WT Docket No. 05-251

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Auction for Direct Broadcast Satellite Service Licenses	)	AUC-03-52

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules,[1] EchoStar Satellite L.L.C. ("EchoStar") hereby submits its Reply to the Opposition to Petition for Reconsideration filed by Dominion Video Satellite, Inc. ("Dominion") in the above-captioned proceeding.

On December 3, 2004, the Commission released an order that barred entities with a full-CONUS Direct Broadcast Satellite ("DBS") license from acquiring, owning, or controlling the license for DBS channels 23 and 24 at the 61.5° W.L. orbital location for a period of four years ("*61.5° W.L. Eligibility Order*").[2] This eligibility restriction effectively prohibited the two primary DBS operators -- DIRECTV and EchoStar -- from acquiring the two unassigned channels at that orbital location either by competitive bidding in a Commission auction or in the immediate post-auction market. On May 20, 2005, EchoStar Satellite L.L.C. filed a petition for reconsideration of the *61.5° W.L. Eligibility Order* on the grounds that changed circumstances -- namely the exit of Rainbow DBS Company LLC ("Rainbow") from the DBS business -- had

[1] 47 C.F.R. § 1.429.

[2] *In the Matter of Auction of Direct Broadcast Satellite Licenses*, AUC-03-52, FCC 04-271 (released Dec. 3, 2004), 70 Fed Reg. 20,479 (Apr. 20, 2005) ("*61.5° W.L. Eligibility Order*").

eliminated the "unique circumstances" cited by the Commission as justification for imposing this eligibility restriction. This petition was published in the Federal Register on October 26, 2005,[3] and Dominion filed an Opposition on November 10, 2005. In its Opposition, Dominion argues essentially that the eligibility restrictions should be retained because Dominion (and other unspecified entities) could make use of the two DBS channels at 61.5° W.L. to provide niche programming services, but would not be able to do so if DIRECTV and EchoStar were to be allowed to bid on the license for these channels as part of Auction No. 52.[4]

Dominion's arguments should be rejected for the following reasons. *First*, despite its claims to the contrary, Dominion has failed to show how it can viably operate as a standalone DBS business with just a few channels at the 61.5° W.L. orbital location. Even a company as well-financed as Rainbow, with the backing of one of the largest cable MSOs in the country, was unable to sustain such a business with just 11 DBS channels at that location. The fact that Dominion has been able to remain in operation to date with only a limited number of DBS channels is more a function of its satellite capacity leasing arrangement with EchoStar than any stand-alone business plan. Indeed, there is nothing in the record to suggest that even with two additional DBS channels, Dominion would be able to incur the very substantial cost of constructing, launching and operating its own DBS satellite to make use of all of its licensed channels. Dominion's asserted plan is out of touch with both commercial reality and common sense, and the Commission should not credit them.

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[3] *See* 70 Fed. Reg. 61,825 (2005).

[4] *See, e.g.*, Opposition at 3 ("If EchoStar and DIRECTV are allowed to participate in the auction, however, Dominion will almost certainly be precluded from obtaining the channels, because both companies have vastly greater financial resources and a strong interest in taking the channels off the market in order to secure their dominant positions.").

Second, even though Dominion suggests that other potential entrants might also emerge to bid for the remaining two DBS channels,[5] the Commission has long recognized that "DBS licensees with a small number of channels face capacity limitations that may hamper their ability to compete effectively in that [MVPD] market."[6] In the past, the Commission has found that an operator with only three or four DBS channels would likely not be viable.[7] Indeed, Rainbow's exit from the business is proof that even 11 or 13 channels was not enough to sustain a viable DBS business. Thus, in the current climate, it is highly unlikely that any as-yet-unidentified entities will now emerge to bid on just two DBS channels. Indeed, no other party has seen fit to file comments on EchoStar's petition for reconsideration in this proceeding.

This conclusion is bolstered by the Commission's recent decision to approve EchoStar's acquisition of Rainbow's 11 DBS channels at 61.5° W.L. In that order, the Commission observed that "the current state of the market makes it unlikely that restricting transferability here would accomplish the goal of the eligibility restrictions in the *Eligibility*

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[5] *See, e.g.*, Opposition at 5 ("The ability of Dominion and others to create or expand similar niche services, however, requires that companies other than EchoStar and DIRECTV have a realistic opportunity to bid on channels 23 and 24 at 61.5° W.L."); *id.* at 5 ("The opportunity to make these valuable licenses [sic] available to a wide variety of applicants . . . will disappear overnight if the FCC lifts the participation prohibitions . . . .").

[6] *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd. 9712, ¶ 134 (1995). *See also 61.5° W.L. Eligibility Order* at ¶ 38 ("We do not believe that a company would incur the very substantial cost of constructing a satellite solely in order to acquire a license to operate on two channels.").

[7] *See 1995 DBS Auction Order*, 11 FCC Rcd at 9764 ¶ 134; *United States Satellite Broadcasting Co., Inc., and DIRECTV Enterprises, Inc.*, Order and Authorization, 14 FCC Rcd 4585, 4595 ¶ 22 (1999) (it would be "commercially difficult to finance and construct a satellite" designed with just three channels); *Advanced Communications Corporation Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite System*, Memorandum Opinion and Order, 14 FCC Rcd 3399, 3425-26 ¶ 70 (1995) ("four channels may not provide sufficient capacity to operate a viable system, [and] such piecemeal assignment of channels could render ... [an] orbital location ... unusable by any single permittee").

Order – i.e., to promote the development of an additional provider of DBS services."[8] *A fortiori*, the state of the market today does not support retaining any eligibility or transferability restrictions on the two remaining DBS channels at 61.5 W.L., as such restrictions are even less likely to promote the development of an additional DBS operator following Rainbow's exit from the market.

With Rainbow's exit, there are no parties with a realistic interest in the two remaining DBS channels at 61.5° W.L., other than Dominion, EchoStar and DIRECTV. In such circumstances, a rule that would exclude EchoStar and DIRECTV would clearly be a "gift" of those two channels to Dominion. The use of auction eligibility rules to essentially anoint one entity as the licensee even before an auction is held is not only bad policy; it likely violates the rights of interested parties to a "a fair and impartial selection process" under the principles established under *Ashbacker*.[9] By creatively excluding the only two other applicants interested in those two DBS channels, the FCC would be devising an end-run around the auction process, thus preventing the frequencies from being assigned to their best and most valuable use.

For all of these reasons, as well as the reasons set out in EchoStar's Petition for Reconsideration, the Commission should eliminate the eligibility restrictions for the two remaining DBS channels at 61.5 W.L. orbital location imposed in the *61.5° W.L. Eligibility Order*.

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[8] *Id.* at ¶ 25 n.68.

[9] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 14 FCC Rcd 8724, at ¶ 26 (1999) ("Orion's interim operation of the station pursuant to the court's explicit order in no way contravenes the rights of the competing applicants to a fair and impartial selection process under the principles articulated in *Community* and *Ashbacker*."), *referring to Ashbacker v. FCC*, 326 U.S. 327 (1945) *and Community Broadcasting Co., Inc. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960).

Respectfully submitted,

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November 23, 2005

CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, an attorney at Steptoe & Johnson LLP, hereby certify that on this 23rd day of October 2005, I caused a copy of the foregoing Reply to Opposition to Petition for Reconsideration to be served on the following:

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