Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
HISPAMAR SATÉLITES, S.A.	)	File No. SAT-PPL-_____
	)	
Petition for Declaratory Ruling to Add AMAZONAS-2 at 61° W.L. to the Commission's Space Station List for the Provision of Subscription Direct-to-Home Video Service	)	

PETITION FOR DECLARATORY RULING

Introduction

HISPAMAR SATÉLITES, S.A., ("HISPAMAR")[1] hereby requests that the Commission add the AMAZONAS-2 satellite, located at 61° W.L., to the Commission's Permitted Space Stations List for the provision of Direct to Home (DTH) subscription video services. This satellite is licensed by the Government of Brazil for operation in the Fixed Satellite Service (FSS) in the 11/12/14 GHz band and is already located at its orbital position. In addition to providing coverage of all of Brazil and other countries of South America, this satellite will provide full-CONUS coverage with capacity operating in the conventional down-link Ku band (10.95-11.20 GHz and 11.70-12.20 GHz), and up-linked in the conventional and extended Ku band (13.75-14.50 GHz). [2]

Grant of this application will serve the public interest by increasing competition in the Multichannel Video Program Distribution ("MVPD") market. The proposed

[1] On October 15, 2009, HISPAMAR was granted permission to add AMAZONAS-2 to the FCC's Permitted Space Station list for the provision of Fixed Satellite Services in the conventional C and Ku-band frequencies. (See File No. SAT-PPL-20090806-00081) with conditions .

[2] The use of this band is based on the existing FCC rules.

application will allow HISPAMAR to offer an additional source of capacity to new entrants and existing providers in the MVPD market. As the Commission has recognized, increasing competition in the MVPD market is an important public interest benefit.[3]

I. AMAZONAS-2 Meets the Requirements for Inclusion on the Permitted Space Stations List for Provision of DTH Services[4]

Sections 25.137(a) and (b) of the Commission's rules set forth the requirements for applicants and petitioners seeking authority to operate in the United States with non-U.S. licensed space stations.

A. Section 25.137(a) Information

Section 25.137(a) requires that petitioners seeking to operate with a non-U.S. licensed space station submit as an exhibit to their Form 312 applications a showing demonstrating that U.S.-licensed satellite systems have effective competitive opportunities to provide analogous services in the country in which the non-U.S. licensed space station is licensed, and all countries in which communications with the U.S. earth station will originate and terminate.[5]

In *DISCO II*,[6] the Commission established a rebuttable presumption in favor of entry by non-U.S. satellites licensed by World Trade Organization ("WTO") Members to provide services covered by the U.S. commitments under the WTO Agreement on Basic Telecommunications Services ("WTO Basic Telecom Agreement"). These commitments

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[3] *See, e.g.*, Pegasus Development Corporation, Consolidated Application for Authority to Operate one U.S. Transmit/Receive Fixed Earth Station (Call Sign E010320) and 1,000,000 Receive-Only Earth Stations (Call Sign E020022) with the Canadian-Licensed Nimiq 1 and Nimiq 2 Satellites to Offer Direct Broadcast Satellite Service Throughout the United States, *Order*, DA 04-909, released March 31, 2004.

[4] On August 24 , 2004 HISPAMAR was granted permission to AMAZONAS-1 to provide Direct-to-Home(DTH) service to, from, or within the United States (See File Number: SAT-MOD-20040628-00 124)

[5] It does not apply. See § 25.137 (a) last parapragh. Brazil is a WTO member.

[6] *In re Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Report and Order, IB Docket No. 96-111, 12 FCC Rcd 24094 (1997)("*DISCO II*")

include fixed-satellite services, except for direct-to-home ("DTH") services.[7] The United States also did not make market access commitments for the DBS service.[8] In *DISCO II*, the Commission indicated that it would apply the effective competitive opportunities test ("ECO-Sat") to requests involving provision of non-WTO covered services such as DTH and DBS by non-U.S. satellites to ensure that entry by the foreign satellite does not distort competition in the U.S. market.[9] Under this test, the Commission examines effective competitive opportunities for U.S.-licensed satellites to serve the home market of the non-U.S. satellite seeking access to the United States. The Commission examines in particular *de jure* and *de facto* barriers to entry for the provision of analogous services, and whether any such barrier would cause competitive distortions in the United States.

AMAZONAS-2 is licensed by the government of Brazil, which also serves as the notifying administration for purposes of international satellite coordination pursuant to the relevant provisions of the International Telecommunications Union (ITU) Radio Regulations. Brazil is a WTO-Member Country.

Clearly, Brazil does provide Effective Competitive Opportunities for U.S.-licensed satellites to provide DTH services. First, Brazil does not maintain any *de jure* barriers to entry. In its Schedule of Commitments under the General Agreement on Trade in Services, Brazil specifically stated that it would allow foreign-licensed satellites to provide service in Brazil.[10] Moreover, Brazil's General Telecommunications Law also

[7] DTH satellite service is provided in bands internationally allocated to the fixed-satellite service ("FSS"), using FSS satellites.
[8] DBS operates in the 12.2-12.7 GHz frequency bands (space-to-earth), allocated for the Broadcasting Satellite Service ("BSS").
[9] *DISCO II*, 12 FCC Rcd at 24136.
[10] Brazil's schedule of commitments includes a headnote that reads in pertinent part "Commitments undertaken in this schedule are subject to the following general conditions: … (iv) The supply of space segment facilities of satellites that occupy orbital positions notified by foreign countries is allowed whenever they offer better technical, operational or commercial conditions. Otherwise, satellites that

provides that foreign-licensed satellites may be permitted to provide service in Brazil and describes the requirements for authorization.[11]

Second, although Brazil's law and WTO schedule reflect a policy in favor of making maximum use of Brazil's orbital and spectrum resources, this policy is neither a *de jure* nor a *de facto* barrier to entry. Indeed, the best evidence that U.S. satellite operators do not face barriers to entry into the Brazilian satellite market is the fact that most of the leading U.S. satellite operators are providing services in Brazil and have been for a number of years. Of particular importance to this application is the fact that two of the major Brazilian DTH providers – DirecTV Latin America and Sky Brasil – use U.S. licensed satellites to provide their services.[12]

Thus, the Brazilian market is not only legally open to U.S.-licensed satellite providers, in fact U.S.-licensed satellites today are the facilities that provide the majority of DTH service in Brazil.[13] Indeed, the Commission suggested that just this kind of evidence would be relevant to a determination whether *de facto* barriers to entry by U.S. providers of DTH capacity exist in a given market. In its *DISCO II Order*, the Commission explained that

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occupy positions notified by Brazil must be used. Regulatory decisions on this regard will be based on a transparent, objective and non-discriminatory process."

[11] See Lei Geral das Telecomunicações Brasileiras, Lei No. 9,427, July 16, 1997, Art. 170-172. The text of the law, in Portuguese, may be found at http://www.planalto.gov.br/ccivil_03/leis/l9472.htm

[12] DirecTV Latin America uses the Galaxy 3C satellite located at 95.0° W.L. DirecTV Latin America is a subsidiary of Hughes Electronics, a US company, and Galaxy 3C is licensed by the FCC and operated by PanAmSat, a US company. Sky Brasil transmits its DTH services to customers in Brazil via PAS 6 at 43.0° W.L. PAS 6 is, of course, also licensed by the FCC and operated by PanAmSat.

[13] Moreover, although it is not directly relevant to the question whether Brazil provide Effective Competitive Opportunities to U.S. satellite operators, it is interesting to note that a substantial number of the channels listed on both of these services are either U.S. cable channels or Brazilian channels owned by major U.S. content providers. While some governments, notably Canada, maintain restrictions on the provision of foreign content, Brazil clearly does not.

> *de facto* barriers would constitute barriers that are not *per se* prohibitions, nor not necessarily formally adopted by the country's government, but that exist and, in practice, act as impediments to entry. For example, a country may permit U.S. entities to provide DTH service, but may impose more stringent technical or programming requirements or higher fees on U.S. providers than on its own providers. By discriminating against U.S. providers, any such *de facto* barriers would severely curtail, if not wholly eliminate, the ability of U.S. satellite entities to do business in the foreign market. As a result, the companies in the home market of the foreign-licensed satellite would be able to serve a market closed, in whole or in part, to U.S. companies. Denying competitive opportunities to U.S. entities in the foreign market, while allowing them for the country's own companies, would give the foreign-licensed satellite a competitive advantage over U.S. entities, causing competitive distortions.[14]

It is worth quoting the FCC's description of potential *de facto* barriers to entry at length both because it clarifies the legitimate concerns that led the Commission to adopt the ECO-Sat test and because it underscores how completely the Brazilian market lacks *de fact* barriers to entry. Granting this application will not create a competitive distortion in the U.S. DTH market because U.S. companies have full access to the Brazilian market. In fact, at present U.S. companies provide DTH satellite capacity for the provision of vast majority of subscription video services in Brazil. In contrast, if the FCC were to deny HISPAMAR's request to access the Brazilian-licensed AMAZONAS-2 satellite to provide DTH service in the United States, it might well lead to a competitive distortion in the Brazilian satellite telecommunications market by denying AMAZONAS-2 effective competitive opportunities in the United States. That, surely, cannot be the result the FCC would want both because U.S. satellite operators do not need such government protection from competition, but also because such protectionism would not only harm AMAZONAS-2 but the overall U.S. public interest, which the FCC is required to serve.

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[14] *DISCO II*, 12 FCC Rcd at 24137.

Overall, Brazil has authorized 59 geostationary satellites that provide a range of FSS and DTH services, nearly all of which are owned in whole or in part by foreign companies. In fact, only 13 of those are satellites utilizing frequencies notified by the Brazilian Administration. Among these companies are familiar operators of U.S.-licensed satellites, including Loral, Hughes/Galaxy, Intelsat , and SES Americom.[15] Based on the foregoing, it is beyond dispute that U.S.-licensed satellite operators have effective competitive opportunities not only in the Brazilian DTH market but in all other segments of the Brazilian satellite market as well.[16]

As we noted at the outset, grant of the instant application will serve the U.S. public interest by allowing AMAZONAS-2 to increase the channel capacity available for the provision of DTH service in the United States and thereby increase competition in the MVPD market. The International Bureau granted a similar application to provide DBS service using a Canadian satellite.[17] Based on the record before it, the Bureau concluded that

> rather than creating a competitive distortion, entry by DBAC into the U.S. market can increase competition in DBS services and in MVPD services generally. The markets for delivery of video programming to households are highly concentrated. In the vast majority of local markets, the primary providers of MVPD services are two DBS providers, EchoStar and DirecTV, and cable operators, and for the vast majority of those markets where cable service is available, there is a single, franchised cable provider. Future provision of DBS services in these markets as proposed

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[15] A listing of the satellites that Brazil has licensed may be found on the web site of Brazil's telecom regulator, Agência Nacional de Telecomunicações (Anatel) at http://www.anatel.gov.br/Portal/verificaDocumentos/documento.asp?numeroPublicacao=236536&assuntoPublicacao=RELAÇÃO%20DE%20SATÉLITES%20AUTORIZADOS%20A%20OPERAR%20NO%20BRASIL&caminhoRel=Cidadao-Satélite-Satélites%20autorizados&filtro=1&documentoPath=236536.pdf (visited on January 12, 2010).

[16] While it is not directly relevant to this application, Brazil has also authorized Brazilian affiliates of four U.S. non-geostationary satellite operators – Iridium, Globalstar, Constellation, and Teledesic – to provide services in Brazil.

[17] *Digital Broadband Applications Corp.*, DA 03-1526 (Int'l Bur. May 7, 2003) (*DBAC Order*).

> by DBAC, with Canadian satellites, will not create a competitive distortion, and could increase competition in MVPD services.[18]

This conclusion, , is included, *mutatis mutandi*, in the FCC's Thirteenth Annual Report on the status of competition in the MVPD market.[19] The Commission noted that "large numbers of consumers continue to subscribe to cable service, which approximately 68 percent of all MVPD households purchase." service.[20]

Thus, while the U.S. MVPD market remains highly concentrated, AMAZONAS-2 can make the market more competitive if it is permitted to make capacity available to new and current service providers in that market. Brazil, which licensed AMAZONAS-2, not only provides effective competitive opportunities to U.S. providers of DTH service, but U.S. operators dominate the Brazilian DTH market. Under these circumstances, the Commission can only conclude that grant of this application poses no threat of competitive distortion in the U.S. DTH market, but will serve the public interest. For these reasons, the Commission should grant this application expeditiously.[21]

B. Section 25.137(b) Information

DISCO II also requires that foreign-licensed satellites meet the same legal, financial, and technical requirements that U.S. space station applicants must meet. As noted above, on August 21, 2009, HISPAMAR filed a petition with the FCC for the inclusion of the AMAZONAS-2 satellite on the Commission's Permitted Space Stations

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[18] *Id*. at para. 18 (footnotes omitted).

[19] *See* 13th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,. MB Docket No. 06-189. Released January 16, 2009

[20] Id. at Summary paragraph 6

[21] In *DISCO II* the Commission noted that it will "accord deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement and foreign policy that are relevant to an application pending before us." 12 FCC Rcd at 24171. Obviously, the Executive Branch will have an opportunity to raise any such concerns it may have, but it does not appear that this application should present any concerns with respect to national security, foreign policy or law enforcement. Rainbow looks forward to working with the Commission to resolve any such concerns that may arise.

List for the provision of Fixed Satellite Services using the conventional Ku-band. (See FCC File No. SAT-PPL-200400402-00073.) In that application, HISPAMAR provided a complete set of legal and technical information required under Sections 25.137(b), 25.114(c) and 25.140 of the Commission's rules.. Also in its *First Space Station Reform Order*, the Commission stated that applicants seeking Permitted List satellite modifications would be required to provide the same information as required in a new space station application, but only need submit those items of information that need to be changed, provided the applicant certifies that the remaining information has not changed.[22]

Conclusion

For the foregoing reasons, the Commission should act expeditiously to grant the instant petition. Grant of this petition will allow HISPAMAR, by means of its satellite AMAZONAS-2, to significantly expand the capacity currently available to competitive MVPD service providers throughout the continental United States. This will further the Commission's long-term objective of increasing competition in the MVPD market and, as is demonstrated above, poses no threat of competitive distortion in the U.S. market because Brazil, the home market of AMAZONAS, is fully open to U.S. providers of DTH service (and of all FSS services).

Respectfully submitted,

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[22] *Id.* at ¶ 317.