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December 8, 2004

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Federal Communications Commission
Office of Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals, Room TW-A325
455 12th Street, S.W.
Washington, D.C. 20554

CONFIDENTIAL -- NOT FOR PUBLIC INSPECTION

Re: **EchoStar Satellite L.L.C., File Nos. SAT-LOA-20030827-00177 and SAT-MOD-20041008-00196, Call Sign S2490**

Dear Ms Dortch:

Pursuant to Sections 0.457 and 0.459 of the Commission Rules governing the submission of confidential materials, 47 C.F.R. §§ 0.457, 0.459, EchoStar Communications Corporation and EchoStar Satellite L.L.C. ("EchoStar"), respectfully request that certain portions of the attached contract¹ between EchoStar Orbital Corporation II² and Lockheed Martin Corporation ("Lockheed") for the construction of a Ka-band satellite to be located at the 117° W.L. orbit location, and materials related to the contract, be afforded confidential treatment and not be placed in the Commission's public files. Also attached are the Statement of Work,

¹ To the extent the contract and specifications reflect enhanced capabilities not included in any authorization, EchoStar is proceeding with construction of the satellite at its own risk. See 47 C.F.R. § 25.113(f).

² EchoStar Orbital Corporation II is one hundred percent indirectly owned by EchoStar Communications Corporation, the ultimate parent of EchoStar Satellite L.L.C. (consistent with the relationship between the contracting party for the EchoStar 9 satellite and EchoStar Satellite L.L.C.).

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Product Assurance Plan, Spacecraft Performance Specifications and Comprehensive Test Plan for the satellite, for which EchoStar also requests confidential treatment. This information is being provided to demonstrate that EchoStar has met the contract execution milestone contained in EchoStar's Ka-band authorization for the 117° W.L. orbital location.³

Please note that the effective date of the contract is December 8, 2004, and that the scheduled delivery date of the satellite is a number of months before the launch and operation milestone. Accordingly, this documentation establishes that EchoStar has entered into a binding contract for the construction of a Ka-band satellite that is scheduled to be delivered in time to meet the remaining milestones set forth in EchoStar's space station authorization.⁴

In a separate submission, EchoStar is providing the Commission with a public, redacted version of this contract and the related materials for the satellite, and this request for confidential treatment relates only to the portions of these materials redacted from the public version.⁵ The redactions are indicated by brackets in the public version.

The redacted portions of the contract and related materials contain information that qualifies as "commercial or financial information" that "would customarily be guarded from competitors" regardless of whether or not such materials are protected from disclosure by a privilege. See 47 C.F.R. § 0.457(d); see also *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) ("[W]e conclude that financial or commercial information provided to

³ See Stamp Grant, SAT-MOD-20041008-00196, at Condition 2 (granted Dec. 6, 2004) (establishing a contract execution milestone of December 8, 2004). See also 47 C.F.R. §25.164(c) and *In the Matter of Amendment of the Commission's Space Station Licensing Rules and Policies; Mitigation of Orbital Debris*, FCC 03-102, First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No. 02-34, and First Report and Order in IB Docket No. 02-54, 18 FCC Rcd 10760, at ¶ 185 (2003) (requiring that a licensee submit its satellite construction contract on or before the contract execution milestone.) ("*First Space Station Licensing Reform Order*")

⁴ See Stamp Grant, SAT-MOD-20041008-00196, at Condition 2 (establishing December 8, 2004 as the contract execution milestone, and December 8, 2008 as the launch and operation milestone).

⁵ See Letter from Pantelis Michalopoulos, Counsel to EchoStar, to Marlene H. Dortch, Secretary, FCC, dated December 8, 2004. This redacted version is being provided to the Commission in accordance with the Commission's order amending its space station licensing rules. See *First Space Station Licensing Reform Order* at ¶ 187.

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the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.").

In addition, the redacted portions of the contract contain sensitive information that if disclosed could place EchoStar and Lockheed at a competitive disadvantage, including specific information regarding price terms, interest terms, insurance terms and obligations, allocation of liability, and termination provisions, and therefore warrant protection under 47 C.F.R. § 0.459. Both EchoStar and Lockheed would be placed at a significant disadvantage if these detailed terms of their contract were revealed to competing service providers, who stand to benefit competitively from any knowledge of the redacted commercial terms included in these materials.

In support of this request, and pursuant to 47 C.F.R. § 0.459(b), EchoStar hereby states as follows:

1. The information for which confidential treatment is sought is contained in EchoStar's submission to demonstrate compliance with its contract execution milestone and includes specific information regarding the price and other critical non-price terms agreed upon with Lockheed, a satellite contractor. As noted above, EchoStar is filing a redacted version of this contract and related materials, and this request for confidential treatment pertains only to provisions of contract that are redacted from the public version.
2. The information is being submitted, as required under 47 C.F.R. §25.164(c), to demonstrate compliance with the contract execution milestone contained in EchoStar's Ka-band license for the 117° W.L. orbital location.⁶
3. This information contains extremely sensitive commercial and financial information that would customarily be kept from competitors. Specifically, the information consists of the price terms and commercially sensitive non-price terms agreed upon with Lockheed for the construction of a Ka-band satellite for EchoStar. EchoStar would be severely prejudiced in its ability to compete if specific information regarding

⁶ See Stamp Grant, SAT-MOD-20041008-00196, at Condition 2 (granted Dec. 6, 2004) (establishing a contract execution milestone of December 8, 2004). See also *First Space Station Licensing Reform Order* at ¶ 185.

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Lockheed's price and critical non-price terms were released to competitors. Moreover, Lockheed would be prejudiced in any future negotiations regarding construction of satellites if its pricing, technical and insurance-related information were available to other satellite construction companies or to prospective purchasers of satellites -- as a result, Lockheed has requested that EchoStar redact this information.

4. The information for which non-disclosure is sought pertains to Ka-band satellite services, for which numerous competitors have received licenses. EchoStar's competitors (as well as the competitors of Lockheed) for Ka-band services stand to benefit competitively from any knowledge of the price and critical non-price terms contained in the contract between EchoStar and Lockheed.
5. Disclosure of the information for which non-disclosure is sought could result in substantial harm to EchoStar and Lockheed by revealing to their competitors, the satellite construction industry and the public EchoStar's agreed-upon price terms and critical non-price terms for its satellite system. Such information could be used by the competitors of EchoStar to develop competing service offerings. *See In re Application of Mobile Communications Holdings, Inc. for Authority to Construct the ELLIPSO Elliptical Orbit Mobile Satellite System*, 10 FCC Rcd. 1547, 1548 (Int'l Bur. 1994) ("buyers receive a clear competitive advantage if they know the prices that other buyers have been charged as a result of individual negotiations."). Moreover, EchoStar would be prejudiced in any future negotiations regarding construction of satellites if pricing information were available to satellite construction companies.
6. EchoStar takes significant measures to ensure that this information is not disclosed to the public.
7. The attached material for which non-disclosure is sought is not available to the public.
8. EchoStar requests that the attached material be withheld from disclosure for an indefinite period. Disclosure of this information at any time could jeopardize the competitive position of EchoStar and Lockheed.
9. Finally, EchoStar notes that denying its request that this information be kept confidential would impair the Commission's ability to obtain this type of voluntarily disclosed information in the future. The ability of a

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government agency to continually obtain confidential information was behind the legislative purpose in developing exemptions from the Freedom of Information Act. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir. 1992) (“Where, however, the information is provided to the Government voluntarily, the presumption is that [the Government’s] interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation.”). The U.S. Court of Appeals for the D.C. Circuit has recognized a “private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis.” *Id.* at 879. The Commission should extend a similar recognition to the enclosed materials.

EchoStar requests that the Commission not release these redacted materials if its request for confidentiality is denied in whole or in part without first consulting with EchoStar.

Respectfully submitted,

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Enclosures

cc: Thomas Tycz, International Bureau