

Int'l Bureau

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Before the

Federal Communications Commission  
Washington, D.C. 20554

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Federal Communications Commission  
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In the Matter of

Mobile Satellite Ventures Subsidiary LLC

Amendment to Application for Authority to Launch  
and Operate a Replacement MSS Satellite at 101°W

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File No. SAT-AMD-20040209-00014;  
Call Sign S2358

**OPPOSITION TO APPLICATION FOR REVIEW**

Mobile Satellite Ventures Subsidiary LLC ("MSV") hereby files this Opposition to the Application for Review filed by EchoStar Satellite L.L.C. ("EchoStar") of the decision of the International Bureau ("Bureau") to reinstate MSV's above-captioned amendment to its application for a replacement Mobile Satellite Service ("MSS") satellite.<sup>1</sup> EchoStar provides no basis for reversal of the Bureau's decision to reinstate MSV's application. The Bureau applied the "substantially complete" standard consistently in reinstating MSV's application while dismissing EchoStar's application for the same frequencies. Unlike MSV's omission of a two-degree spacing analysis which was not clearly required at the time its application was filed, EchoStar's failure to precisely specify the frequencies for which it was applying was a material error which prejudiced other applicants and potential applicants.

**Background**

*Procedural History of EchoStar Application.* On August 27, 2003, EchoStar filed an application for authority to launch and operate a satellite at 101°W using 250 MHz of Planned Ku-band frequencies for which MSV had already applied as well as the remaining 50 MHz of Planned Ku-band frequencies (*i.e.*, 10.70-10.75 GHz and 13.15-13.20 GHz) for which no entity

<sup>1</sup> See EchoStar Satellite L.L.C., Application for Review, File No. SAT-AMD-20040209-00014 (October 15, 2004) ("*EchoStar Application for Review*").

had applied.<sup>2</sup> Under the new first-come, first-served licensing policies for geostationary (“GSO”) satellites,<sup>3</sup> EchoStar was second-in-line behind MSV with respect to 250 MHz of the 300 MHz it requested and first-in-line with respect to the remaining 50 MHz.

On November 26, 2003, EchoStar amended its pending application to correct certain deficiencies.<sup>4</sup> On February 9, 2004, the Bureau dismissed EchoStar’s amended application as incomplete and otherwise not in compliance with the Commission’s rules for two independent reasons.<sup>5</sup> First, the Bureau cited EchoStar’s failure to clearly identify the downlink frequencies it was requesting. *EchoStar Dismissal* at 1-2. As a result, the Bureau found that it was unable to determine the precise frequencies for which EchoStar was applying. *Id.* at 2. Second, the Bureau ruled that EchoStar’s application did not comply with Section 25.114(c)(5) of the rules because it failed to indicate which transponders will be connected to which spot beam in either the uplink or downlink direction. *Id.* EchoStar filed a Petition for Reconsideration of this decision, which is pending.<sup>6</sup> In its Petition, EchoStar did not dispute that its application contained the errors and omissions identified by the Bureau. Rather, EchoStar argued that these errors and omissions were minor and its application was “substantially complete” taken as a whole. *EchoStar Recon Petition* at 2. MSV has opposed this Petition, noting that EchoStar’s

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<sup>2</sup> Application of EchoStar, File No. SAT-LOA-20030827-00179 (filed August 27, 2003). Throughout this Opposition, references to the amount of spectrum refer to its use in both the uplink and downlink direction.

<sup>3</sup> *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, FCC 03-102 (rel. May 19, 2003) (“*Space Station Licensing Reform Order*”).

<sup>4</sup> See EchoStar, Amendment, File No. SAT-AMD-20031126-00343 (November 26, 2003) (“*EchoStar November 2003 Amendment*”).

<sup>5</sup> See Letter from Thomas S. Tycz, FCC, to David K. Moskowitz, EchoStar, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (February 9, 2004) (“*EchoStar Dismissal*”).

<sup>6</sup> See EchoStar, Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 10, 2004) (“*EchoStar Recon Petition*”).

failure to specify clearly the frequencies it was requesting was material in that it prejudiced other applicants and potential applicants.<sup>7</sup> MSV also explained that EchoStar's failure to indicate which transponders would be connected to which spot beam deprived MSV of information that would have been useful in determining whether EchoStar's sharing proposal is technically feasible. *MSV Opposition to EchoStar Recon Petition* at 7.

On February 10, 2004, EchoStar refiled an application for the 300 MHz of Planned Ku-band frequencies it previously requested in its November 2003 Amendment.<sup>8</sup> The Bureau subsequently placed this application on *Public Notice*. See Report No. SAT-00203 (March 26, 2004).<sup>9</sup>

*Procedural History of MSV Replacement Application.* MSV is the successor to Motient Services Inc. ("Motient"), the entity authorized by the Commission in 1989 to construct, launch, and operate a United States MSS system in the L-band.<sup>10</sup> MSV's current satellite was launched in 1995 and operates at 101°W. In July 1998, MSV filed an application to launch and operate a higher-power, replacement satellite with substantially greater capacity.<sup>11</sup> To accommodate this greater capacity, the application, as amended in December 2000, requested authority to use an

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<sup>7</sup> See MSV, Opposition to Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (March 24, 2004), at 5-7 ("*MSV Opposition to EchoStar Recon Petition*").

<sup>8</sup> See Application of EchoStar, File No. SAT-LOA-20040210-00015 (February 10, 2004).

<sup>9</sup> In its Comments on the application, MSV has explained that the Bureau must defer action on EchoStar's application until after MSV's first-in-line application is processed and granted. See Comments of MSV, File No. SAT-LOA-20040210-00015 (April 26, 2004) ("*MSV Comments*"); Response of MSV, File No. SAT-LOA-20040210-00015 (May 21, 2004) ("*MSV Response*").

<sup>10</sup> *Order and Authorization*, 4 FCC Rcd 6041 (1989); *remanded by Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991); *Final Decision on Remand*, 7 FCC Rcd 266 (1992); *aff'd, Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275 (D.C. Cir. 1993); see also *AMSC Subsidiary Corporation, Memorandum Opinion and Order*, 8 FCC Rcd 4040 (1993).

<sup>11</sup> See Application of AMSC, File No. SAT-LOA-19980702-00066 (July 2, 1998).

additional 250 MHz of Planned Ku-band spectrum for feeder links beyond the 200 MHz for which MSV is already licensed.<sup>12</sup> Specifically, MSV's replacement application requested the following 450 MHz of Planned Ku-band spectrum at 101°W: 10.75-10.95 & 11.2-11.45 GHz (downlink) and 12.75-13.15 & 13.20-13.25 GHz (uplink). The only segment of the Planned Ku-band for which MSV is not currently licensed and did not apply in December 2000 was the following 50 MHz: 10.70-10.75 GHz (downlink) and 13.5-13.20 GHz (uplink). The Bureau placed MSV's amended application on *Public Notice* in March 2001. See Report No. SAT-00066 (March 19, 2001).

On November 18, 2003, MSV filed a minor amendment to its pending replacement application to revise the technical parameters of its proposed satellite, but did not request additional frequencies beyond those for which it had already applied.<sup>13</sup>

On December 3, 2003, the Bureau released a *Public Notice* clarifying the interference analysis that must be provided with a satellite application to demonstrate compliance with two-degree orbital spacing.<sup>14</sup> The Bureau stated that an application filed after December 3, 2003 that does not contain this analysis would be dismissed, but an application filed before this date that did not contain this analysis would have to be supplemented but would not be dismissed.

On February 9, 2004, upon dismissal of EchoStar's November 2003 Amendment, MSV filed the above-captioned amendment to its pending application to request the 50 MHz of

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<sup>12</sup> See Application of Motient Services Inc., SAT-AMD-20001214-00171 (December 14, 2000). In March 2001, MSV filed a second amendment in which it requested to operate terrestrial base stations, but did not request additional frequencies beyond those for which it had already applied. See Application of MSV, File No. SAT-ASG-20010302-00017 *et al.* (March 2, 2001).

<sup>13</sup> See MSV, Minor Amendment, File No. SAT-AMD-20031118-00335 (November 18, 2003) ("*MSV November 2003 Amendment*").

<sup>14</sup> See *Public Notice, Clarification of Space Station Application Interference Analysis*, SPB-195, DA 03-3863 (December 3, 2003) ("*December 2003 Public Notice*").

Planned Ku-band frequencies at 101°W for which it was not licensed and had not previously requested (10.70-10.75 GHz and 13.15-13.20 GHz).<sup>15</sup> As a result, MSV gained first-in-line status for these frequencies. MSV explained in its amendment that there are no satellites authorized to operate using Planned Ku-band frequencies within two degrees of its proposed satellite at 101°W. *See MSV Amendment*, Appendix A at 4.

On April 23, 2004, the Bureau dismissed MSV's February 2004 Amendment for omitting a two-degree spacing analysis.<sup>16</sup> As a result, EchoStar became first-in-line for the following 50 MHz of Planned Ku-band frequencies: 10.70-10.75 GHz (downlink) and 13.15-13.20 GHz (uplink).<sup>17</sup> In compliance with the policy stated in the *December 2003 Public Notice*, the Bureau requested MSV to supplement its November 2003 Amendment with a two-degree spacing analysis but did not dismiss the amendment because it was filed prior to the *December 2003 Public Notice*.<sup>18</sup>

On May 24, 2004, MSV filed a Petition for Reconsideration of the Bureau's dismissal of its February 2004 Amendment, explaining that the Bureau erred in dismissing the application

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<sup>15</sup> *See* MSV, Amendment, File No. SAT-AMD-20090209-00014 (filed February 9, 2004) ("*MSV February 2004 Amendment*"). EchoStar has asked the Bureau to reinstate its November 2003 Amendment *nunc pro tunc*. *EchoStar Recon Petition*. In its Reply to MSV's Opposition to its Petition for Reconsideration, EchoStar accepts that if its application is reinstated *nunc pro tunc* as filed on November 26, 2003, it will not assume first-in-line status for the 250 MHz of Planned Ku-band frequencies for which MSV originally filed in December 2000 (11.2-11.45 GHz band (downlink) and 12.75-13.00 GHz band (uplink)). *See* EchoStar, Reply, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (April 5, 2004), at 9.

<sup>16</sup> *See* Letter from Thomas Tycz, FCC, to Lon C. Levin, MSV, File No. SAT-AMD-20040209-00015, DA 04-1095 (April 23, 2004) ("*Bureau Decision*").

<sup>17</sup> MSV has asked the Bureau to defer grant of EchoStar's application for this 50 MHz until after MSV's amendment is reinstated and granted. *MSV Comments* at 5-6; *MSV Response* at 9-10.

<sup>18</sup> *See* Letter from Robert G. Nelson, FCC, to Lon C. Levin, MSV, File No. SAT-AMD-20031118-00335 (April 23, 2004).

because a two-degree spacing analysis is not required when there is no authorized satellite using the same frequencies within two degrees of the proposed satellite.<sup>19</sup>

On June 16, 2004, the Bureau issued a *Public Notice* confirming that the rules and its *December 2003 Public Notice* were ambiguous as to whether a two-degree spacing analysis is required when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite.<sup>20</sup> The Bureau explained that the rules are “subject to conflicting, but reasonable, interpretations” and that “one reasonable interpretation of the rule is that if there are no authorized space stations [within 2 degrees], then no interference analysis is required.”<sup>21</sup> While the Bureau clarified that such an analysis is required under these circumstances, it also reinstated two applications that had been previously dismissed for failing to include a two-degree spacing analysis under these circumstances given this ambiguity. *See Northrop Grumman Decision; contactMEO Decision.*

On September 15, 2004, the Bureau issued a decision reinstating MSV’s February 2004 Amendment.<sup>22</sup> Consistent with its *June 2004 Public Notice*, the Bureau explained that one reasonable interpretation of its rules and policies is that if there are no authorized satellites within two degrees of a satellite proposed in an application using the same frequencies, then a two-

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<sup>19</sup> See MSV, Petition for Reconsideration, File No. SAT-AMD-20040209-00014 (May 24, 2004) (“*MSV Petition*”), at 7. EchoStar has opposed this Petition. See EchoStar Satellite LLC, Opposition to Petition for Reconsideration, File No. SAT-AMD-20040209-00014 (June 7, 2004) (“*EchoStar Opposition*”).

<sup>20</sup> See *Public Notice, Clarification of 47 C.F.R. § 25.140(b)(2): Space Station Application Interference Analysis*, SPB-207, DA 04-1708 (June 16, 2004) (“*June 2004 Public Notice*”).

<sup>21</sup> See Letter from Thomas S. Tycz, FCC, to Peter Hadinger, Northrop Grumman Space & Mission Systems Corporation, File No. SAT-AMD-20040312-00032 et al, DA 04-1725 (June 16, 2004), 2-3 (“*Northrop Grumman Decision*”); see also Letter from Thomas S. Tycz, FCC, to David M. Drucker, contactMEO Communications, LLC, File No. SAT-AMD-20040322-00057 et al, DA 04-1722 (June 16, 2004), at 2 (“*contactMEO Decision*”).

<sup>22</sup> See *Mobile Satellite Ventures Subsidiary LLC, Order*, File No. SAT-AMD-20040209-00014 (Satellite Division, International Bureau, September 15, 2004) (“*MSV Reinstatement Order*”).

degree spacing analysis is not required. *MSV Reinstatement Order* ¶ 11. The Bureau accordingly reinstated MSV's February 2004 Amendment. The Bureau noted that its action was consistent with its reinstatement of two similar applications. *Id.* (citing *Northrop Grumman Decision* and *contactMEO Decision*). In its decision, the Bureau required MSV to supplement its application with a two-degree spacing analysis by September 28, 2004. *Id.* ¶ 12. MSV timely filed this analysis,<sup>23</sup> and the Bureau subsequently placed MSV's amended application on *Public Notice* in October 2004. See Report No. SAT-00248 (October 8, 2004).

On October 15, 2004, EchoStar filed an Application for Review of the Bureau's decision to reinstate MSV's February 2004 Amendment. See *EchoStar Application for Review*. EchoStar does not dispute that at the time MSV filed its February 2004 Amendment the Commission's rules and policies were ambiguous as to whether a two-degree spacing analysis was required when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite. Nor does EchoStar dispute that reinstatement of MSV's application was consistent with the Bureau's decision in the *Northrop Grumman Decision* and *contactMEO Decision*. Rather, EchoStar mostly repeats the arguments it has already made in its pending Petition for Reconsideration of the Bureau's decision dismissing its November 2003 Amendment. *EchoStar Recon Petition*. EchoStar argues that the Bureau held MSV to a "much less exacting standard" in determining that MSV's application was "substantially complete" while dismissing EchoStar's application. *EchoStar Application for Review* at 1, 5. EchoStar characterizes MSV's omission of a two-degree spacing analysis to be a material error which warranted dismissal whereas its own failures to clearly specify the frequencies it was requesting and to indicate which transponders would be connected to which spot beam were minor errors

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<sup>23</sup> See MSV, Amendment, File No. SAT-AMD-20040928-00192 (September 28, 2004).

which did not warrant dismissal. *Id.* at 6-8. EchoStar asks the Commission to ensure that the “substantially complete” standard is applied consistently. *Id.* at 9.

### **Discussion**

#### **I. The Bureau Acted Properly In Reinstating MSV’s February 2004 Amendment**

The Bureau reinstated MSV’s February 2004 Amendment because the Commission’s rules as well as the *December 2003 Public Notice* were ambiguous as to whether a two-degree spacing analysis is required when there are no authorized satellites using the same frequencies within two degrees of the satellite proposed in an application. There are no satellites authorized to operate using Planned Ku-band frequencies within two degrees of MSV’s proposed replacement satellite at 101°W. EchoStar does not contest this point nor does it contend that when MSV filed its February 2004 Amendment the Commission’s rules and policies clearly required MSV to submit a two-degree spacing analysis. Accordingly, EchoStar has offered no basis for reversal of the Bureau’s decision to reinstate MSV’s February 2004 Amendment.<sup>24</sup>

#### **II. The Bureau Has Applied the “Substantially Complete” Standard Consistently in Reinstating MSV’s Application While Dismissing EchoStar’s Application**

The Commission’s rules provide that satellite applications will be processed if they are “substantially complete” when they are filed.<sup>25</sup> Under a “substantially complete” standard, minor errors in an application do not warrant dismissal of the application. While EchoStar

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<sup>24</sup> EchoStar claims that MSV was required to submit a two-degree spacing analysis because MSS feeder links are considered to be a Fixed Satellite Service (“FSS”), and the Commission’s rules clearly require a two-degree spacing analysis to be submitted with an application for FSS frequencies. *EchoStar Application for Review* at 6. This is irrelevant. The Bureau reinstated MSV’s application because the Commission’s rules and policies were ambiguous as to whether a two-degree spacing analysis is required when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite. Regardless of whether the frequencies for which MSV applied were FSS frequencies, the Bureau found that MSV acted reasonably in omitting a two-degree spacing analysis given this ambiguity.

<sup>25</sup> *Space Station Licensing Reform Order* ¶ 244.



claims that the Bureau applied this standard inconsistently in reinstating MSV's application while dismissing EchoStar's, there is a fundamental difference between the two applications that justified the Bureau's action. Unlike MSV's omission of a two-degree spacing analysis that was in fact not required at the time its application was filed, EchoStar's failure to clearly state the frequencies for which it was applying violated the Commission's rules<sup>26</sup> and prejudiced potential applicants under first-come, first-served licensing.<sup>27</sup> Clear and accurate specification of the frequencies requested in an application is essential so that potential applicants have unambiguous notice as to which frequencies are available for assignment, thereby avoiding prejudice to other potential applicants.<sup>28</sup> The internal inconsistencies in EchoStar's application created uncertainty

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<sup>26</sup> See 47 C.F.R. § 25.114(c)(4) (requiring application to list radio frequencies requested); 47 C.F.R. § 25.112(a)(1) (listing internal inconsistencies as grounds for dismissal of an application).

<sup>27</sup> See *MSV Opposition to EchoStar Recon Petition* at 6-8. Moreover, EchoStar's failure to indicate which transponders will be connected to which spot beam deprived MSV of information that would have been useful in determining whether EchoStar's sharing proposal is technically feasible. *Id.* at 7.

<sup>28</sup> The Commission has recognized that inconsistencies in the frequency requested in an application cannot be considered a mere clerical error because of the potential for prejudice to other applicants. *Mobile Phone of Texas, Inc., Memorandum Opinion and Order*, 5 FCC Rcd 3459 (Chief, Common Carrier Bureau, June 12, 1990). In *Mobile Phone*, in response to a *Public Notice* establishing a 60-day cut-off window for Public Land Mobile Service frequency 152.15 MHz, Mobile Phone filed an application that was internally inconsistent as to whether it was requesting frequency 152.15 MHz or 152.09 MHz. Mobile Phone later filed a letter clarifying that it intended to apply for frequency 152.15 MHz. The Mobile Services Division ("MSD") deemed this letter to be a major amendment causing Mobile Phone's application to be filed outside of the 60-day cut-off window. The MSD thus dismissed the application. Mobile Phone filed a Petition for Reconsideration of the MSD's action seeking reinstatement of its application arguing that its letter was merely intended "to clarify ambiguous information in its timely filed application." *Id.* ¶ 5. The Common Carrier Bureau rejected Mobile Phone's Petition because reinstating its application would be unfair to other applicants by increasing the number of mutually exclusive applicants and would harm the public interest by delaying service to the public. *Id.* ¶ 8. Moreover, while the Common Carrier Bureau recognized that it had been the practice of the MSD to request corrections regarding minor technical data, it explained that "this practice is not utilized to correct frequency errors." *Id.* n.14.

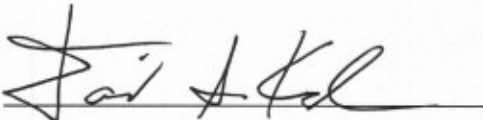
Similarly, the Commission has held that an application for a broadcast station will be dismissed if there are internal inconsistencies regarding the coordinates proposed for the

for potential applicants, resulting in delay in license grants, service to the public, and use of spectrum, thus undermining the goals of the first-come, first-served regime. *MSV Opposition to EchoStar Recon Petition* at 7. Whereas EchoStar's errors were major and thus justified dismissal, MSV's omission of a two-degree spacing analysis was not an error at all. As the Bureau has recognized (and EchoStar has not refuted), MSV reasonably interpreted the Commission's rules and policies to not require a two-degree spacing analysis when there are no authorized satellites using the same frequencies within two degrees of the proposed satellite. *MSV Reinstatement Order* ¶ 11. Under these circumstances, the Bureau acted consistently in reinstating the MSV application and dismissing the EchoStar application.

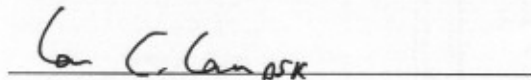
#### Conclusion

MSV requests that the Commission act consistently with the views expressed herein.

Respectfully submitted,



Bruce D. Jacobs  
David S. Konczal  
**SHAW PITTMAN LLP**  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000



Lon C. Levin  
Vice President  
**MOBILE SATELLITE VENTURES  
SUBSIDIARY LLC**  
10802 Park Ridge Boulevard  
Reston, Virginia 20191  
(703) 390-2700

Dated: November 1, 2004

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transmitter site. *Coachella Valley Wireless Corp., Memorandum Opinion and Order*, 7 FCC Rcd 4252 (July 2, 1992). Among other things, such information is crucial for determining the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license necessary to determinations of mutual exclusivity and compliance with spacing rules. *Ocean Waves Broadcasting, Hearing Designation Order*, 3 FCC Rcd 4637 (Chief, Audio Services Division, August 3, 1988).

## CERTIFICATE OF SERVICE

I, Sylvia A. Davis, a secretary with the law firm of Shaw Pittman LLP, hereby certify that on this 1<sup>st</sup> day of November 2004, served a true copy of the foregoing "Opposition to Application for Review" by first class United States mail, postage prepaid, upon the following:

Thomas S. Tycz\*  
International Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

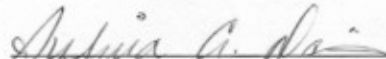
Andrea Kelly\*  
International Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

David K. Moskowitz  
Senior Vice President and General Counsel  
EchoStar Satellite L.L.C.  
9601 South Meridian Boulevard  
Englewood, CO 80112

Robert Nelson\*  
International Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Pantelis Michalopoulos  
Philip L. Malet  
Brendan Kasper  
Steptoe & Johnson LLP  
1330 Connecticut Avenue N.W.  
Washington, D.C. 20036

Counsel for EchoStar Satellite LLC

  
Sylvia A. Davis

\*By hand delivery