-Scott-Rodino Act" or "HSR Act" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

1.21 "Indemnified Party" shall have the meaning set forth in Section 6.5.1.

1.22 "Indemnitor" shall have the meaning set forth in Section 6.5.1.

1.23 "Liability" means any liability or obligation of any nature (whether known or unknown, whether absolute or contingent, whether liquidated or unliquidated, whether due or to become due and whether accrued or unaccrued), including without limitation any liability for Taxes.

1.24 "Liens" means any lien, mortgage, deed of trust, pledge, hypothecation, assignment, security interest, charge, easement, encumbrance, preference, option, restrictive covenant, priority or other security agreement or preferential arrangement of any kind or nature (including without limitation any conditional sale or other title retention agreement having substantially the same economic effect as any of the foregoing).

1.25 "Lockheed Contract" mean the Contract between R/L DBS Company, LLC (now known as Rainbow DBS) and Lockheed Martin Corporation for Rainbow-1, dated as of May 1, 2001, as previously amended through the Execution Date.

1.26 "Operating Transponder" means a Transponder that, at Closing has been determined based upon the results of the in-orbit testing contemplated pursuant to Section 4.3.9 to meet the applicable Satellite Performance Specifications, including through periods of eclipse, or that Buyer, using reasonable business judgment, and after examining all reasonable technical alternatives for correcting any failures of such Transponder to meet the Satellite Performance Specifications, determines can be used for its intended commercial communications purposes. In the event a component of Rainbow-1 fails, all applicable spare components available must be used before an affected Transponder ceases to be an Operating Transponder.

1.27 "Ordinary Course of Business" means the ordinary course of business consistent with past custom and practice (including without limitation with respect to quantity and frequency), but in all events at least the same degree of care as would be exercised by a reasonably prudent satellite owner and operator.

1.28 "Partial Loss" means that, at Closing and as determined based upon the results of the in-orbit testing contemplated pursuant to Section 4.3.9, either Actual CONUS Beam Operational Capability is less than Stated CONUS Beam Operational Capability or Actual Spot Beam Operational Capability is less than Stated Spot Beam Operational Capability, but in either case Rainbow-1 is not a Total Loss.

1.29 "Person" means an individual, partnership, trust, corporation, joint venture, limited liability company, association, government bureau or agency or other entity of whatever kind or nature.

1.30 "Rainbow-1" shall have the meaning set forth in the Recitals.

1.31 "Rainbow DBS" shall have the meaning set forth in the preamble to this Agreement.

1.32 "Regulatory Approvals" means (a) all approvals from the FCC (or a bureau or subdivision thereof acting under delegated authority) required for the assignment of the FCC Licenses provided that such approvals are effective, have not been stayed, enjoined or reconsidered by the FCC or any bureau thereof or by any court, and the period for such reconsideration by the FCC or any bureau thereof or by any court has elapsed, and (b) the expiration or termination of the waiting period (and any extensions thereof) with respect to this transaction under the HSR Act or the entry of a final non-appealable consent judgment by a court of competent jurisdiction that permits such transaction.

1.33 "Regulatory Provisions" means all applicable requirements of the Communications Act and the published policies, rules, decisions, and regulations of the FCC, in each case as amended from time to time.

1.34 "Remaining Mission Life" means fifteen (15) years minus the number of days between July 27, 2003 and the Closing.

1.35 "Satellite Performance Specifications" means the performance specifications for Rainbow-1 in the form of Appendix A hereto.

1.36 "Stated CONUS Beam Operational Capability" means, when Rainbow-1 is configured to operate with the maximum number of CONUS beam Transponders, thirteen (13) CONUS beam Operating Transponders operating in boost mode, multiplied by the Remaining Mission Life, and expressed in Transponder years and/or portions thereof. For example, if the Remaining Mission Life at Closing is twelve (12) years, the stated CONUS Beam Operational Capability would equal one hundred fifty-six (156) CONUS beam Transponder years.

1.37 "Stated Spot Beam Operational Capability" means, when Rainbow-1 is configured to operate with the maximum number of spot beam Transponders, one hundred thirty (130) spot beam Operating Transponders multiplied by the Remaining Mission Life, and expressed in Transponder years and/or portions thereof. For example, if the Remaining Mission Life at Closing is twelve (12) years, the Stated Spot Beam Operational Capability would equal one thousand five hundred sixty (1,560) spot beam Transponder years.

1.38 "Survival Date" shall have the meaning set forth in Section 5.3.

1.39 "Taxes" shall have the meaning set forth in Section 2.5.

1.41 "Transponder" means, individually, those sets of equipment within the communications subsystem of Rainbow-1 that provide a discrete path to receive communications signals from Earth, translate and amplify such signals, and transmit them to Earth.

1.42 "TT&C" means tracking, telemetry and control functions.

1.43 "Unconditional" with respect to any Regulatory Approvals or other consents means that such Regulatory Approvals or other consents contain no conditions that would (a) have a material adverse effect (i) on either Party's ability to consummate the transactions contemplated by this Agreement, or (ii) on Buyer's ability to own and operate the Acquired Assets after Closing, or (b) create any obligation on the part of Buyer to accept (as a condition to receipt of such Regulatory Approvals or otherwise): (i) any restriction on the right of Buyer to operate pursuant to (A) the FCC Licenses (except with respect to the Unlicensed Frequency Channels),

other than (1) any restrictions generally imposed on operators of high-powered DBS services, by applicable Regulatory Provisions and restrictions of the types generally and customarily imposed by the FCC on operators of high-powered DBS services, and (2) such other restrictions, which, individually or in the aggregate, do not have an Acquired Asset Material Adverse Effect or a Buyer Material Adverse Effect; or (ii)

other than (A) any restrictions generally imposed on operators of high-powered DBS services, by applicable regulatory provisions and restrictions of the types generally and customarily imposed by the FCC on operators of high-powered DBS services, and (B) such other restrictions, which, individually or in the aggregate, do not have an Buyer Material Adverse Effect.

1.44 "Unlicensed Frequency Channels" means DBS frequency channels 23 and 24 at the 61.5° West Longitude orbital location that have not been assigned permanently by the FCC and for which Rainbow DBS currently holds special temporary authority to operate from the FCC (File Nos. SAT-STA-20030623-00122, SAT-STA-20040319-00081 and SAT-STA-20040924-00191 (extension requests pending)).

## **2. PURCHASE AND SALE**

2.1 Assets to be Transferred. At the Closing, in accordance with and subject to the terms and conditions set forth in this Agreement, Rainbow DBS agrees to sell, assign, transfer and convey to Buyer, or at Buyer's option, one or more Affiliates of Buyer, all of Rainbow DBS' right, title and interest in and to the Acquired Assets, free and clear of any and all Liens; provided that if the FCC does not permit Rainbow DBS to assign the portion of the FCC Licenses authorizing operation of the Unlicensed Frequency Channels, or imposes any conditions or restrictions on such assignment of the Unlicensed Frequency Channels whatsoever, (i) the Parties will proceed with the Closing on all other Acquired Assets, (ii) there shall be no adjustment to the Consideration paid by Buyer hereunder, and

(iii) Rainbow DBS shall have no Liability arising out of the FCC's refusal to permit the assignment of the portion of the FCC Licenses authorizing operation of the Unlicensed Frequency Channels or any conditions or restrictions placed on such assignment of the Unlicensed Frequency Channels. Except for obligations arising after Closing in the Ordinary Course of Business under the Contract Rights and the FCC Licenses, Buyer will take the Acquired Assets free of, and Buyer is not assuming any Liabilities of Rainbow DBS.

**2.2 Consideration.** As consideration for the sale, assignment, transfer and conveyance of the Acquired Assets hereunder, in accordance with and subject to the terms and conditions set forth in this Agreement, Buyer agrees to pay Rainbow DBS at Closing the sum of Two Hundred Million United States Dollars (\$200,000,000) subject to adjustment as set forth in Section 4.3.11 (the "Consideration").

**2.3 The Closing.** The closing of the transactions contemplated by this Agreement (the "Closing") shall occur at 9:00 a.m. local time on the fifth (5th) business day following the date on which all conditions to closing in Article 3 have been satisfied or waived, at the offices of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Chrysler Center, 666 Third Avenue, New York, NY 10017, or on such other date or at such other time or place as the Parties may agree.

**2.4 Deliveries at Closing.**

**2.4.1 *Rainbow Deliveries.*** At the Closing, Rainbow DBS shall deliver to Buyer (i) a bill of sale in the form of Appendix B and other assignments and instruments of transfer reasonably requested by Buyer, all in form and substance reasonably acceptable to Buyer, transferring good and marketable title to all of the Acquired Assets to Buyer, free and clear of any and all Liens, (ii) a certificate dated as of the date of Closing, containing a true and accurate description of the performance specifications of Rainbow-1 as of the Closing, and as determined based upon the results of the in-orbit testing contemplated pursuant to Section 4.3.9, (iii) the certificate specified in Section 3.1.1, and (iv) the Deliverable Data.

**2.4.2 *Buyer Deliveries.*** At the Closing, Buyer shall deliver to Rainbow DBS (i) the Consideration by wire transfer to an account designated in writing by Rainbow DBS not less than five (5) business days prior to Closing, and (ii) the certificate specified in Section 3.2.1.

2.6 Further Assurances. At any time and from time to time after the Closing, at the request of Buyer and without further consideration, Rainbow DBS will promptly execute and deliver such other instruments of sale, transfer, conveyance, assignment and confirmation, and will, without delay, take such further action, as may be reasonably requested in order to more effectively transfer, convey and assign to Buyer, and to confirm Buyer's title free and clear of all Liens (other than Liens arising under contracts to which Buyer or its Affiliates are a party) to, the Acquired Assets, and each of the Parties shall execute such other documents and take such further action as may be reasonably required or desirable to carry out the provisions of this Agreement and the transactions contemplated hereby.

### **3. CONDITIONS TO CLOSING**

3.1 Conditions to Obligation of Buyer. The obligation of Buyer to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment, at or prior to Closing, of each of the following conditions (unless waived by Buyer):

3.1.1 *Representations, Warranties and Covenants*. The representations and warranties of Rainbow DBS contained in this Agreement shall be true and correct in all material respects as of the Execution Date and the Closing, and all the covenants contained in this Agreement to be complied with by Rainbow DBS at or before the Closing shall have been complied with in all material respects, and Buyer shall have received a certificate of Rainbow DBS to such effect signed by a duly authorized officer of Rainbow DBS.

3.1.2 *Compliance with Law*. There shall be no statute, law, judgment, decree, injunction, rule or order of any federal, state, local or foreign government, governmental authority, governmental department, commission, administrative or regulatory agency, instrumentality, court or arbitrator ("Governmental Entities") outstanding or in effect that prohibits, restricts, conditions (except for conditions that, despite their existence would make the matter Unconditional hereunder) or delays consummation of the transactions contemplated by this Agreement. There shall be no litigation pending that would enjoin, restrain, condition (except for conditions that, despite their existence would make the matter Unconditional hereunder), delay or prohibit the consummation of the transactions contemplated by this Agreement.

3.1.3 *Regulatory Approvals*. The Parties shall have received the Unconditional grant of all Regulatory Approvals, except for any approval from the FCC to assign Rainbow DBS' special temporary authority with respect to the Unlicensed Frequency Channels.

3.1.4 *Third Party Consents.* Rainbow DBS shall have obtained the necessary consent from Lockheed Martin Corporation to assign the Contract Rights to Buyer.

3.1.5 *Total Loss.* No Total Loss shall have occurred on or before the Closing.

3.1.6 *In-orbit Testing.* The in-orbit testing contemplated by Section 4.3.9 below shall have been completed and the report on such testing shall have been delivered as specified in Section 4.3.9.

3.2 Conditions to Obligation of Rainbow DBS. The obligation of Rainbow DBS to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment, at or prior to the Closing, of each of the following conditions (unless waived by Rainbow DBS):

3.2.1 *Representations, Warranties and Covenants.* The representations and warranties of Buyer contained in this Agreement shall be true and correct in all material respects as of the Execution Date and the Closing, and all the covenants contained in this Agreement to be complied with by Buyer at or before the Closing shall have been complied with in all material respects and Rainbow DBS shall have received a certificate of Buyer to such effect signed by a duly authorized officer of Buyer.

3.2.2 *Compliance with Law.* There shall be no statute, law, judgment, decree, injunction, rule or order of any Governmental Entities outstanding or in effect that prohibits, restricts, conditions (except for conditions that, despite their existence would make the matter Unconditional hereunder) or delays consummation of the transactions contemplated by this Agreement. There shall be no litigation pending that would enjoin, restrain, condition (except for conditions that, despite their existence would make the matter Unconditional hereunder), delay or prohibit the consummation of the transactions contemplated by this Agreement.

3.2.3 *Regulatory Approvals.* The Parties shall have received the Unconditional grant of all Regulatory Approvals, except for any approval from the FCC to assign Rainbow DBS' special temporary authority with respect to the Unlicensed Frequency Channels.

3.2.4 *Third Party Consents.* Rainbow DBS shall have obtained the necessary consent from Lockheed Martin Corporation to assign the Contract Rights to Buyer.

#### **4. REPRESENTATIONS, WARRANTIES AND COVENANTS**

4.1 Representations, Warranties and Covenants of Rainbow DBS. Rainbow DBS represents, warrants and covenants to Buyer as follows:

**4.1.1 Organization of Rainbow DBS.** Rainbow DBS is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. Rainbow DBS has all requisite power and authority to own and operate the Acquired Assets as currently owned and operated by it. Rainbow DBS is duly qualified or licensed as a foreign entity to conduct business, and is in good standing, under the laws of each jurisdiction where the character of the properties owned, leased or operated by it, or the nature of its activities, makes such qualification or licensing necessary, except where the failure to do so would not have a material adverse effect on its ability to consummate the transactions contemplated by this Agreement.

**4.1.2 Authority.** Rainbow DBS has all requisite power and authority to execute and deliver this Agreement and the other documents executed and delivered pursuant hereto, to perform its obligations hereunder and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement and the other documents executed and delivered pursuant hereto, the performance of Rainbow DBS' obligations hereunder and the consummation of the transactions contemplated hereby, have been duly authorized by all necessary action on the part of Rainbow DBS and no other proceedings are necessary in connection therewith. No vote of the holders of the outstanding shares of any class of Rainbow DBS' outstanding securities is necessary to approve the consummation of the transactions contemplated by this Agreement.

**4.1.3 Binding Obligation.** This Agreement and the other documents delivered pursuant hereto have been duly executed and delivered by Rainbow DBS and constitute valid and binding obligations of Rainbow DBS, enforceable against it in accordance with their terms.

**4.1.4 No Conflicts.** Except with respect to matters that would not have a material adverse effect on Rainbow DBS' ability to consummate the transactions contemplated by this Agreement, the execution and delivery of this Agreement and the other documents delivered pursuant hereto do not, and the performance by the Rainbow DBS of its obligations hereunder and the consummation of the transactions contemplated hereby, will not (A) conflict with or result in any violation of, or default (with or without notice or lapse of time, or both), or (B) give rise to any right of termination, cancellation or acceleration of any obligation or to a loss of a material benefit under, (i) any provision of Rainbow DBS' organizational documents or those of any Affiliate of Rainbow DBS, (ii) any material contract (including the Lockheed Contract) to which Rainbow DBS or any of its Affiliates is a party, or (iii) subject to the governmental filings and other matters referred to in Section 4.1.5, any permit, license, franchise, statute, law, ordinance, rule, regulation, writ, injunction, judgment, decree or order applicable to Rainbow DBS or any of its Affiliates, or by which any of their respective properties or assets may be bound or affected. Except for any Liens arising under contracts to which Buyer or its Affiliates are a party, the consummation of the transactions contemplated by this Agreement will not result in any Liens on the Acquired Assets.

**4.1.5 Governmental Consents.** No consent, approval, order or authorization of, or registration, declaration or filing with, any Governmental Entity is required by or with respect to Rainbow DBS or any of its Affiliates in connection with the execution and delivery of this Agreement and the other documents delivered pursuant hereto and the consummation of the transactions contemplated hereby, except for (i) the Unconditional grant of the Regulatory Approvals, and (ii) such consents, approvals, orders or authorizations, or registrations, declarations or filings which if not obtained or made will not, or could not reasonably be expected to, adversely affect in any material respect the transactions contemplated by this Agreement.

**4.1.6 FCC Licenses and Acquired Assets.** Except for Rainbow DBS' special temporary authorization for the Unlicensed Frequency Channels for which requests for extension were timely filed and are presently pending before the FCC, each of the FCC Licenses is valid and in full force and effect and none of the FCC Licenses has been modified, canceled, revoked, or conditioned, except for the conditions expressly stated therein or which, despite their existence, would make the matter Unconditional hereunder. None of the Acquired Assets has been sold, conveyed, pledged, assigned or transferred to any other Person, and no Person (other than Buyer or Rainbow DBS) has any present or future preemptive right, right of first refusal or other right to acquire, license or use any of the Acquired Assets. Rainbow DBS is the licensee under, and controls, the FCC Licenses and is the owner of, and controls, the other Acquired Assets. The Acquired Assets are not subject to any Liens. Rainbow DBS has timely and completely performed all material obligations required to date under the FCC Licenses. Rainbow DBS has taken all required actions to date to achieve international coordination of the Acquired Assets, including, without limitation, cooperating with the FCC in filing and prosecuting all necessary modifications to the International Telecommunication Union's Region 2 Broadcasting-Satellite Service Plan and associated feeder link plan set forth at Appendices 30 and 30A to the International Radio Regulations, including TT&C for the system, and such Acquired Assets have been designed and are in compliance with, and Rainbow DBS has been, and is, in compliance with, all material obligations required to date under the FCC Licenses and the applicable Regulatory Provisions. Rainbow DBS is not aware of any facts or circumstances relating to the FCC qualifications of Rainbow DBS or any of its Affiliates or otherwise, or to the International Telecommunication Union's coordination process, that would prevent or materially delay the Unconditional grant of the relevant Regulatory Approvals by the FCC or the modification of the International Telecommunication Union's Region 2 Broadcasting-Satellite Service Plan and associated feeder link plan. Except for Rainbow DBS' pending applications to extend its temporary authority for the Unlicensed Frequency Channels, there is no pending, or, to the knowledge of the Rainbow DBS, threatened, application, petition, objection or other pleading with the FCC or other Governmental Entity which challenges the validity of, or any rights of the holder under, the FCC Licenses and no pending or, to the knowledge of Rainbow DBS, threatened FCC enforcement proceeding is underway regarding the FCC Licenses. Rainbow DBS and its Affiliates have been and are in compliance with the Communications Act and the rules and regulations of the FCC, except where such non-compliance could not reasonably be

expected to have a material adverse effect on the transactions contemplated by this Agreement.

**4.1.7 Compliance with Laws.** Rainbow DBS and its Affiliates, and their ownership and operation of the Acquired Assets, have, at all times, been and are in compliance with all, federal, state, local and foreign statutes, laws, rules, regulations, judgments, orders, writs, injunctions and decrees, and are not in violation of, and have not received any actual or, to the knowledge of Rainbow DBS, threatened claim or notice of violation of, any such statutes, laws rules, regulations, judgments, orders, writs, injunctions and decrees with respect to the conduct of its business related to, or the ownership and operation of, the Acquired Assets, except for such instances of non-compliance or violation, if any, which could not reasonably be expected to have a material adverse effect on the transactions contemplated by this Agreement. Rainbow DBS and its Affiliates have complied with, and Rainbow-1 has been designed and constructed in compliance with, all material Regulatory Provisions applicable to the Acquired Assets.

**4.1.8 Agreements, Contracts and Commitments.** Rainbow DBS has supplied to Buyer true, complete (excluding certain redactions required by Lockheed Martin Corporation) and correct copies of all agreements containing Contract Rights, and each such agreement is in full force and effect and is the valid and legally binding obligation of Rainbow DBS, Rainbow DBS' Affiliates and the other parties thereto, enforceable in accordance with their respective terms, and, subject to obtaining the consent of Lockheed Martin Corporation, is freely and fully assignable to Buyer free and clear of all Liens without penalty or other adverse consequences. Neither Rainbow DBS, Rainbow DBS' Affiliates nor, to the knowledge of Rainbow DBS or Rainbow DBS' Affiliates, any other party to such agreement is in breach of, or default under, any such agreement. Neither Rainbow DBS nor Rainbow DBS' Affiliates has received or delivered any notice of default under any such agreement and no event, occurrence or condition exists which, with the passage of time or the giving of notice or both, would constitute a default under any such agreement by Rainbow DBS, Rainbow DBS' Affiliates or to Rainbow DBS' knowledge, any other party thereto. Neither Rainbow DBS nor Rainbow DBS' Affiliates has received notice of the pending or threatened cancellation, modification, revocation or termination of any such agreement, nor does Rainbow DBS have knowledge of any facts or circumstances which could reasonably be expected to lead to any such cancellation, modification, revocation or termination. Rainbow DBS has performed all of its required obligations under the Lockheed Contract and, between the Execution Date and the Closing, will not (i) terminate the Lockheed Contract or (ii) amend or modify the Lockheed Contract in a manner that would have a material adverse effect on the Contract Rights. Rainbow DBS has the Contract Right to require Lockheed Martin Corporation to provide Flight Operations (as defined in the Lockheed Contract) for Rainbow-1 in accordance with the terms and conditions of the Lockheed Contract at no additional charge through August 28, 2005.

**4.1.9 Acquired Assets.** Rainbow DBS has made available and, between now and the Closing will continue to make available to Buyer, at Rainbow DBS' offices, and will deliver to Buyer at Closing, all Deliverable Data related to Rainbow-1, all waivers and

deviations from the Rainbow-1 performance specification approved by Rainbow DBS, all variations from the Satellite Performance Specifications occurring and observed on Rainbow-1, all anomalies occurring and observed on Rainbow-1 since its launch and all actions taken with respect thereto. The health and operational reports provided to Buyer regarding the status of Rainbow-1 pursuant to Section 4.3.3 are the originals, or true and correct copies of, the health and operational reports delivered to Rainbow DBS by Lockheed Martin Corporation. Rainbow-1 and the other Acquired Assets has not been sold, conveyed, pledged, assigned or transferred to any other Person, and no Person (other than Buyer or Rainbow DBS) has any right to acquire, or has any other economic interest in, Rainbow-1 and the other Acquired Assets. No other Person except Rainbow DBS has rights to access or use the Acquired Assets. None of the Acquired Assets is subject to any Liens, and, upon Closing, Buyer shall acquire good and marketable title to the Acquired Assets, free and clear of any Liens. From the date of its acquisition of Rainbow-1, Rainbow DBS has, or has caused, Rainbow-1 to be operated and maintained in accordance with the requirements of Rainbow-1's manufacturer and pursuant to procedures and processes that meet general standards in the industry for the operation and maintenance of communications satellites. Rainbow DBS owns Rainbow-1 free and clear of any Liens.

**4.1.10 *Litigation.*** There is no suit, action, arbitration, claim, governmental or other proceeding or investigation before any Governmental Entity pending or, to the knowledge of the Rainbow DBS, threatened, against Rainbow DBS or any of its Affiliates related to the Acquired Assets or the transactions contemplated by this Agreement which, if decided adversely could reasonably be expected to have a material adverse effect on Rainbow DBS' ability to consummate the transactions contemplated by this Agreement. There are no agreements with any taxing authority with respect to the taxation of the Acquired Assets or income therefrom.

**4.1.11 *Performance Specifications.*** The Satellite Performance Specifications attached as Appendix A hereto (Docket No. 8584123, Revision B, June 20, 2002, issued and released August 19, 2002) is the revision of the Rainbow-1 satellite performance specifications in effect on the Execution Date, under the Lockheed Contract, and includes all waivers and deviations that have been approved by Rainbow DBS as of the Execution Date.

**4.2 Representations, Warranties and Covenants of Buyer.** Buyer represents, warrants and covenants to Rainbow DBS as follows:

**4.2.1 Organization of Buyer.** Buyer is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Colorado. Buyer is duly qualified or licensed as a foreign entity to conduct business, and is in good standing, under the laws of each jurisdiction where the character of the properties owned, leased or operated by it, or the nature of its activities, makes such qualification or licensing necessary, except where the failure to do so would not have a material adverse effect on its ability to consummate the transactions contemplated by this Agreement.

**4.2.2 Authority.** Buyer has all requisite power and authority to execute and deliver this Agreement and the other documents executed and delivered pursuant hereto, to perform its obligations hereunder and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement and the other documents delivered pursuant hereto, the performance of Buyer's obligations hereunder and the consummation of the transactions contemplated hereby, have been duly authorized by all necessary action on the part of the Buyer and no other proceedings are necessary in connection therewith. No vote of the holders of the outstanding shares of any class of Buyer's outstanding securities is necessary to approve the consummation of the transactions contemplated by this Agreement.

**4.2.3 Binding Obligation.** This Agreement and the other documents delivered pursuant hereto have been duly executed and delivered by Buyer and constitute valid and binding obligations of Buyer, enforceable against it in accordance with their terms.

**4.2.4 No Conflicts.** Except with respect to matters that would not have a material adverse effect on Buyer's ability to consummate the transactions contemplated by this Agreement, the execution and delivery of this Agreement and the other documents delivered pursuant hereto do not, and the performance by Buyer of its obligations hereunder and the consummation of the transactions contemplated hereby, will not (A) conflict with or result in any violation of, or default (with or without notice or lapse of time, or both), or (B) give rise to any right of termination, cancellation or acceleration of any obligation or to a loss of a material benefit under (i) any provision of Buyer's organizational documents or those of any Affiliate of Buyer, (ii) any material contract to which Buyer or any of its Affiliates is a party, or (iii) subject to the governmental filings and other matters referred to in Section 4.2.5, any permit, license, franchise, statute, law, ordinance, rule, regulation, writ, injunction, judgment, decree or order applicable to Buyer or any of its Affiliates, or by which any of their respective properties or assets may be bound or affected.

**4.2.5 Governmental Consents.** No consent, approval, order or authorization of, or registration, declaration or filing with, any Governmental Entity is required by or with respect to Buyer or any of its Affiliates in connection with the execution and delivery of this Agreement and the other documents executed and delivered pursuant hereto, and the consummation of the transactions contemplated hereby, except for: (i) the Unconditional grant of the Regulatory Approvals and (ii) such consents, approvals, orders or