

COPY

January 30, 2006

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

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Federal Communications Commission  
Office of Secretary

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Policy Branch  
International Bureau

Re: Ka-Band Bonds

Dear Ms. Dortch:

Rainbow DBS Company LLC ("Rainbow DBS") respectfully requests consent to withdraw and unconditionally release performance bonds submitted by Rainbow DBS in connection with five Ka-band fixed-satellite service licenses (the "Ka-band Licenses")<sup>1</sup>, and a waiver of the requirement, to the extent necessary, to submit a performance bond as provided in the *First Report and Order* and *Fifth Report and Order* in IB Docket No. 02-34.<sup>2</sup> Rainbow DBS originally acquired the Ka-band Licenses to serve as a supplement and complement to its high definition VOOM direct broadcast satellite ("DBS") service. Although Rainbow DBS invested substantial sums to create and sustain the VOOM enterprise, including significant amounts toward the development of the Ka-band Licenses, VOOM was discontinued last year. Given Rainbow DBS's efforts to build a competitive satellite service, the underlying purpose of the bond requirement would not be served by compelling Rainbow DBS to forfeit the bonds for the Ka-band Licenses.

As the Commission is well aware, notwithstanding substantial risks, Rainbow DBS made a sustained and costly effort to create, construct, launch and operate VOOM as a third competitive DBS service. Cablevision, Rainbow DBS's parent company, invested approximately \$1 billion over a six-year period to launch a state-of-the-art DBS satellite, develop consumer equipment, construct uplink facilities, and create and acquire innovative high definition programming.<sup>3</sup> VOOM initiated service in 2003.<sup>4</sup> It offered an innovative, comprehensive, high-definition television programming service that was not available from any other satellite or cable provider. VOOM provided subscribers nearly 40 HD channels, including

<sup>1</sup> File Nos. SAT-LOA-20030827-00172 (call sign S2485); SAT-LOA-20030827-00173 & SAT-AMD-20031009-00312 (call sign S2486); SAT-LOA-20030827-00175 (call sign S2488); SAT-LOA-20030827-00248 (call sign S2554); SAT-LOA-20030827-00249 (call sign S2555).

<sup>2</sup> *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No. 02-34, 18 FCC Rcd 10,760 (2003) ("First Report and Order"); *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Order on Reconsideration and Fifth Report and Order, 19 FCC Rcd 12,637 (2004) ("Fifth Report and Order").

<sup>3</sup> See Rainbow DBS Co. LLC and EchoStar Satellite L.L.C., Opposition to Joint Petition to Deny, IB Docket No. 05-72, at 10 (filed Apr. 12, 2005) ("Rainbow-EchoStar Opposition").

<sup>4</sup> Rainbow DBS launched the Rainbow 1 satellite in July 2003, and began providing service under the VOOM brand shortly thereafter. See *Rainbow DBS Company LLC, Assignor, and EchoStar Satellite L.L.C., Assignee, Consolidated Application for Consent to Assignment of Space Station and Earth Station Licenses, and related Special Temporary Authorization*, Memorandum Opinion and Order, 20 FCC Rcd 16,868 (2005) ("Rainbow-EchoStar Order").

21 original VOOM channels, as part of its overall 130-channel package. The service, however, was severely constrained in capacity with only 11 FCC-licensed DBS frequencies, one-tenth the capacity controlled by EchoStar and one-fifth the capacity controlled by DIRECTV.<sup>5</sup> Moreover, VOOM's satellite, Rainbow 1, was located at an orbital slot (61.5° W.L.) that could not by itself provide robust coverage to the entire continental United States. Consequently, Rainbow DBS attempted to acquire additional satellite resources to use in conjunction with the VOOM service.

First, in 2003 and early 2004, Rainbow DBS acquired the five Ka-band Licenses. These satellites were to "supplement and complement the DBS service, enabling consumers to more fully take advantage of the new services and technologies," including high definition programming and local-into-local television services.<sup>6</sup> Rainbow DBS made significant progress toward the construction of its Ka-band satellites. It timely posted a performance bond for each license,<sup>7</sup> and satisfied the first milestone in November 2004 by entering into a construction contract with Lockheed Martin for all satellites.<sup>8</sup> In total, Rainbow DBS invested more than \$13 million directly to develop and construct the Ka-band Licenses, including more than \$12 million paid under the satellite construction contract.

Second, in July 2004, Rainbow DBS successfully bid for and tendered full payment of \$6.4 million in Auction 52 for additional DBS frequencies at the 166° W.L. and 175° W.L. locations.<sup>9</sup> However, the United States Court of Appeals for the D.C. Circuit recently held that Auction 52 was unauthorized, invalidating Rainbow DBS's acquisition of the additional DBS frequencies.<sup>10</sup> The FCC subsequently nullified the auction and established procedures for a refund of monies paid.<sup>11</sup>

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<sup>5</sup> Rainbow DBS also acquired special temporary authority to operate on two additional frequencies at the 61.5° W.L. location. See File No. SAT-STA-20030623-00122; *Rainbow DBS Co. LLC; Application for Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61.5° W.L. Orbital Location, Order and Authorization*, 18 FCC Rcd 19,825, 19,828-29 (2003).

<sup>6</sup> See, e.g., *Rainbow DBS Co. LLC Application for Authority*, at 5, File No. SAT-LOA-20030827-00172 (Aug. 27, 2003) ("By supplementing its DBS service with its Ka-band offering, Rainbow DBS will also enhance competition in the multichannel video program distribution ("MVPD") and DBS markets by strengthening the third entrant into the DBS market").

<sup>7</sup> Rainbow DBS initially submitted a \$5 million bond per satellite, pursuant to the *First Report and Order* in the Commission's space station licensing reform docket. See Public Notice, Policy Branch Information, Satellite Space Applications Accepted for Filing, Rep. No. SAT-00187 (rel. Jan. 15, 2004); Public Notice, Policy Branch Information, Actions Taken, Rep. No. SAT-00192, 19 FCC Rcd 2912, 2913 (2004); First Report and Order, 18 FCC Rcd at 10825 (¶ 168). Pursuant to the Commission's *Fifth Report and Order*, Rainbow DBS later reduced the amounts to \$3 million per bond. See Public Notice, Policy Branch Information, Satellite Space Stations Accepted for Filing, Rep. No. SAT-00251 (rel. Oct. 22, 2004); Fifth Report and Order, 19 FCC Rcd at 12654 (¶ 43).

<sup>8</sup> See Public Notice, Policy Branch Information, Actions Taken, Rep. No. SAT-00283, 20 FCC Rcd 7808, 7809 (2005).

<sup>9</sup> See Public Notice, Direct Broadcast Satellite Service Licenses Auction Closes, Winning Bidders Announced, 19 FCC Rcd 13,193 (Attachment A) (2004).

<sup>10</sup> *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005).

<sup>11</sup> Public Notice, Direct Broadcast Satellite (DBS) Service Auction Nullified, FCC 05-213 (rel. December 21, 2005). Rainbow DBS has applied for and received a refund of its winning bids in Auction No. 52.

Despite these substantial investments, by 2005, VOOM was only able to attract approximately 40,000 subscribers.<sup>12</sup> Given the considerable losses the company was incurring, Cablevision agreed to sell the Rainbow 1 satellite and earth station assets to EchoStar Satellite, L.L.C. in January 2005. However, within the company there remained those who continued to search for a way to continue the VOOM service. Indeed, "Cablevision's chairman [Mr. Charles F. Dolan] personally attempted to find a way to continue the VOOM service, founding VOOM HD, LLC and funding Rainbow DBS's continuing operations until funding could be secured for VOOM HD."<sup>13</sup> VOOM HD, LLC also intended to acquire the Ka-band Licenses and the contract with Lockheed Martin.<sup>14</sup> Ultimately, however, a decision was made to discontinue offering the VOOM service effective April 30, 2005. The Rainbow-EchoStar transaction was approved in October 2005 and consummated in November 2005.<sup>15</sup>

The shut-down of the VOOM service and the sale of its satellite assets have compelled Rainbow DBS to terminate the construction contract with Lockheed Martin and surrender the Ka-band Licenses.<sup>16</sup> Under these unique circumstances, Rainbow DBS respectfully submits that payment of the five Ka-band bonds would not serve the purposes for which the bonds were required. Rainbow DBS has not "warehoused" the Ka-band spectrum. Both the company and Mr. Dolan personally invested substantial capital and carried out a sustained, though ultimately unsuccessful, effort to continue the VOOM service and to complete construction of the Ka-band satellites. Furthermore, this effort did not "preclude[] another party willing and able to construct a satellite from doing so."<sup>17</sup> When Rainbow DBS applied for the Ka-band Licenses, such licenses were generally available.<sup>18</sup> Many licenses in the Ka-band have been returned or revoked,<sup>19</sup> and the first-come, first-served procedure adopted in the *First Report and Order*

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<sup>12</sup> Rainbow-EchoStar Opposition at 10.

<sup>13</sup> Rainbow-EchoStar Order, ¶ 25.

<sup>14</sup> "Voom Says It Has Funding to Buy Remaining Assets," Communications Daily (Mar. 2, 2005).

<sup>15</sup> See Rainbow-EchoStar Opposition at 8 and Exhibit 4.

<sup>16</sup> Consequently, Rainbow DBS has been unable to satisfy the second milestone (critical design review) for each of the Ka-band Licenses, which was due for four of the satellites in November 2005 and for the fifth satellite in January 2006.

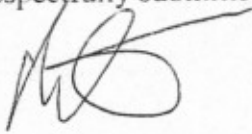
<sup>17</sup> Fifth Report and Order, 19 FCC Rcd at 12,647 (¶ 25).

<sup>18</sup> Rainbow DBS submitted its applications on the day the FCC lifted the freeze on new satellite applications imposed by the *First Report and Order*. As of two months before imposition of the freeze, there were approximately 37 Ka-band orbital locations available. See "KA Band Service: Is There Anybody Out There?" Presentation by Thomas S. Tycz, Chief, Satellite Division, FCC (Feb. 27, 2003), available at <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-231635A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-231635A1.pdf)>.

<sup>19</sup> *PanAmSat Licensee Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 11,534 (2001); *Motorola, Inc. and Teledesic, LLC*, Memorandum Opinion and Order, 17 FCC Rcd 16,543 (2002); *CAI Data Systems, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 22,332 (2003); *Pegasus Dev. Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 26,672 (2003); *VisionStar Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 14820 (2004); *NetSat 28 Company, L.L.C.*, Memorandum Opinion and Order, 19 FCC Rcd 17,722 (2004); *CyberStar Licensee, LLC*, Order, 20 FCC Rcd 15,263 (2005).

ensures that potential entrants could obtain Ka-band spectrum at many desirable locations in a minimal amount of time. Therefore, Rainbow DBS respectfully requests that the Commission consent to the withdrawal and release of the bonds associated with the Ka-band Licenses and, if necessary, waive the performance bond requirement.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'D. Deitch', written over a horizontal line.

David A. Deitch  
S.V.P and General Counsel